described as *confirming* the order subject to modification. It was making a fundamentally different order.

23 If Mr Hobson's submission is correct, the consequence, as he accepted, was that, if the inspector had been satisfied that there was a right of way on foot along the course of bridleway 8, but that this was the limit of the right of way, he would have been bound to decide that the original order should not be confirmed, leaving on the definitive map a bridleway that should not be there. This would be a manifestly unsatisfactory state of affairs. In my judgment, the scheme of the procedure under Schedule 15 is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be *confirming* the original order would be undesirable in principle and difficult in practice. Accordingly I consider that Mr Laurence was correct to challenge the decision of the inspector as to the ambit of his powers.

24 This might have been of some moment, for the inspector stated that he regarded his conclusion as "fundamental in this case". It does not, however, appear to me that his conclusion had any effect on his decision. The inspector decided that the evidence was clearly inconsistent with the right of way depicted as bridleway 8 ever having existed as such. His decision letter then continued:

> "The question remains as to whether an error in recording a path as a public bridleway, which, by definition, includes public footpath rights of way, reads across to those rights. I take the view that the error was in the recording of a right of way of whatever rights and consequently find myself persuaded that the provisions of section 53(3)(c)(iii) have been satisfied in relation to the order path apart from the very southernmost part between point A and the junction with bridleway 16."

25 It seems to me, and Mr Laurence did not gainsay this, that the inspector found in terms that it would be erroneous for the definitive map to portray a right of way of any kind along the course of what had been depicted as bridleway 8.

*The reasons for the inspector's decision*

26 The inspector received a substantial body of evidence as to the nature and extent of the user made of the path depicted as bridleway 8, both before and after 1952. There was no positive evidence that it had ever been used by horses, nor any clear evidence that such user would even have been a physical possibility. There was considerable evidence of its use as a footpath, but the evidence conflicted as to whether this was under license or in assertion of a public right of way. Latham J summarised this and other evidence in his judgment. I do not find it necessary to repeat that exercise for this reason. Mr Laurence conceded that he could not contend that the inspector's decision was perverse. He accepted that there was evidence which might have supported the decision reached by the inspector even had he applied himself correctly to its consideration. Mr Laurence submitted,

however, that there were two errors of principle in the inspector's approach. A
But for those errors he might have reached a different decision. It followed
that his decision should be quashed.

27 I propose now to consider in turn each of the alleged errors.

*The effect of the definitive map*

28 Under the scheme set out in the 1949 Act the depiction of a right of B
way on the definitive map was intended to establish conclusively, once and
for all, the existence of that right of way. The Court of Appeal in *R v
Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354
decided, however, that Parliament had had second thoughts. Mr Laurence
has reserved the right to challenge that decision should he have the
opportunity in the House of Lords. In this court he accepts, as he must, that
the 1981 Act provides for the removal of rights of way from the definitive C
map if it is shown that they were depicted on it by mistake.

29 Mr Laurence submits that, although the definitive map is *to that
extent* no longer conclusive as to the existence of a right of way, it is cogent
evidence of the existence of any right of way shown on it. His primary
challenge to the inspector's decision is that the inspector attached no weight
at all to the fact that bridleway 8 had been entered on the definitive map D
when he should have treated this as highly material evidence of the existence
of a right of way.

30 The inspector found that there was no reason to doubt that the
proper statutory procedures were carried out in relation to the depiction of
bridleway 8 on the definitive map. Mr Laurence showed us what those
procedures must have involved.

31 They involved a parish survey of the relevant area by Councillor E
Proctor, a meeting of Sawley Parish Council, and the provision by Councillor
Proctor of details of rights of way, including bridleway 8, to the clerk to
Bowland Rural District Council. The clerk signed a form on which the
details of bridleway 8 that had been provided by Councillor Proctor were set
out. That form had a space for insertion of the reasons for believing that the
bridleway was public, but nothing was entered in this space. The rural F
district council in its turn passed the information on to the West Riding
County Council, which was then the surveying authority. The entry by the
county council of bridleway 8 on the definitive map showed that they were
satisfied, if not that it subsisted, at least that it was reasonably alleged to
subsist. Thereafter, there were opportunities to challenge the draft map, but
in so far as bridleway 8 was concerned such challenges as were made were
subsequently compromised or abandoned. When the definitive map was G
finally published in August 1973, all involved anticipated that it would
conclusively and permanently establish the existence as a right of way of
bridleway 8. It was in the light of this history that Mr Laurence submitted
that the very fact of the depiction of bridleway 8 on the definitive map
should have carried very significant evidential weight with the inspector.

32 Latham J, at paragraph 23 of his judgment, accepted that the fact of H
the inclusion of the right of way on the definitive map was "obviously some
evidence of its existence" but continued:

> "The fact of the inclusion of the right of way on the definitive map is obviously some evidence of its existence. But the weight to be given to

A that evidence will depend upon an assessment of the extent to which there is material to show that its inclusion was the result of inquiry, consultation, or the mere ipse dixit of the person drawing up the relevant part of the map. In the present case, there was nothing to suggest that any significant probative material existed at the time to support Mr Proctor's survey . . ."

B 33 Mr Laurence submitted that the judge's approach to the definitive map erred in principle. It was wrong to discount it simply because there was no evidence of the basis upon which bridleway 8 had been entered on it. It was of the nature of things that such evidence might be lost with the passage of time, in which event an assumption should be made that such evidence had none the less existed. Mr Laurence invoked a statement by Lord C Denning MR in *R v Secretary of State for the Environment, Ex p Hood* [1975] QB 891, 899–900: "The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975."

34 Latham J's decision in the present case was recently followed by Richards J in *R v National Assembly for Wales, Ex p Robinson* (2000) D 80 P & CR 348. He said, at p 356:

"The factual position in *Trevelyan* was materially identical to that in the present case. Mr Proctor's survey form delineating the route of the right of way did not include any explanation as to the nature of the evidence supporting the claim. That is equally true here. I have already referred to the fact that the relevant section on the survey record card is E blank. A passage at the end of paragraph 39 of the decision letter suggests that the National Assembly took the view that there could have been more evidence of public use at the time of inclusion of the footpath on the definitive map than exists now. Any such view would be pure speculation. There is nothing to show that reliance was placed at the time on anything beyond the mere existence of the footpath. That being so, no F weight could properly be attached to the mere fact that the footpath was included on the definitive map. By attaching weight to the fact of inclusion, the National Assembly fell into error."

35 Mr Laurence submitted that this passage compounded the error of approach of Latham J.

36 I consider that the approach of Latham and Richards JJ to the weight G to be given to the definitive map was, as Mr Laurence has submitted, wrong in principle. In the course of argument the court drew the attention of counsel to section 32 of the Highways Act 1980, which does not appear to have featured in discussion below. This 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 H 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." A

37 Both counsel agreed that this provision was applicable by analogy to the weight to be attached to the definitive map in the context of the inspector's task of considering whether, having regard to all the available evidence, he was satisfied that the right of way depicted as bridleway 8 did not exist. B

38 Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake. C D

39 These considerations are reflected in guidance published by the Secretary of State for the Environment (Circular 18/90) and the Secretary of State for Wales (Circular 45/90) after the decision of the Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354: E

"in making an application for an order to delete or downgrade a right of way, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map is in error by the discovery of evidence, which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded . . . Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative map and statement of the highest attainable accuracy. The evidence needed to remove a public right from such an authoritative record, will need to be cogent. The procedures for identifying and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years, without being questioned earlier." F G

*The inspector's approach*

40 The approach of the inspector to the standard of proof appears from the following passages of his decision letter, which followed a detailed assessment of all the evidence: H

"Looked at in the context of the evidence of the persons working on or for the estate or those holding exclusive rights such as the Yorkshire Fly

Fishers' Club, a clear impression builds up of a situation in which it seems to me to be beyond the bounds of credibility to accept that a public right of way existed over the Sawley Estate to the north of the junction with the Dockber Road in the first half of the century. I agree that the evidence needed to remove a public right of way from the definitive map and statement needs to be clear and cogent and demonstrate that a mistake had been made in the original claim and recording. I have noted all the representations and objections on the matter but I am not persuaded, on the balance of the evidence, that a public bridleway existed from the junction with bridleway 16, northwards to point N and the junction with footpath 18, on the line of the order route, or the route originally claimed, prior to 1952. I am, consequently, persuaded that a mistake was made during the Sawley parish survey and that the order path was recorded in error as a public bridleway."

41 I would make the following comments in relation to these passages.

42 The statement "I am not persuaded, on the balance of the evidence, that a public bridleway existed" is unhappily worded. Taken in isolation, those words suggest that the inspector considered that he should confirm the order unless satisfied on balance of probabilities that there was a bridleway. But it is not right to take those words in isolation. The inspector directed himself that clear and cogent evidence was necessary to remove a public right of way from the definitive map and that it had to be demonstrated that a mistake had been made. This was necessarily, albeit implicitly, a recognition of the evidential effect of the definitive map. The finding by the inspector that it was, on the evidence, "beyond the bounds of credibility to accept that a public right of way existed" over the material portion of bridleway 8 was a finding of fact that, unless demonstrated to be perverse, manifestly satisfied the test required to justify a finding that the bridleway had been marked on the definitive map as a right of way in error. For these reasons, I would reject the first ground of challenge made by Mr Laurence to the decision letter.

*Anomalies*

43 As an independent ground of challenge to the inspector's decision, Mr Laurence contended that he failed to take into account the fact that the order deleting bridleway 8 resulted in a number of anomalies on the definitive map. Two footpaths, numbers 28 and 29 linked with bridleway 8. The removal of the bridleway had the result that these ended in culs-de-sac. Furthermore bridleway 8 continued for half a mile or so to the east of the land affected by the order. The result of the order was, so Mr Laurence contended, to end this section in a cul-de-sac.

44 The inspector referred to the fact that confirmation of the order would produce anomalies in relation to the two footpaths, but Mr Laurence submitted that this reference failed to accord to them their proper significance. The inspector should have given more detailed consideration to whether the order could be reconciled with these anomalies. I do not agree. The inspector's reference demonstrates that he did apply his mind to the significance of the two footpaths. He clearly considered that they did not outweigh the import of the other evidence. It was open to him so to conclude.

45 Mr Laurence also complained that the inspector made no reference to the anomaly created by the isolated eastern section of bridleway 8. It is true that the inspector did not refer to this when dealing with anomalies. He had, however, given consideration to this section of the bridleway earlier in his decision letter. In the course of considering the significance of an early map, OS 1908/09, he commented that he found it particularly significant that the map showed a bridlepath on the line of the eastern section of bridleway 8 that crossed by a ford to the north side of the Ribble rather than continuing along the course of the disputed part of the bridleway. This was a matter that the inspector could properly weigh against any suggestion that there was no explanation for the eastern section of bridleway 8.

46 Latham J was not impressed by the argument based on anomalies. He pointed out that the eastern section of bridleway 8 did not fall within the area of the map that the inspector was required to consider. Had he considered the evidence in relation to it, he might have concluded that the eastern section of the bridleway had also been depicted in error. I share his conclusion that the fact that the order produced the anomalies identified by Mr Laurence does not invalidate the inspector's decision. I would dismiss this appeal.

SIMON BROWN LJ

47 I agree.

LONGMORE LJ

48 I also agree.

*Appeal dismissed.*
*No order as to costs. Costs order below to stand.*
*Permission to appeal refused.*

*Solicitors: Brooke North, Leeds; Treasury Solicitor.*

S L D

# Appendix 10.9

# *Lewis v Thomas* [1950] 1 KB 438

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Dec. 16, 20.

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

## LEWIS *v.* THOMAS.

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

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

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

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

APPEAL from Cardigan county court.

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

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

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

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

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

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The plaintiff appealed.

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

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

Sub-section 2: "Where any "such way has been enjoyed "as aforesaid for a full period "of forty years, such way shall "be deemed conclusively to have "been dedicated as a highway "unless there is sufficient evidence "that there was no intention "during that period to dedicate "such way."

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

(3) (1938) 158 L. T. 507.

(4) (1925) 89 J. P. 59, 118.

immaterial. That intention cannot be attributed to the rector.

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

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

*Cur. adv. vult.*

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

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

(1) [1937] 2 K. B. 77.
(2) [1947] Ch. 67.
(3) (1916) 81 J. P. 112.

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whether facts have been proved sufficient to establish user within the meaning of sub-ss. 1 and 2 of s. 1 of the Act of 1932 as of right and without interruption.

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

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

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

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

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

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

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

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

(1) [1937] 2 K. B. 77. (2) 158 L. T. 507.

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anything turns on the fact that the rector may or may not have had any particular idea in his mind when Reynolds locked the gate.

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

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

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

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

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

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

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

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

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

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

There is no direct authority on the point of interruption so

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

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

(1) 89 J. P. 59.
(2) Ibid. 61.
(3) (1843) 11 M. & W. 827.
(4) 89 J. P. 118.

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

ASQUITH L.J. I agree.

*Appeal dismissed.*

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

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

B. A. B.

# Appendix 10.10

# *R (oao Alfred McAlpine Homes Limited) v Staffordshire County Council* [2002] EWHC 76 (Admin)

# R (on the application of McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

SULLIVAN J

17 JANUARY 2002

17 JANUARY 2002

**Commons — Commons registration — Registration of village green — Claimant objecting to registration — Claimant arguing land not used by significant number of persons — Claimant submitting that registration authority not entitled to register lessor area than applicants applying for — Whether registration authority in error**

H Wolton QC and R Green for the Appellant

C Mynors for the Respondent

Laytons; Staffordshire County Council

**SULLIVAN J**

**[1]** This is an application for judicial review of a decision by the Staffordshire County Council's regulatory committee at a meeting on 23 May 2001 to accept an application for the registration of land at Ladydale Meadow, Leek, as a town or village green for the reasons set out and in relation to the land defined in the report of an independent inspector, Mr Vivian Chapman of counsel, dated 25 April 2001.

*The Statutory Framework*

**[2]** The Commons Registration Act 1965 ("the Act") makes provision for the registration of common land or town or village greens. As amended by s 98 of the Countryside and Rights of Way Act 2000, s 22(1) of the Act defines a town or village green as follows:

> "'Town or village green' means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or which falls within subsection (1A) of this section.
>
> (1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the

inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either --

(a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

**[3]** As at the date of the inspector's report no provisions had been prescribed but that is of no consequence since paragraph (b) of subsection (1A) has no relevance for present purposes.

**[4]** The council is under a duty as registration authority to maintain a register of common land and a register of town or village greens (see ss 1 to 3 of the Act).

**[5]** Section 13 deals with the amendment of registers:

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

(a) any land registered under this Act ceases to be common land or a town or village green; or

(b) any land becomes common land or a town or village green ... "

**[6]** The High Court has power to order rectification of registers under section 14.

"The High Court may order a register maintained under this Act to be amended if --

(b) the register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;

and, in either case, the court deems it just to rectify the register."

**[7]** The relevant regulations are the Commons Registration (New Land) Regulations 1969, as amended ("the Regulations"). Reg 3(1) provides:

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

**[8]** An application must comply with the requirements set out in reg 3(7). These include in paragraph (a) the requirement that an application must be:

"In Form 29, 30, 31 or 32 as appropriate."

**[9]** Form 30 must be used where application is made for the registration as a town or village green of land which became so registerable after 2 January 1970. The form requires the applicant or applicants to describe the land which is the subject of the application. In Pt 3 of the form the applicant must give:

"Particulars of the land to be registered, ie the land claimed to have become a town or village green,"

**[10]** And must give the name by which the town or village green is usually known, the locality and the:

"Colour on plan herewith".

**[11]** Reg 5 deals with the disposal of applications. Paragraph (4) provides:

"Subject to paragraph (7) below, a registration authority shall, on receipt of an application,--

(a) send a notice in Form 33, 34 or 35, as appropriate, to every person (other than the applicant) whom the registration authority has reason to believe (whether from information supplied by the applicant or otherwise) to be an owner, lessee, tenant or occupier of any part of the land affected by the application, or to be likely to wish to object to the application;

(b) publish in the concerned area, and display, such a notice as aforesaid, and send the notice and a copy of the application to every concerned authority;

(c) affix such a notice to some conspicuous object on any part of the land which is open, unenclosed and unoccupied, unless it appears to the registration authority that such a course would not be reasonably practicable.

(6) Every concerned authority receiving, under this regulation, notice and a copy of an application should forthwith display copies of the notice, and shall keep the copy of the application available for public inspection at all reasonable times until informed by the registration authority of the disposal of the application.

(7) Where an application appears to a registration authority after preliminary consideration not to be duly made, the authority may reject it without complying with paragraph (4) above, but where it appears to the authority that any action by the applicant might put the application in order, the authority shall not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

**[12]** Reg 6 relates to the consideration of objections and provides in paragraph (1):

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

**[13]** Those provisions require inter alia that copies of the objections to the application must be sent to the applicant, who must be given a reasonable opportunity of dealing with the matters contained therein.

**[14]** Reg 7 determines the method of registration and provides in paragraph (1):

"Where a registration authority accepts an application, it shall make the necessary registration, following as closely as possible whichever of the Model Entries 4 and 7 to 12 may be applicable, with such variations and adaptations as the circumstances may require ... "

*Factual Background*

**[15]** The factual background is set out in some detail in the inspector's report. It can be summarised as follows. The town of Leek has a population of about 20,000. Open country comes close to the centre of the town in the southeast sector. Within that sector is Pickwood Hall, a mansion which stands on a hill, surrounded by trees. To the west of the hall there is a large field of about 20 acres, known to local people as Ladydale Meadow. The meadow was formally part of the parkland of the hall. It slopes steeply down to a valley on the west and streams run down the west and south sides of the meadow to meet at the southwest corner. Two public footpaths, numbers 26 and 27, run down from the centre of Leek to meet near the northwest corner of the meadow, and at that point just outside the meadow there is a ancient well known as Lady of the Dale, or Ladydale Well. From there a public footpath runs from the well in a southerly direction on the west side of the stream down the valley. Also near the well there is a stile which gives access to Ladydale Meadow. From the stile a private right of way crosses the meadow in an east-west direction and passes through a pair of stone gateposts at the edge of the woodland surrounding the hall. At the southwest corner of the meadow there is a pair of stone gateposts, from which a disused carriage drive climbs up and across the meadow to the hall. The meadow consists of rough, unimproved grassland and is wet towards the bottom of the valley.

**[16]** To the west of the valley there is a housing estate known as the Ladydale Estate. There are 71 houses within the estate, with a population of some 200. The meadow was allocated as part of a proposed housing site in the Staffordshire Moorlands local plan, which was adopted in 1998. In 1999 Alfred McAlpine Homes (Northwest) Limited applied for planning permission to build 24 houses on the meadow. The council failed to determine the application within the prescribed period and so McAlpine appealed to the Secretary of State. Following a public inquiry the inspector allowed the appeal and granted planning permission on 30th June 2000.

**[17]** The application under the Act was made on 27th October 1999 by a Mr Brown and a Ms Kerr. The application described the land claimed to have become town or village green as follows:

"Name by which usually known: Ladydale Meadow.

Locality: as shown on map. Exhibit (A).

Colour on plan herewith: outlined in yellow."

**[18]** The plan had attached to it explanatory notes which said that:

"The area in question is outlined in neon yellow.

It is marked on the northern boundary by a marked public footpath and a dotted black line.

To the east, we would like the area registered to be as far as the line marked in red on the map.

To the south, again, following the black dots and public footpath to the junction with the line marked in red.

To the west, still following the dotted line alongside the stream, back northwards to the footbridge near the Ladydale Well."

**[19]** The description said that the area comprised a gently sloping meadow and near the bottom of the slope there was an area of wetland encompassing a seasonal pond.

**[20]** The inspector described the boundaries of the application. He noted that the obvious intention of the applicants was to try to trump the outstanding planning application, but continued:

"However, it appears to me that the motive of the applicants is legally irrelevant to the question whether the application land has become a town or village green, although it is a factor to be taken into account when assessing the credibility of the witnesses who gave evidence in favour of the application."

**[21]** He then dealt with procedural matters.

**[22]** One of the applicants appeared in person on behalf of those who supported the registration of the meadow as a town or village green. He called witnesses and submitted numerous written statements. Mr Wolton QC appeared for the objectors and called a witness and submitted a written statement. The inquiry ran over two days and the inspector received final submissions in writing, having held an accompanied site view.

**[23]** In Pt 4 of his report the inspector set out both the old and the new definition of town or village green. By the new definition, I mean the definition as amended by s 98 of the Countryside and Rights of Way Act 2000 (see above). At the inquiry there was some debate as to whether the old or the new definition should be applied. The inspector's view was that he should apply the new definition and for the purposes of this hearing the parties are agreed that he was right to do so.

**[24]** The inspector then set out the evidence for the applicants. He noted by way of introduction that 16 witnesses gave oral evidence for the applicants and in addition the applicants relied on numerous written statements. The inspector set out the evidence in considerable detail and analysed it with meticulous care. Mr Wolton very fairly accepts that he cannot challenge the inspector's summary of the witnesses' evidence nor the inspector's assessment of the credibility of the witnesses. He does challenge the conclusions that the inspector drew from the evidence.

**[25]** It is unnecessary for present purposes to rehearse all the evidence for the applicants in detail. The inspector concluded that two of the 16 witnesses were really of no assistance in relation to the matter that he had to decide. Of the remaining 14 witnesses, six were able to give evidence covering the whole of the 20-year period. The remaining eight witnesses were able to give evidence which dealt with varying periods. One witness, for example, was able to give evidence going back to late 1980. Another witness was able to speak of what had occurred in the 1930s. Another had not moved to Pickwood Hall until November 2000. Since the inspector referred, in particular, to the six witnesses who were able to give evidence in relation to the whole of the 20-year period, it is sensible to refer very briefly to what he said about those witnesses.

**[26]** First there was Mr Yates, who had been born in Leek in 1931 and lived there all of his life. For the last nine years he had lived on the Ladydale Estate. The inspector said that he gave evidence that, for 20 years or more, he had regularly walked in the meadow and in more recent times with his dog. He had seen other people walking on the meadow.

"Since moving to the Ladydale Estate he sees people walking on the meadow on most of his visits. He recognises up to 15 of the people as from the Ladydale Estate, although some come from further afield."

**[27]** The inspector said that Mr Yates's evidence was not wholly consistent, but he accepted the broad thrust of his evidence, to the effect that he had been using the meadow for informal recreation without the permission of the landowner on a frequent basis for more than 20 years and that many others had been doing the same.

**[28]** Mr Northcott was born in 1967 and had lived in Leek all his life. Since 1990, he had lived on the Ladydale Estate. He said that he had used the meadow for informal recreation for well over 20 years. As a child, he remembered playing hide and seek all over the meadow. He acquired a dog, or possibly a dog acquired him, in 1990 and he walked it twice a day in the meadow until it died in 1998. The inspector records him saying:

> "On many occasions he had seen other people in the meadow, adults walking with or without dogs, and children playing. He recognised some as his neighbours."

**[29]** Mr Fisher was born in 1946 and had lived in Leek since 1974. He lived in another part of the town but he walked through Ladydale Meadow five or six times a year and in the 1980s he and a friend, together with their children, used to go sledging in the meadow. He said, when walking up the hall footpath he had seen other dog walkers, usually to the right of the hall footpath. The inspector refers to the hall footpath as the footpath that leads from the stile across the meadow towards the hall.

**[30]** Mr Malkin was born in 1933. He was away from Leek for some years but returned in 1957, married and had children, and he regularly walked in the meadow with his children and subsequently his grandchildren. He had retired seven years previously and since then he had walked in the meadow five to seven days a week, before then ten to 20 times a year. He had picnicked on the meadow, but not in the last 20 years. He said he had seen many other people using the meadow, mostly walking and exercising dogs. He had seen children and adults sledging on the meadow in the snow.

**[31]** Mr Hobson was born in Leek in 1962. He moved in 1990 to Ladydale Close on the Ladydale Estate. He gave evidence that he had used the meadow for recreation since he was seven or eight years old. He had used it more as a child and as an adult, and rather less as a teenager. On about half of his visits there were other people walking with or without dogs.

**[32]** Mr Allen was the last of the six witnesses whose evidence covered the whole of the 20 years. He had moved to Leek in 1979, lived in the Ladydale Estate, and since 1979 he said he had used the meadow for walking his dog every other day and also for golf practice. He said he saw other people on the meadow about twice a week and usually they were walking with or without dogs. He thought that the general use of the meadow had not changed much over the last 20 years, except that there were more dog walkers.

**[33]** In addition to the evidence of those witnesses, other witnesses gave evidence of their use of the meadow over a relatively long period, for example Mr Lloyd, who had lived at Pickwood Cottage since October or November 1980. Since he had a private right of way to go across the meadow, the inspector quite rightly concluded that his evidence could not prove the use of the meadow by himself or his family.

> "However [he added], Mr Lloyd's evidence does show frequent use of the lower half of the meadow for informal recreational use by other people back to late 1980."

**[34]** A Mr Gilman had in 1939 been taken to Ladydale Well by his aunt and he said that the aunt, who was a head mistress took children annually to the well and they ate their picnic in the meadow. The inspector said that this tended to show that the meadow was accessible to the public before the war, but it was not evidence of use by local people. Mr Gilman also gave hearsay evidence about what he had been told by local people as to what the workers from the mills used to do in their breaks from work.

**[35]** In addition, there was, for example, a Mrs Lee, who had moved into the Ladydale Estate in 1983. Her house overlooked the meadow and she said that, when she moved in she saw people using the meadow. She talked to her neighbours and they expressed general views to her about how the meadow could be used. She used the meadow for walking the dog, walking with her family, picnics, blackberrying and sledging in the snow. When she used the meadow, there was usually somebody else using it as well, and she had seen people every day from her windows using the meadow.

**[36]** The applicants submitted written evidence. The inspector said that evidence had to be approached with considerable caution. Much of it was very vaguely expressed. It was unclear what period it covered or precisely to what land it related and it had not been tested by cross-examination. He added:

> "However, even giving full weight to these qualifications, it can be said that the written evidence is largely consistent with and supportive of the oral evidence given by the applicants' witnesses, to the effect that many local people from Leek have been using the Meadow for informal recreation for more than 20 years without permission or objection."

**[37]** The inspector referred to two videos, which he did not consider threw any light on the issues in the application. He then dealt with the evidence for the objectors. One witness gave oral evidence, a Mr Deaville. It is unnecessary to do more than say that the inspector was not particularly impressed by Mr Deaville's evidence. A written statement by Mr Watson, a landowner, was put by Mr Wolton. As to that, the inspector said:

> "As it was not possible for the applicants to test Mr Watson's evidence by cross-examination, or for me to see and assess the demeanour of Mr Watson as a witness, I prefer the evidence of the applicants' witnesses, whom I had the opportunity to see and hear, and who were fully and properly tested by Mr Wolton's robust but fair cross examination."

**[38]** In the light of all that evidence the inspector reached the following findings of fact:

> "7.1. Substantial use has been made of Ladydale Meadow for informal recreation for more than 20 years before the application and still continues. A number of the applicants' witnesses were able to give evidence covering the whole of the 20-year period, ie Mr Yates, Mr Northcott, Mr Fisher, Mr Malkin, Mr Hobson and Mr Allen.
>
> 7.2. Informal recreation has mostly been walking with or without dogs and children's play.
>
> 7.3. The persons who have enjoyed informal recreation on the Meadow have almost always walked to the Meadow from their homes in Leek. Inevitably, more have come from parts of Leek close to the Meadow, and in particular the Ladydale Estate, than from parts of Leek which are further away, but there was evidence of users from all over Leek. This is not surprising because the Meadow is within easy walking distance from the centre of Leek and is situated beside the Ladydale Well, which is a well known local attraction.
>
> 7.4. The majority of recreational users have entered and left by the stile, although some people have used the Carriage Drive Gate, which was rarely locked and sometimes open.
>
> 7.5. Recreational users have not confined themselves to particular routes on the Meadow but have wandered all over the Meadow, although they have tended to use the application land more than other parts of the Meadow.
>
> 7.6. There have been no signs forbidding entry to the Meadow and no one has turned recreational users off the application land.
>
> 7.7. Recreational use of the Meadow has been open and users have not sought or obtained permission to use the Meadow.
>
> 7.8. The reason why the Meadow has been used for informal recreation to a substantial extent for a long period is based upon a combination of a number of factors:
>
> (a) an absentee landowner,
>
> (b) land of little agricultural value,
>
> (c) an agricultural licensee with limited interest in the land under a succession of seasonal grazing licences,
>
> (d) its situation close to Leek on the edge of a residential estate and beside the local attraction of Ladydale Well,
>
> (e) inviting access over what looks like a stile for public use, and
>
> (f) the absence of signs or any other action to dissuade entry."

**[39]** The inspector concluded that:

> "On the above findings of fact, the applicants have proved that the land falls within the new definition of town or village green."

**[40]** He then went through the various elements of the definition, starting in para 8.1 with "land". He said that:

> "Although the plan accompanying the application is imperfect, I think that it is easily possible, giving the benefit of any inaccuracy to the objectors, to identify the land which is both subject to the application and is proved to have been used for recreation by local people for more than 20 years.
>
> The northern boundary will be the northern edge of the Hall Footpath, which is easily identifiable on the ground.
>
> The southern boundary will be the fence or stream bank, whichever is the more northerly at any point.
>
> The western boundary will be the fence or stream bank, whichever is the more easterly at any point.
>
> The eastern boundary will be a line drawn due south from the gateposts at the eastern end of the Hall Footpath.
>
> It seems to me irrelevant whether the applicants might have been able successfully to apply for registration of a larger area. The registration authority has simply to consider the land which is the subject of the application."

**[41]** He concluded that the land had been used for informal recreation for not less than 20 years, and that conclusion is not subject to challenge. He then dealt with the question of "a significant number of the inhabitants of any locality", saying:

> "'Significant' is rather an imprecise word but it is an ordinary word in the English language and there is little help to be gained from trying to define it in other language. It seems to me that it is really a matter of impression. In my view, the evidence shows that the recreational use of the application land has been by a significant number of the inhabitants of Leek."

**[42]** He then concluded that Leek was a locality for the purposes of the Act. That conclusion is not challenged. He went on in para 8.4 to consider the test, "... any neighbourhood within a locality", saying:

> "Further, it seems to me that there has been 20 years' recreational use of the application land by a significant number of the inhabitants of the Ladydale Estate.
>
> In my view, the Ladydale Estate is a 'neighbourhood'."

**[43]** He set out his reasons for reaching that conclusion, which is not challenged.

**[44]** He then dealt with the question of whether the informal recreation spoken of by the applicants fell within the statutory description, " ... indulging in lawful sports and pastimes ... ", and concluded that it did. He dealt with the question of whether it had been " ... as of right ...". He said that the use of the meadow for informal recreation by local people continued. He recommended that:

> " ... The registration authority should accede to the application in relation to the land defined in para 8.1 above but should reject the application in relation to the rest of the application land."

**[45]** That recommendation was accepted by the regulatory committee of the council.

**[46]** On behalf of the claimants, Mr Wolton QC described the effect of the Act as draconian. Registration would result in the landowner in the present case being unable to use his land in a beneficial manner. Not merely the planning permission obtained for residential development on part of the meadow, but also the ability to use the meadow to obtain access to other land with residential planning permission to the south would be frustrated by registration. Such interference with a landowner's rights required the most careful scrutiny and could be justified only upon the basis of the most cogent evidence.

**[47]** He referred to *R v Suffolk County Council, ex parte Steed* [1997] 10 EG 146, 75 P & CR 102. Lord Justice Pill, giving the leading judgment of the court, observed at page 111:

> "I approach the issue (of registration of a town green created by prescription) on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ... The test for considering whether the rights are established is a stringent one as stated earlier in this judgment. That provides protection for those with an interest in the land. The registration procedure, as laid down in the regulations, provides further protection by

> imposing duties upon a registration authority to send, publish and affix notices (regulation 5.4) and conferring the right to object (page 115)."

**[48]** Although the decision in Steed, that there must be a subjective belief in the prescriptive right, was overruled in *R v Oxfordshire County Council, ex parte Sunningwell* [2000] 1 AC 335, [1999] 3 All ER 385 Lord Hoffmann, who gave the leading speech in that case, did not suggest that a more relaxed approach to the determination of applications for registration under the Act was appropriate.

**[49]** Against this background Mr Wolton challenged the council's decision to accept the inspector's recommendation on two grounds. Firstly, whilst there was no issue that a number of inhabitants of Leek and of the Ladydale Estate had used the meadow for informal recreation for 20 years, there was no evidence to support the inspector's conclusion that the number of inhabitants so doing was significant. His conclusion to that effect was really no more than speculation. Secondly, there was no power to accept an application for registration in relation to part only of the land included in the application. The registration authority had power to accept an application in respect of the whole of the land applied for or to reject an application.

**[50]** In relation to the first point, it is submitted on behalf of the claimant that, in the context of the Act, the words "significant number" of the inhabitants of any locality or of a neighbourhood meant that the number had to be considerable or substantial. The inspector had fixed the population of Leek at 20,000 and that of the Ladydale Estate at around 200. Only six witnesses were able to give evidence covering the whole of the 20-year period. All of the six had lived in the locality of Leek for that period but only one of them had lived on the Ladydale Estate for the full 20 years. Thus, one had the position of six witnesses out of a town with a population of 20,000; alternatively, one witness out of a neighbourhood with a population of 200. These numbers simply could not be regarded as being in any way significant.

**[51]** Mr Wolton analysed the evidence of these six witnesses in some detail, as indeed he did in his written closing submissions before the inspector. He submitted in essence that, although these witnesses gave general evidence about the use of the meadow, none of them condescended to the number of people from Leek or from the Ladydale Estate who had actually used the meadow over the full 20-year period. Other witnesses had given evidence but they had not been able to speak as to the full period of 20 years. Plainly there had been an increase in dog walking over recent years but as to what had occurred in earlier years, that was really pure speculation.

**[52]** So far as the written evidence is concerned, that had to be approached with considerable caution. The inspector had been correct to say that much of it was vaguely expressed and it was unclear what period it covered or to what land it related. Moreover, it had not been tested in cross-examination. Mr Wolton accepted that, in principle, such evidence could corroborate other oral evidence but, he submitted, there was nothing of substance or significance to corroborate. It simply was not possible to derive from the totality of the oral or written evidence the proportion of people from Leek or the Ladydale Estate who, for the past 20 years, had been using the meadow for recreation, let alone to determine whether that proportion was significant or not. The inspector's conclusion that the statutory definition had been met was therefore Wednesbury unreasonable.

**[53]** Mr Wolton referred to Lord Hoffmann's speech in the *Sunningwell* case. At page 168 of [1999] 3 WLR Lord Hoffmann had said this:

> "My Lords, I pause to observe that Lord Blackburn does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been ... 'openly and in the manner that a person rightfully entitled would have used it... '."

**[54]** Thus, the question had to be asked: how would the user described by the witnesses before the inspector have appeared to the owner of the land? The picture here was of occasional or casual use, largely for dog walking. It was not a picture of use by a sufficient number of persons to be representative of the inhabitants either of Leek or of the Ladydale Estate.

**[55]** Turning to the second matter, the inspector's recommendation that a reduced area of land be registered, it was submitted on behalf of the claimant that, where an application is defective because, for example, the land to which it

relates is not shown on the evidence to be wholly common land or town or village green, then the registration authority may either reject it or invite the applicant to amend it. The registration authority has no power itself to amend an application. The registration authority's sole function is to consider the application and the objections to it. If, having done so, the application satisfies the relevant statutory requirements, then the registration authority may accept the application, but if the statutory requirements are not made out, the registration authority has no option but to reject the application. There is no power in either the Act or the Regulations for the registration authority to approve a different area of land from that which appears in the application.

**[56]** Mr Wolton referred me to a report by Mr Gerard Ryan QC on another non-statutory public inquiry into Spring Common, Huntingdon. In that case it seems that a property known as Spring House had been included in the application. Mr Ryan said this in his report:

> "It is also objected that if a claim for registration of a green is not supported by evidence justifying the claim in respect of the whole green, but possibly only as to a part or parts, the registration must be rejected. I find nothing in the 1965 Act or the New Land Regulations which justifies another view. In this context a somewhat technical but nevertheless important issue stems from the inclusion within the boundary of the claimed green of a property at the northern of the Eastern Meadow known as Spring House. This is, I understand, owned by a local authority and is currently being renovated to fulfil either a social services or an educational function. Extensive work was being carried out there on the day I inspected Spring Common. It was conceded at the end of the Applicant's case that the inclusion of this property was an error."

**[57]** Mr Ryan then referred to the dicta of Lord Justice Pill in the Steed case, which I have quoted above. He continued:

> "An implication of the learned Judge's observations must be that the unjustified and admittedly erroneous inclusion of a separate substantial property within the boundary of a claimed green becomes a serious issue. Moreover a commons registration authority is not in my view empowered by the legislation to amend a claim to accord with the evidence put forward to support it. I conclude that the erroneous inclusion of Spring House and its curtilage in this claim comprises an incurable defect which is fatal to it. It is obviously important that both a claim form and accompanying plan are prepared with great care: the inclusion of Spring House on this plan seems attributable to carelessness."

**[58]** A little later on in his report he said that the power of the registration authority under the Regulations:

> "is then to accept or to reject the application on the basis of the material before it; that must mean the application as presented and objected to. A modified application might not, for example, attract an objection which is otherwise relevant. It is the applicant who decides what to claim.
>
> The limit of the Authority's power in the context of the perfecting of an application is contained in Regulation 5(7) which enables it to reject, at the outset, an application which does not comply with the New Land Regulations. Although the error made here may be regarded as leading to a small defect in this application in terms of the area claimed, it is nevertheless a significant and in my view an incurable defect which is fatal to the application."

**[59]** It is fair to note that in that case Mr Ryan also concluded that the evidence tendered was not sufficient to establish use for lawful sports and pastimes for the whole of Spring Common throughout a 20-year period.

**[60]** On behalf of the defendant Mr Mynors submits that, in respect of the first ground of complaint, it is inevitable in cases of this kind that much, if not the whole of the evidence available is going to be assertions, whether made orally or in writing, as to what has taken place in the past, possibly many years earlier. It will be very rare indeed to find anyone who has been present upon the relevant land for the whole of the 20-year period or who has direct knowledge of what occurred every day on the land over that period. Inevitably, people will be saying what they remember doing themselves and what they remember seeing other people doing many years ago. Whether a significant number of the inhabitants of a locality are said to be engaging in activities on a particular piece of land must be very much a matter of impression. It is for that reason that registration authorities, confronted with contested applications of this kind, regularly cause non-statutory inquiries to be held by inspectors who are experienced in this branch of the law. In the present case Mr Chapman's very considerable experience in this branch of the law is not in dispute.

**[61]** Mr Mynors points out that inspectors, in assessing the quality of evidence, will be perfectly well aware of the underlying motives of many of those supporting an application for registration; that is to say that they wish to prevent development from taking place. The inspector in the present case expressly acknowledged that fact. He points to para 7.1 of the inspector's report, where the inspector referred to the six named witnesses who were able

to deal with the whole of the relevant 20-year period, but submits that the evidence of those witnesses was supplemented by the evidence of other witnesses, who could give evidence, not over the whole of the 20-year period, but in respect of a greater or lesser part of it. He acknowledges that such evidence of itself could not be conclusive as to the use of the land over the whole period but submits that, taken together with the evidence of the six named witnesses, it was strongly corroborative.

**[62]** Moreover, he points out that there was no evidence of change of ownership of the land or of some other change, for example the erection of fences, the pulling down of a stile, the falling into disrepair of a bridge, which might have suggested that the pattern of use of the land would be likely to have altered at any time over the 20-year period.

**[63]** He points to the general location of the land, its accessibility by footpath from the centre of Leek, and its proximity to a local attraction. He submits that, on the totality of the evidence, it was not in the least unreasonable for the inspector to conclude that those using the meadow were from a locality, Leek, or from a neighbourhood within the locality: Ladydale Estate.

**[64]** It being acknowledged that the inspector was perfectly entitled to conclude that a number of the inhabitants, whether of Leek or the Ladydale Estate, had been using the meadow for informal recreation over a 20-year period, in considering whether that number was a significant number, the inspector rightly declined to define the word “significant” in other terms. The inspector correctly pointed out that “significant” was an ordinary word in the English language and that what was significant in any particular case was very much a matter of impression. The council did not accept that “significant” in this context necessarily meant considerable or substantial. Even if it did, expressions of that kind were equally imprecise. He submitted that what matters is that the number of people using a piece of land is sufficient to indicate that their use of the land signifies that the land is in general use by the local community for informal recreation, rather than, for example, occasional use by individual persons as trespassers.

**[65]** So far as the area to be registered is concerned, Mr Mynors submitted that it was plain from para 8.1 of the inspector's report that, however the land was to be defined, the inspector did not intend to allow any land outside the application land to be included. He was seeking:

> “ ... to identify the land which is both subject to the application and is proved to have been used for recreation by local people for more than 20 years.”

**[66]** Later on in that paragraph the inspector said that the registration authority had simply to consider the land which is the subject of the application and that it was irrelevant that an application might have been successfully made in respect of a larger area. In any event the council had no intention of registering any land that was outwith the boundaries of the application land. The council did, however, intend to cut down the area to be registered by drawing in the eastern boundary. In summary, the council contended that it was entitled to register less than was applied for.

**[67]** Mr Mynors accepted that there is no explicit power, either in the Act or in the Regulations, for the registration authority to register as a town or village green only part of the land which was the subject of an application, but he submits that such express authority is not necessary because an application for the inclusion of an area of land within the register must of necessity involve a claim that each and every part of that land is eligible to be registered. He submits that it would be wholly artificial if, in order to be on the safe side, an applicant had to split up the land which he wished to see registered into a number of smaller areas and apply separately for the registration of each of those smaller areas. There would appear to be no good reason why a registration authority, having considered the evidence on behalf of the applicant and the objector, should not be able to say that it accepted that part of the land that was the subject of an application was registerable, but had concluded that the remainder was not. That would not be contrary to the purpose underlying the Act and the Regulations, which was that the land the subject of the application should be defined so that proper notice could be given to owners, lessees, tenants or occupiers so that they could object to the application, if they wished to do so. If all such persons had been notified and had an opportunity to state their view, then no one could be prejudiced if the registration authority, in the light of all the evidence, registered a lesser area. He accepted that, if the registration authority sought to go outside the area

applied for, prejudice might arise because those who might wish to object would not have had or might not have had notice of the application.

**[68]** By way of analogy he referred to the fact that planning authorities regularly grant permission for a lesser form of development than that which has been applied for. In the case of *Wheatcroft v Secretary of State for the Environment* 43 P & CR 233, [1982] JPL 37, Mr Justice Forbes had endorsed such a practice, provided what was permitted was not substantially different from that which was applied for. Mr Justice Forbes added that, in deciding whether or not what had been permitted was in substance not that which was applied for, one had to consider the extent to which those who might wish to object to a lesser form of development had been consulted and and had an opportunity to express their views.

**[69]** Mr Mynors has pointed out that the court is permitted by s 14(b) of the Act to rectify the register where it appears to the court that no amendment or a different amendment ought to have been made. He submitted that, whilst the court in such cases might simply be rectifying an error made by the registration authority, the words would be equally apt to cover a case where a different amendment to the register was found to be appropriate on the evidence.

**[70]** Finally, on a practical note, he submitted that there would be little sense in preventing the registration authority from registering a smaller area. Inevitably, the inspector's report would be released to the applicants for registration and to the objectors. If the registration authority was compelled to say that, as a result of the inspector's conclusion that a lesser area should be registered, it had no power to accept the registration, the practical consequence would be there would thereupon be a fresh application for registration of the smaller area. The inspector's report would be evidence in any further inquiry into that fresh application and, absent any material change of circumstances, precisely the same result would be reached, save that a great deal of time, trouble and money would have been expended. He submitted that, as a matter of discretion, the court should not quash the council's decision, since it would cause no prejudice to the claimants.

*My Conclusions*

**[71]** Dealing firstly with the question of a significant number, I do not accept the proposition that significant in the context of s 22(1) as amended means a considerable or a substantial number. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. In my judgment the inspector approached the matter correctly in saying that “significant”, although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.

**[72]** The inspector concluded in para 7.1 that substantial use had been made of the meadow for informal recreation for more than 20 years before the application. He referred specifically to six of the witnesses who could give evidence covering the whole of the 20-year period. Mr Wolton's criticisms of the inspector's conclusions are not well founded. It is quite unrealistic to refer simply to the six witnesses or to deal with the matter on the basis that they are only six out of 20,000 or one out of 200, and that such numbers are not significant. I accept that, if all of those six witnesses had said that they had not seen others on the land over the 20-year period, then it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant. But the fact of the matter is that they did not give such evidence: they were able to give evidence, not merely about what they did themselves, but what they saw others doing on the meadow over the 20-year period.

**[73]** It is difficult to obtain first-hand evidence of events over a period as long as 20 years. In the present case there was an unusual number of witnesses who were able to speak as to the whole of the period. More often an inspector at such inquiries is left with a patchwork of evidence, trying to piece together evidence from individuals who can deal with various parts of the 20-year period. In the present case, however, the evidence of the six witnesses who were able to cover the whole 20-year period was amply supported by many other witnesses who dealt not simply with the last few years but with a very considerable part of the 20-year period, some of them going back almost 20 years, some going back to times before the 20-year period began.

**[74]** If there had been anything to suggest circumstances might have changed -- a change of ownership, a change in the physical condition of the land, fences erected, bridges broken down, gates locked -- then there might have been some substance in Mr Wolton's submissions. But there is no evidence to suggest that there was any relevant change that might reasonably lead to the conclusion that evidence about what was happening, say, 15 years ago was not relevant for the purpose of deciding what was happening 20 years ago.

**[75]** In addition to the oral evidence, the inspector had the written evidence. Clearly, he had to treat that evidence with caution because it was not subject to cross-examination but, having looked at the totality of that evidence, he was entitled to conclude that it was largely consistent with and supportive of the oral evidence given by the applicant's witnesses to the effect that many local people from Leek had been using the meadow for informal recreation for more than 20 years without permission or objection.

**[76]** In addition, the inspector was entitled to have regard to the matters set out in paras 7.3 to 7.8 of his report; that is to say, the meadow is within easy walking distance from the centre of Leek. There are footpaths leading to it. It is beside the Ladydale Well, which is a well-known local attraction. It is very easy to get into the meadow from Ladydale Well over the stile. There is also the Carriage Drive Gate, which the inspector concluded was rarely locked and sometimes open. There were no signs forbidding entry and generally the surrounding circumstances were entirely consistent with the contentions of the applicant's witnesses that people were using it for informal recreation: there was an absentee landowner; the land had little agricultural value; the agricultural licensee had a limited interest; and so forth.

**[77]** In short, all of the pieces of evidence referred to above fitted together and pointed in the same direction. That is to say that there had indeed been use for 20 years or more by a significant number of the inhabitants of Leek and of the adjoining estate. Far from being a unreasonable conclusion based upon speculation, the inspector's conclusion is in my judgment amply supported by a painstakingly careful analysis of all the evidence before him.

**[78]** Turning to the second matter, following discussions between the parties, it is clear that the council does not propose to register any land that is outwith the application site. It proposes to register a smaller area than was applied for. It is plain from para 8.1 of the inspector's report that he did not intend that additional land, ie land outwith the application site, should be registered. As he said, what he was trying to do was to identify land which was both the subject of the application and proved to have been used for recreation by local people. So the concerns expressed by the claimant that land outwith the application site might be registered are not made out.

**[79]** Does the council have power to register a smaller area than applied for? It is perfectly true that there is no express power in either the Act or the Regulations to register a smaller area of land. I have set out the relevant enactments above. The Regulations require that the application must be in a particular form, and that form requires that the land the subject of the application should be identified. However, it has to be recognised that those who make applications for registration are not necessarily expert cartographers. Plainly, they will not have the benefit, as the inspector did, of being able to consider all of the relevant evidence for and against registration of a particular parcel of land.

**[80]** What is the purpose of identifying the land in the application? The answer is, so that the registration authority can give appropriate notice to owners, lessees, tenants or occupiers, or to others who might wish to object to an

application to register. It seems to me that, provided the boundary is not altered in such a way as to defeat that purpose of defining the land in the application form, for example by including land which might be owned, tenanted or occupied by others, there can be no sensible objection to the registration authority cutting down the extent of land to be registered.

**[81]** Mr Ryan's decision is readily understandable on the facts. In that case it would appear that a significant building which, on any basis, could not form part of a town or village green, had been carelessly included in an application. One can well understand that such an egregious error might have been fatal to that particular application, but that is very different from the facts of the present case. The applicants sought the registration of Ladydale Meadow. There was debate as to the extent to which they had used the whole of the 20 acres of the meadow. The inspector found that they had not used the whole of it. There is no question of carelessness or of the inclusion of a parcel of land that could not on any basis form part of a town or village green. Moreover, what is of importance is that no prejudice to the claimant in the present case has been suggested.

**[82]** Mr Wolton submits that the *Wheatcroft* case 43 P & CR 233, [1982] JPL 37 is not analogous to the present case because a planning permission will generally confer benefits upon the landowner, whereas a registration as a town or village green will be detrimental to an owner's interests. Provided the registration authority does not step outside the boundary of the application and provided the landowner, tenant and occupier have had ample opportunity to make their representations, it is difficult to see why, as a matter of common sense, the registration authority should not be able to register a lesser area, provided it is not substantially different from that which has been applied for. There is no substantial difference here, only a more accurate definition of the boundaries in the light of all of the evidence. I accept Mr Mynors' submission that it is implicit in an application to register an area of land that the applicant is saying that each and every part of that land is registerable as a town or village green. It would be quite artificial to require an applicant to split up the application site into a number of smaller parcels.

**[83]** Even if I am wrong about this and the registration authority does not have power itself to register a lesser area than that applied for, this court has a discretion as to whether or not to grant relief. As a matter of discretion I can see no useful purpose being served by quashing the council's decision to register a lesser area. The only consequence would be that the applicants for registration would be able to put in a fresh application to register the lesser area. The inspector's report recommending registration of that lesser area would be public knowledge and would plainly be evidence that could be put forward at any further inquiry, if there were to be one, and, absent any material change of circumstances or new evidence, precisely the same conclusion would be reached. Thus it seems to me, absent any prejudice to the claimant on the facts of the present case, it would be pointless to grant relief on such a limited basis.

**[84]** For these reasons, this application for judicial review is dismissed.

Application dismissed.

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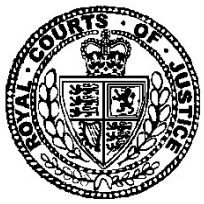
# Appendix 10.11

# *Network Rail Infrastructure Ltd v Welsh Ministers* [2020] EWHC 1993 (Admin)



Neutral Citation Number: [2020] EWHC 1993 (Admin) Case No: CO/3369/2019

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

Wrexham Law Courts Bodhyfryd, Wrexham, LLP 7BP

Date: 30/07/2020

**Before**:

**HIS HONOUR JUDGE JARMAN QC**
Sitting as a judge of the High Court
**Between:**

**NETWORK RAIL INFRASTRUCTURE LTD** — **Claimant**
**- and -**
**WELSH MINISTERS** — **Defendants**

**(1) CONWY COUNTY BOROUGH COUNCIL**
**(2) GUTO BEBB**
**(3) MIKE PRIESTLEY**
**(4) RAMBLERS**
**(5) ROGER AND GLENYS ARDEN**
**(6) J AND K PITT**

**Interested Parties**

**Mr Juan Lopez** (instructed by **Eversheds Sutherland (International) LLP**) for the **claimant Mr Gwion Lewis** (instructed by **Government Legal Department**) for the **defendants**

Hearing dates: 16-17 July 2020

# Approved Judgment

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30 am Thursday 30 July 2020.**

**HH JUDGE JARMAN QC:**

*Introduction*

1. By a decision dated 18 July 2019 (the decision) an inspector appointed by the Welsh Ministers confirmed the Conwy County Borough Council (Footpath No 73 in the community of Conwy) Definitive Map Modification Order 2016 (which council and order I shall refer to as such) and the existence of a public footpath over land in Conwy owned by the claimant. The description of the footpath (the footpath) given in the order, which was made under the Wildlife and Countryside Act 1981 (the 1981 Act) is:

> "A Public Footpath, that is a public right of way on foot in the Community of Conwy, beginning at a ladder stile adjacent to a bus shelter on the southern side of Glan-y-Mor Road at grid reference SH 78621 78495 and proceeds over the stile and over two sets of railway lines in a south easterly direction for approximately 30m then over a stone stile to terminate at the junction with the coastal/cycle path at grid reference SH 786257 as indicated by a broken black line on the Order Map."

2. It is important to note at the outset the limited extent of the footpath so confirmed. It starts and ends at boundary features enclosing two railway branch lines from Llandudno Junction to Llandudno, which features are surmounted by the wooden and stone stiles referred to. The other side of the stone stile a cycle path runs along the top of sloping masonry, as annotated on the plan forming part of the order. This masonry was constructed to support the lines and encroaches over the high water mark of the River Conwy estuary. As is clear from the order and the plan, the footpath as confirmed stops short of the cycle path and the sloping masonry.

3. An application to record that route was made by the second and third interested parties. The claimant objected to the making of the order and so a three day hearing was held locally before the inspector, at which the first interested party (the council) took a neutral stance, but the making of the order was supported by the other interested parties in these proceedings.

4. The wooden stile was removed in 1992 and so called into question the use of the footpath. The inspector considered whether 20 years user of the footpath as of right, that is not by force or stealth or permission, was established immediately prior to 1992 so as to amount to dedication of a public way under section 31 of the Highways Act 1980 (the 1980 Act). That provides that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate.

5. The inspector also considered the claimant's submission that pursuant to the Railway Regulation Act 1840 and the Regulation of Railways Act 1868 any such use would amount to a criminal offence. She decided that it was not possible to reach a firm conclusion on criminality given the period under consideration and the lack of evidence regarding user and what occurred at the time. She had regard to the decision of Dove J in *Ramblers Association v Secretary of State for Environment, Food and*

*Rural Affairs* [2017] EWHC 716 (Admin), in which he upheld a decision of another inspector to the effect that dedication of a public right of way over an operational railway would be incompatible with the statutory objectives of the claimant to provide a safe and efficient railway and its duty to ensure the safety of the public and its passengers. The inspector in the present case said that if that was the totality of the evidence, she may have concluded that it was not possible for dedication of a public right of way to have occurred at common law.

6. However, the inspector then observed that the case she was dealing with differed from that of *Ramblers* in that she had substantial documentary evidence from before and at the time of creation of the railway, and that if that evidence supported the existence of a path on the claimed route prior to or at the time the railway was constructed, that would suggest that the claimed footpath pre-existed the railway and had been dedicated at some point in the pre railway age. In that case statutory incompatibility would be irrelevant as the right of way would pre-date the railway.

*The inspector's conclusion on a public right of way pre 1853*

7. The inspector then examined the documentary evidence in turn and dealt with OS maps, an 1840 Tithe map, railway plans, and other documents. Her core reasoning in confirming the order was that she was satisfied that the evidence pointed towards the order route being available on the ground and used by the public on foot before the statutory process necessary to construct the railway lines was commenced in 1853. The reasoning is summarised in paragraphs 61-63 of the decision as set out below, after a finding that the claimant's predecessor had indicated a lack of intent to dedicate a right of way since 1992.

> "61. Nevertheless, bringing all the threads together, I find the evidence in relation to the Order route to be more probable than not of it being a historical footpath predating the railway. In particular the Tithe map and early OS mapping strongly confer a track leading to the foreshore and are suggestive but not determinative of a public road, This track provided the only access in the local area to the foreshore, ferry links and onwards travel to Conway. In later mapping this track became Pentywyn Road.
>
> 62. I have no evidence that this link between the track and the foreshore was severed other than during the construction of the railway. At this time the railway provided both a pedestrian and vehicular crossing over the rails and constructed a new slipway which did not preclude public use. This is most clearly shown on the 1882 Railway Plan, which was completed post construction of the original branch line. The newspaper article, dated 1899, suggests continued use of the foreshore from Tywyn towards Llandudno, accessed using a crossing at Tywyn.
>
> 63. Although finely balanced in this case, I am satisfied that the evidence points towards the Order route being available on the ground, pre railway, that was used by the public on foot. Accordingly, all subsequent use will be use pursuant of the preexisting right and the submissions regarding statutory

> incompatibility are irrelevant, the right of way having pre-dated the railway."

8. Unsurprisingly, as these passages demonstrate, the evidence as to use by the public of the order route prior to construction of the railway lines consisted largely of what could be taken from maps and plans and in particular Tithe and OS maps, and plans forming part of the enabling statutes for construction of the railway lines.

9. The lines were built as a branch line from the Chester and Holyhead Railway to connect with St George's Harbour at Llandudno Bay to the north. The foreshore referred to is that of St George's Channel where the River Conwy flows into the Irish Sea, just to the west of Tywyn. The town of Conwy lies opposite on the other side of the channel. The ferry referred to operated across the channel between these communities before the construction of the suspension bridge across the River Conwy from Conwy to the opposite part of the foreshore. The construction of the bridge, designed by Thomas Telford, commenced in 1822 and was completed in 1826.

*The nature of the challenge*

10. The claimant's challenge to the inspector's reasoning is made under schedule 15 paragraph 12 of the 1981 Act which provides as follows:

> "Proceedings for questioning validity of orders"
>
> 12(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.
>
> (2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.
>
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

11. That statutory formulation is a familiar one in respect of the right to challenge orders made by inspectors under statutory powers, and it follows that the general principles

of judicial review are applicable to this challenge (see *R Durbin v Welsh Ministers* [2014] EWHC 4458 (Admin).)

12. Those principles were conveniently summarised in respect of decisions by or behalf of minsters in *Seddon Properties Ltd v. Secretary of State for the Environment* (1981) 42 P&CR 26 by Forbes J, which so far as presently material may be further distilled as follows:

> "The Secretary of State must not act perversely. That is, if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion that he did reach, the decision may be overturned…
>
> In reaching his conclusion the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant…
>
> The Secretary of State must abide by the statutory procedures...
>
> The Secretary of State in exercising his powers, which include reaching a decision such as that in this case, must not depart from the principles of natural justice…
>
> Since the courts will only interfere if he acts beyond his powers (which is the foundation of all the above principles)…the courts will not entertain a submission that he gave undue weight to one argument or failed to give any weight at all to another. Again, in doing so he must, at any rate if substantial issues are involved, give clear reasons for his decision.
>
> In approaching this task it is no part of the court's duty to subject that decision letter to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph."

13. Further guidance on the adequacy of reasoning in this context was given by the House of Lords in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR 1953. Lord Brown at paragraph 36 said:

> "The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration…A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

14. In *Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council* (1993) 66 P. & C.R. 263, Sir Thomas Bingham MR said that the question, when dealing with an allegation of inadequate reasoning, is whether the decision letter "leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication".

15. The claimant accepts that the decision must be read fairly as a whole and that matters of weight and judgment were matters for the inspector. Nevertheless the challenge made on its behalf is put under five main heads, namely irrationality in the overall conclusion and the treatment of certain documents, material errors of fact, taking into account immaterial considerations and/or failing to take into account material considerations, inadequate reasons, and breach of natural justice or procedural or substantive unfairness.

16. The Welsh Ministers, in seeking to resist that challenge, do so on the basis that it is in essence an attempt to relitigate the merits of the claimant's case before the inspector and amounts to no more than disagreement with conclusions to which the inspector was entitled to come on the evidence presented at the hearing. I shall deal with each of the grounds in turn.

*Ground 1: Irrationality*

17. Mr Lopez, for the claimant, emphasises that this ground applies to the overall conclusions of the inspector but also to her treatment of several different pieces of evidence. The overall conclusion is irrational he submits, as the evidence adduced on behalf of the claimant was that the railway lines over which the footpath runs were built on land reclaimed from the sea. Accordingly, any public use of a way before 1853 could not have been along the order route, but if anywhere along a prereclamation route. In his skeleton argument he claims that the decision is entirely silent on the reclamation point.

18. However, the inspector expressly records at paragraph 37 of the decision that the claimant asserted that the claimed footpath cannot have been in existence at any time before the railway was constructed given that the line of the railway as built was on land that had to be reclaimed from the sea.

19. That comes within a section headed "Railway plans" from paragraphs 34 to 44. In paragraph 35 the inspector observed that the statutory process required to authorise railway schemes was exacting and that the book of reference and deposited plans needed to be of a high standard, and ended the paragraph with this observation:

> "Railway plans, which were normally specifically surveyed for the scheme, usually record topographical detail faithfully."

20. In paragraphs 38 to 43 the inspector then dealt with the relevant plans from 1853 to 1882. The latter plan in particular shows the railway lines at points built on a stone retaining wall or embankment which is situated beyond the high water mark but some way short of the low water mark.

21. Whilst these marks were not referred to by the inspector, earlier on in the decision at paragraph 27 she referred to evidence linking the ferry with Tywyn and the visits of non-conformist preachers visiting "Tywyn the Ferry" many times from 1771, and continued:

> "Moreover, it would appear from the submitted Admiralty Charts that the location of the crossing here was dictated by the depth of the water and the location of sand bars within the estuary."

22. The evidence given on behalf of the claimant at the hearing was that the sloping masonry dropped from rail level with its toe directly into the estuary waters, being

below the water mark where there was not a beach or path. However, it is clear from the order plan that the footpath ends some distance from the toe of the masonry at this point. Moreover, as Mr Lopez had to accept and as is clear from some of the plans, including some of the railway plans, the water mark here referred to is the high water mark. The low water mark at this point shows that apart from the times of high tide, the footpath does lead to foreshore between the two water marks. I do not accept that this means that one end of the footpath would be under water for substantial times of the day, as submitted by Mr Lopez, and although clearly frequency of user may be affected by the high tide that is unlikely to have been significant.

23. Mr Lopez criticises the inspector's treatment of each of the various pieces of documentary evidence, and so it is necessary to refer to this in some detail. I shall deal with them in the same order as the inspector did.

24. The first category of such evidence are early OS maps and an 1840 Tithe map. The oldest map before the inspector was the OS map for 1819. This shows the town of Conwy, and on the opposite shore across the estuary a building marked as Ferryhouse. A road or track runs from there to Pen-y-bont and Tal-y-sarn to the east and beyond. I shall refer to this as a road to avoid confusion with another track shown on later OS mapping which the inspector dealt with later on. She in places in the decision refers to this road also as a track, but it is clear enough from the context to what she referred. The community of Tywyn is not marked, although the community of Pen Towyn (this was spelt Pen Tywyn on later maps and in English means the top of or end of Tywyn) is shown further to the west, just to the west of Tyn-y-coed. The road is shown running from here right down to the foreshore, where further buildings are shown marked "Store houses." Just to the west of this are shown a scattering of more buildings marked as Pen-y-bryn. It is where this road meets the foreshore that the footpath lies.

25. At paragraph 27 the inspector said this:

> "27. The 1819 OS map clearly shows a route from the estuary foreshore close to 'Store houses at Pen-y-bryn towards Tyn-ycoed. I was informed at the inquiry that the Store houses were historically used in conjunction with a ferry which operated from a point close to 'Ferryhouse' over the Conwy. The Ferry was thought to have been in existence from c.1285. Goods (including stone to build Conwy Castle) and people were said to walk/be transported along the foreshore to either access the road towards Tyn-y-coed or the ferry. The following account is made by Fiona Richards in 'Tywyn in Victoria Times' revised in 2012, which links Tywyn to the ferry: "*Non conformity had taken hold in Tywyn and one of the first non-conformist preachers to visit the area was Thomas Hughes who lived in Mochdre. He visited 'Tywyn the Ferry' many times, the first probably in 1771.*"

26. There is then the reference to the Admiralty Charts cited above, and at paragraph 28 the inspector continued:

> "28. No other routes other than that at Store houses and Ferryhouse provide direct access to the estuary foreshore. I see no reason to doubt that the public extensively used this route to access the foreshore and walk along it."

27. Mr Lopez is critical of the inspector's treatment of the evidence regarding the ferry and submits that there was no evidence as to frequency, status, disembarkation points or timescale of the operation of the ferry. Given that it is likely that the ferry fell into disuse after the construction of the bridge in 1826, that is hardly surprising, and the inspector had to consider these matters on the basis of likelihood to be drawn from the available documentation.

28. Mr Lopez submits that the reference to Thomas Hughes cannot be taken to suggest that that particular preacher used the ferry. As it is said he came from Mochdre, and there is a place with that name to the north east near Colwyn Bay, that may well be right. But the inspector did not find otherwise. The importance of the reference is that Tywyn was linked with the ferry which gave the location. The precise point of disembarkation, which as the inspector observed was dependent on water depth, was not as important as the fact found by her that access to the foreshore was gained at Store houses over a route very similar to the order route to access the foreshore as a destination or for onward travel. Onward travel via the ferry was just one method and direction of onward travel, and in the context that the foreshore was also a destination.

29. Mr Lopez also criticizes the inspector for failing to deal with the possibility that the ferry may not have been used by the public as of right, but only by particular groups such as fishermen and miners and then only permissively. However, there was no hint in the documentation to suggest this might have been the case, and the inspector was entitled to have regard to the evidence of the Store houses and the Ferryhouse adjacent to the foreshore and to the link between the ferry and Tywyn in seeing no reason to doubt that the public extensively used this route to access the foreshore and walk along it.

30. Mr Lopez further submits that the inspector's reference to no other routes other than that at Store houses and Ferryhouse providing direct access to the foreshore is incorrect, as there are clearly such access points further to the south east, near to Peny-bont and Tal-y-sarn, for example. However, in my judgment paragraph 28 can only sensibly be read as referring to the vicinity of the claimed footpath route rather than the estuary foreshore in any wider meaning.

31. The inspector then deals with later OS maps in these terms at paragraph 29 and 30:

> "29. This route is again shown in the 1841 OS map, although at this time the route along the foreshore to Ferryhouse is shown as a formal track. At Ferryhouse the then newly constructed Conwy Bridge is shown. It is highly probable that a track was constructed to provide a more reliable link to and from the bridge. Network Rail stated that it was this track which severed the right of way and the public would have no longer needed access to the estuary at this point. However, the 1841 OS map shows a small spur towards the estuary, below the 'Storehouses' which may have provided a slipway for boats and access to the estuary for those walking towards Llandudno, Great Orme or for people foraging for seaweed or shellfish. However, I accept that given the construction of a track towards Conwy the public would no longer need to access the foreshore to reach Ferryhouse, but there would be nothing to prevent them from continuing to doing so.

> 30. The 1862 and 1889 OS maps shows the railway running along the seaward side of the routes described above. Whilst the scale of the map makes it difficult to assess in detail the construction of the railway was over the slipway. The railway authority constructed a new slipway, which is clearly shown on the 1889 map. These maps do not indicate a level crossing at this point. However, other level crossings indicated on the Railway Deposit Plans are also not shown."

32. Mr Lopez submits that it is not clear which route the inspector says is again shown on the 1841 OS map. In my judgment it is tolerably clear from paragraphs 28-29 that this route is the one which provided direct access to the estuary foreshore at Store houses. That is still shown clearly on the 1841 OS map. The other direct access at Ferryhouse is not shown and Ferryhouse is not marked, because the bridge at this point connects with the road to the east and the new track to Store houses. Moreover, it is at Store houses that the footpath was confirmed.

33. Mr Lopez further submits that the inspector's reference to a small spur at this point is unclear and was not canvassed at the hearing. This reference was made in the context of the claimant's contention at the hearing that the new track from the bridge to Store houses would have severed the right of way. As the inspector acknowledges, the scale of the map makes it difficult to assess in detail. She alluded to the possibility of the small spur providing a slipway, but it is not clear where on the 1841 OS map that was. Mr Lewis for the Welsh Ministers suggests that it is a small spur to the west of Store houses serving scattered buildings and leading to the estuary at that point. The word used by the inspector - "below" Store houses - may also suggest the spur is a very small appendage in the direction of the estuary where the road from Pen-y-bryn to Tyn-y-coed meets the track.

34. Whichever it was, it is clear from these paragraphs and from paragraphs 61 and 62 that the inspector did not make a finding as to the likelihood of the spur providing a slipway or that this was along the order route but relied on the possibility in rejecting the claimant's contention that the track had severed that link. It is clear from paragraph 61 that it was the road leading to the foreshore shown on the OS mapping, and not the slipway on the foreshore, which the inspector found was suggestive but not determinative of a public road. That was not irrational. Moreover, it is clear that the later OS mapping referred to in paragraph 30 showed that the railway was constructed over this slipway (whichever route it took) and that a new slipway on a different line to the east had been constructed with the railway.

35. The next criticism made by Mr Lopez was that the inspector in paragraph 33 said that overall, the Tithe and OS maps do not show conclusively whether the routes depicted were public or private but may assist in conjunction with other information. He submits that this is equivocal and the proper conclusion is that such mapping provides no evidence of the status of a way (see *Maltbridge Island Management Company v SSE (2) Herefordshire CC* [1998] EWHC Admin 820 and *R (Elveden Farms Limited) v SSEFRA* [2012] EWHC 644 (Admin)).

36. However, this point was expressly acknowledged by the inspector in paragraph 26, where she went into detail about the formulation of OS maps and the disclaimer they carry to the effect that a track or way shown on them is not evidence of the existence of a public right of way. In paragraph 31 she made a similar point in relation to Tithe maps, which as she observed were drawn up to show the productiveness of land for

tithe assessment and that a private, as well as a public, right of way can diminish such productiveness.

37. After dealing with the OS maps and Tithe map, the inspector went on to deal with the railway plans. It is clear that she did not regard the books of reference as giving any indication whether any way dealt with was public or private. In paragraph 39, she refers to a deposited plan dated 1856 which shows an occupational level crossing at the point of the claimed footpath after the building of the railway. She also referred to the Law Commission Consultation Paper 194 dated 2010 which stated that an occupation crossing occurred where the railway crossed a private road or way which served a farm, hamlet of village, and continued:

> "We think that normally the private road or way would have a

pre-existing right of way over it." 38. In paragraph 40, the inspector said this:

> "40. It is Network Rail's case that this occupation crossing was provided solely for fisherman, who required access to the foreshore. However, I have no agreements or other evidence to support this claim and given that a stile and unlocked gate were provided there was nothing to prevent it being used by anyone. Indeed, given the historical access to the foreshore at this location there would be no reason for the public to doubt that this was not to continue via the level crossing."

39. That case was stated by Jeremy Greenwood, the claimant's head of liability negotiations. He said at the inquiry that the crossing was provided pursuant to section 68 of the Railway Clauses Consolidation Act 1845 to make good the interruption of private access confined to private users, probably fishermen and/or miners. Mr Lopez submits that the inspector misunderstood this evidence and that the provision of a stile and unlocked gate is not an indication of public rather than private use. However, the inspector's reference to these features was in the context of rejecting the claimant's case that the occupation crossing was provided for fishermen. Cleary no witness could give direct evidence of the particular use, and the inspector was entitled to draw proper inferences from the documents. She was entitled take into account the absence of evidence to support the claimant's contention, and was also entitled to observe that given the historical access to the foreshore at this location there was no reason for the public to doubt that it was to continue after construction of the railway.

40. The inspector went on in paragraph 41 to observe that a deposited plan in 1861 did not appear to show a crossing or a slipway, but that a plan attached to a conveyance in 1863 did show a slipway which continues to provide some evidence of a point of access to the foreshore. In paragraph 42 she referred to a railway map dated 1882 which clearly showed a crossing over the railway to link with the slipway and also a double-pecked line linking the road to the foreshore which seemed to infer both a vehicular and a pedestrian crossing.

41. Mr Lopez submits that it was irrational for the inspector to have regard to what was on the ground after the construction of the railway, when it was the pre-existing use which she was concerned with. I do not accept that submission. The inspector was entitled to take this into account as some evidence of pre-existing use and the weight to be attached to that was a matter for her.

42. The same applies to a letter from an asset liability manager of the claimant's predecessor, Railtrack Plc, to the council dated 29 November 2001. In the letter the

manager said that he had visited the crossing at Tywyn and consulted Railtrack's previous records. The letter continued:

> "This was once a vehicular level crossing probably constructed at the time of the advent of the railway here. Although the crossing in now disused, in as far as vehicles are concerned, separate pedestrian facilities were provided and are perpetuated. I cannot trace any signs have ever been displayed, at this site, which would lead any user to believe there was an intention by Railtrack or its predecessors not to dedicate the route to the public."

43. The separate pedestrian facilities referred to ties in with what is shown on the 1882 plan. At paragraph 60 the inspector observed that that letter would seem to confirm that public use had been established. Mr Lopez submits that that was a misunderstanding on the part of the inspector of the letter, but in my judgment the inspector was entitled so to interpret it.

44. After dealing with the railway plans, the inspector then went on to deal with prints, postcards, and photographs. In paragraph 45 she said this:

> "The first is an 1822 watercolour, by Samuel Austin, which shows a track leading down to the foreshore, said to represent the slipway (or access to the foreshore) and the track to Tyn-yCoed."

45. She also referred to prints dated 1850 and 1861 showing people and boats on the Tywyn side of the foreshore. She rightly reminded herself in paragraph 46 that the 1822 watercolour and other prints were creative works and their accuracy and reliability was unpersuasive, and remarked that taken on their own they do not demonstrate public use. In my judgment it is clear that the inspector accorded little weight to these works which she was entitled to do. She also noted that a later photograph when motor cars first appeared, showed a wooden style over onto the railway at this point.

46. The inspector then dealt with other matters which took the issue of a public right of way along the footpath no further, before concluding this section of the decision on documentary evidence by reference to an article (the article) published in the Llandudno Advertiser on 22 December 1899 entitled "A Short History of Old Llandudno." The authorship of the article is not revealed, but it is archived in the National Library for Wales.

47. It is said in the article that between 50 and 60 years ago, so between 1839-1849, Llandudno was a very small village where fishing and mining were the staple industries. Conwy was a very important market town and the centre of commerce for the locality. Goods were brought from there to Llandudno by horse and cart several times a week. One access to Llandudno was said to be along the sand on the western or northern side and then on through Llanrhos. The article continued:

> "The other access to the town was along Conway Shore, turning to the left at Tywyn, following along the Beach, passing Deganwy (which was then a gentleman's residence), turning down to the sands, passing up to "Morfa Uchaf" (Higher

> Marsh), just opposite the present west entrance to Gloddaeth Street."

48. The mining referred to was mining of copper ore from the Great Orme which towered then as now over Llandudno. The article went on to deal with post office business in the following colourful way:

> "All letters, papers, parcels etc, were carried to and from Llandudno by a short, hardy, strong man – John Hughes by name, who always used to carry the bags to and from Conwy by the sands. He would arrive here each day about 8am, then walk up to Penygwaith, do a hard day's work, and return to Conwy about 6pm; this he did for many years."

49. The inspector cited these passages in paragraph 55 of the decision (and referred to the article in paragraph 61) and said this in paragraph 56:

> "56. It would appear from this that people would have used the road/track (constructed c.1841) along the shoreline to Tywyn, where this road ended. At this point it would be highly probable that people then used the rail crossing at Tywyn to access the foreshore, particularly as no other similar crossing point hereabout has been brought to my attention. It is clear that the foreshore was accessed by a variety of people and not solely fishermen. Tywyn was a thriving area at this time and had a population greater than Deganwy."

50. In a footnote to that paragraph the inspector clarified her reference to using the rail crossing as follows:

> "Given the construction of the railway in 1858, the slip way at Tywyn would have been used to get down to the foreshore and continue their walk to Llandudno."

51. Mr Lopez submits that the inspector overlooked the reference in the article to two accesses from Conwy to Llandudno. However, far from overlooking that reference, the inspector cites the article as showing this access as "another" access. The article makes clear that the other was an inland route via Llanrhos. Mr Lopez further submits that it was irrational for the inspector to conclude that access was along the shoreline to Tywyn, when there are more prominent roads shown on the 1841 OS map which would have been used by pedestrians between Conwy and Llandudno, such as the one via Marle. However, he was not able to answer how those roads would sit with the reference to "…along Conwy shore turning left at Tywyn..."

52. In my judgement the inspector was entitled to conclude that that reference was to access along the track appearing in the 1841 OS map from the bridge to Tywyn and then turning left at Tywyn onto the beach. This ties in with her rejection of the claimant's contention that this track severed any link between Pentywyn Road and the foreshore at that point. The inspector's reference to people using the rail crossing at Tywyn in this context also shows the timescale which she drew from the article.

53. Mr Lopez submits that this access would have been less used if there was another access, that the fact that Llandudno was a very small village meant that any such use would not have a sufficient quality of public use, that the reference to one postman would not have that quality and that in any event that may have been a permissive service. In my judgment there is nothing in any of those points. Although Llandudno

was a small village, the community of Tywyn as found by the inspector was thriving. The vivid account of the postman was just one example of use of access between the commercial centre of Conwy and the village of Llandudno, the others being of trading access.

54. After the inspector dealt with that article, under a subheading "Whether the footpath subsists on the balance of probabilities," she concluded in paragraph 57 that taking the documentary evidence as a whole, a route very similar to the order route has existed for a long time and it is clear that that route had been used by the public for access to the foreshore as a destination or for onward travel. In the next three paragraphs she dealt with the issue that user after construction of the railway was "as of right" and concluded that it could not be presumed that a public footpath had been dedicated in accordance with the provisions of the 1980 Act.

55. That led to paragraphs 61-63 cited above, in which the inspector concluded that the evidence pointed to the order route being available on the ground, pre-railway, that was used by the public on foot.

56. Mr Lopez submits that the reference to the Tithe map and the early OS mapping "in particular" in paragraph 61 shows that the inspector placed impermissible weight on these documents as showing public as opposed to private use. In my judgment that is not a fair reading of the paragraph, which begins "...bringing all the threads together…" It is clear that the inspector placed particular weight on these maps to show a road leading to the foreshore. They were, she concluded, "suggestive" but not determinative of a public road. However, it is also clear from the following sentence as to why she was able to reach that conclusion. It was not the mere fact that the road was shown on the mapping. It was because it provided the only access in the local area to the foreshore, ferry links and onwards travel.

57. In my judgment these and all the points taken by Mr Lopez to show the decision was irrational amount to attempts to reargue the merits of the issues before the inspector or involve a misreading of the evidence or of her findings. The ground is not made out.

*Ground 2: material error of fact*

58. Mr Lopez accepts that there is what he terms overlay between the points which he says support ground 1 and those supporting ground 2.

59. It is not in dispute that for a material error of fact to be properly challengeable, four conditions must be fulfilled (per Carnwath LJ (as he then was) in *E v SSHD* [2004] EWCA Civ 49 at [44]-[67]). First, there must have been a mistake as to existing fact. Second, the fact or evidence must have been established in the sense that it was uncontentious and objectively verifiable. Third, the applicant must not have been responsible for the mistake. Finally, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.

60. Most of the alleged errors involve points already made under ground 1, namely public use, the spur/slipway and new slipway, the severance by the new track of any access to the foreshore at Store houses or the existence of such access, the inspector's conclusion that the 1892 plan showed a separate pedestrian access, and her conclusions as to the ferry. In my judgment none of these involve uncontentious or objectively verifiable facts. They involve drawing inferences of fact from documentary evidence as to the likelihood of the existence of a public right of way over the footpath before the statutory railway process commenced in 1853.

61. One additional error of fact alleged is that the inspector at paragraph 11 indicated that the claimant had argued that the application to confirm the public right of way was motivated by the opening of the cycle path next to the railway in 2006, when that claim was not in fact made. No transcript is available of what was said at the hearing, but even if this had not been claimed, it is difficult to see how this played a material part in the inspector's reasoning that a public right of way had been established. Ground 2 is not made out.

*Ground 3: Material/immaterial considerations*

62. Mr Lopez says in his skeleton argument that for the reasons given under grounds 1 and 2, the inspector has alternatively failed to take into account material considerations and/or has taken into account immaterial considerations. Two further aspects are now relied upon by Mr Lopez, having abandoned the third referred to in his skeleton argument, namely that the inspector failed to take into account; first, that none of the post railway OS maps show a way over the railway lines; second, the significance of the stile and gates installed on construction of the railway.

63. For reasons already given, in my judgment none of these points show a failure to take material points into account or taking immaterial points into account. The inspector was not required to comment on every piece of evidence presented at the hearing. The inspector dealt with the stile and gates in paragraph 40.

*Ground 4: Inadequate reasoning*

64. The lack of adequate reasoning challenge is particularly focussed upon evidential leaps and unfounded speculation from the OS and Tithe mapping to a conclusion of public status.

65. However, it will be apparent from my conclusions under ground 1 that in my judgment the reasoning of the inspector was adequate, and any doubts raised by Mr Lopez are merely forensic doubts. It is reasonably clear in particular from her conclusions at paragraphs 61-63 how and why she reached her conclusions on the main issues, and I cannot see how the claimant has been substantially prejudiced by any want of reasoning.

*Ground 5: Breach of natural juice; procedural/substantive unfairness*

66. Mr Lopez, who represented the claimant at the inquiry, submits that the inspector did not give the claimant an opportunity to comment upon the interpretations of the documents which she had in mind or upon the Law Commission Consultation Paper 194 which was not before the inquiry. Moreover, she drew from another inspector's decision in 2012 which in turn summarised the Planning Inspectorate's "Definitive Map Orders: Consistency Guidelines" and Training Manual without allowing the claimant an opportunity to comment on these matters. She did so in her approach to such issues as Tithe mapping, deposited railway plans and the book of reference, and user evidence. Finally, she did not address her mind to whether the weight to be afforded to those witnesses who were not cross-examined should be reduced.

67. The guidelines referred to are within the public domain, whereas access to the training manual is not so easily available.

68. As for the first of these points, Mr Lewis relies on the observation of Lord Diplock observed in *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369D-E as follows:

> "Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision."

69. In my judgment that reasoning is equally applicable (if not more so) to the inspector's thought processes on the documentary evidence and is sufficient to dispose of the first point. In relation to the Law Commission Consultation Paper 194, the relevant extract was cited in the applicants' statement of case.

70. The training manual draws heavily in turn upon the guidelines, and as Mr Lewis submits is generic guidance which, so far as material, is not controversial as applied in this particular case. For example, the advice as to user evidence was not central to the reasoning of the inspector in her approach to documentary evidence in deciding whether on the balance of probabilities a pre-railway public right of way was in existence. For similar reasons, the fact that some witnesses were not cross examined takes the matter no further.

71. Mr Lopez pointed to what he termed nuances between the guidance and how it was paraphrased in the 2012 decision of the inspector's colleague, including the approach to user, OS and Tithe mapping, and railway plans. However, I am not persuaded that such nuances impacted upon the inspector's conclusions to the extent that failure to flag up reliance upon her colleague's 2012 decision which in turn referred to the guidance and/or the training manual amounts to a breach of natural justice or procedural or substantive unfairness.

*Outcome*

72. Accordingly, none of the grounds of challenge to the decision are made out. The inspector rightly recognised that the issue of whether the evidence pointed towards the order route being available on the ground, pre-railway, that was used by the public on foot was finely balanced. She was entitled on that evidence to conclude that the balance tipped in favour of it being likely that there was such a route.

73. The claimant's application is dismissed and the order stands. Counsel helpfully indicated that any outstanding consequential matters can be dealt with on the basis of written submissions, which should be filed and exchanged within 14 days of hand down.

# Appendix 10.12

# *R (Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs*

# [2021] AC 194

A

# The Weekly Law Reports

## Volume 2

*Containing those cases which are intended to be included in The Law Reports*

B

C

Supreme Court

## Regina (Lancashire County Council) *v* Secretary of State for the Environment, Food and Rural Affairs

## Regina (NHS Property Services Ltd) *v* Surrey County Council

D

[2019] UKSC 58

2019 July 15, 16; Dec 11

Lord Wilson, Lord Carnwath, Lady Black, Lady Arden, Lord Sales JJSC

*Commons — Town or village green — Registration — Application to register land* E *owned by public authority as town or village green — Whether registration incompatible with statutory purposes for which land held — Commons Act 2006 (c 26), s 15*

In two separate cases applications were made to register land as a town or village green under section 15 of the Commons Act 2006[1] on the basis that local inhabitants had indulged as of right in lawful sports and pastimes on the land for a period of at F least 20 years. In the first case the land, which lay adjacent to a primary school, was owned by the claimant education authority. The Secretary of State's inspector held that most of the land should be registered under section 15, rejecting the claimant's contention that registration would be inconsistent with the statutory purposes for which it was held. The judge dismissed the claimant's claim for judicial review of that decision. In the second case the land, which adjoined a hospital, was owned by the claimant company, which was owned by the Secretary of State for Health and G provided facilities to bodies exercising functions under the National Health Service Act 2006. The registration authority registered the land under section 15, rejecting the claimant's contention that registration would be inconsistent with the statutory purposes for which it was held. The judge allowed the claimant's claim for judicial review of that decision. On appeal the Court of Appeal upheld the registration of the land in both cases, holding that in each case registration was permissible because it

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[1] Commons Act 2006, s 15: "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies. (2) This subsection applies where— (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the application . . ."

was not incompatible with any statutory purposes that specifically related to the land in question.

On the claimants' appeals—

*Held*, allowing the appeals (Lord Wilson JSC dissenting and Lady Arden JSC dissenting in part), that section 15 of the Commons Act 2006 did not apply to land which had been acquired and was being held for statutory purposes which were incompatible with the land's registration as a town or village green; that in order for such an incompatibility to arise it was not necessary (i) that the land was actually being used, or was intended to be used in future, for such a statutory purpose, or (ii) that the land was specified in the statute whose purposes were incompatible with registration or (iii) that the land was held by a statutory undertaker, as opposed to a public authority; that, therefore, the issue of incompatibility was to be determined as a matter of principle, by comparing the statutory purpose for which the land was held with the rights claimed pursuant to the 2006 Act, rather than by carrying out a factual assessment of how the land was being used or was proposed to be used; that, in the first case, registration of the land would be incompatible with the educational statutory purposes for which the land was held, which included the construction of new school buildings or playing fields and (in relation to part of the land) the safeguarding of children on land used for education purposes; that, in the second case, registration of the land would be incompatible with the health-related statutory purposes for which the land was held, namely the provision of health facilities; and that, accordingly, neither the land in the first case nor the land in the second case was capable of being registered as a town or village green under section 15 of the 2006 Act (post, paras 55–60, 65–66, 68–69, 76).

*R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, SC(E) applied.

*New Windsor Corpn v Mellor* [1975] Ch 380, CA, *Oxfordshire County Council v Oxford City Council* [2006] Ch 43, CA and *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, SC(E) considered.

Decision of the Court of Appeal [2018] EWCA Civ 721; [2018] 2 P & CR 15 reversed.

The following cases are referred to in the judgments:

*Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59; [2001] 1 WLR 2180; [2002] 1 All ER 377, HL(E)

*British Transport Commission v Westmorland County Council* [1958] AC 126; [1957] 2 WLR 1032; [1957] 2 All ER 353, HL(E)

*E v Secretary of State for Home Department* [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351; [2004] LGR 463, CA

*Edinburgh (Magistrates of) v North British Railway Co* (1904) 6 F 620, Ct of Sess

*Edwards v Bairstow* [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)

*Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325, Ct of Sess

*Jones v Bates* [1938] 2 All ER 237, CA

*New Windsor Corpn v Mellor* [1975] Ch 380; [1975] 3 WLR 25; [1975] 3 All ER 44; 73 LGR 337, CA

*Oxfordshire County Council v Oxford City Council* [2005] EWCA Civ 175; [2006] Ch 43; [2005] 3 WLR 1043; [2005] 3 All ER 961; [2005] LGR 664, CA; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817; [2006] LGR 713, HL(E)

*R v Inhabitants of Leake* (1833) 5 B & Ad 469

*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385; [1999] LGR 651, HL(E)

*R v Suffolk County Council, Ex p Steed* (1995) 71 P & CR 463

*R (Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195; [2014] 2 WLR 1360; [2014] 3 All ER 178; [2014] LGR 459, SC(E)
*R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)
*R (Cooper Estates Strategic Land Ltd) v Wiltshire Council* [2019] EWCA Civ 840; [2019] PTSR 1980, CA
*R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70; [2010] 2 WLR 653; [2010] 2 All ER 613; [2010] LGR 295, SC(E)
*R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2012] EWHC 647 (Admin); [2014] QB 186; [2012] 3 WLR 709; [2012] 3 All ER 1361; [2013] EWCA Civ 276; [2014] QB 186; [2013] 3 WLR 1389; [2013] 4 All ER 677, CA; [2015] UKSC 7; [2015] AC 1547; [2015] 2 WLR 601; [2015] 2 All ER 991; [2015] LGR 232, SC(E)
*TW Logistics Ltd v Essex County Council* [2018] EWCA Civ 2172; [2019] Ch 243; [2018] 3 WLR 1926; [2019] 3 All ER 312, CA
*Tabernacle Permanent Building Society v Knight* [1892] AC 298, HL(E)
*Winterburn v Bennett* [2016] EWCA Civ 482; [2017] 1 WLR 646, CA

The following additional cases were cited in argument:

*Attorney General v Poole Corpn* [1938] Ch 23; [1937] 3 All ER 608, CA
*Attorney General v Teddington Urban District Council* [1898] 1 Ch 66
*Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623, HL(Sc)
*Betterment Properties (Weymouth) Ltd v Dorset County Council* [2007] EWHC 365 (Ch); [2007] 2 All ER 1000; [2008] EWCA Civ 22; [2009] 1 WLR 334; [2008] 3 All ER 736, CA
*Betterment Properties (Weymouth) Ltd v Dorset County Council (No 2)* [2014] UKSC 7; [2014] AC 1072; [2014] 2 WLR 300; [2014] 2 All ER 1; [2014] LGR 249, SC(E)
*Blount v Layard (Note)* [1891] 2 Ch 681, CA
*Calder Gravel Ltd v Kirklees Metropolitan Borough Council* (1989) 60 P & CR 322
*Fitch v Fitch* (1797) 2 Esp 543
*Mills v Silver* [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA
*National Provincial Bank Ltd v Ainsworth* [1965] AC 1175; [1965] 3 WLR 1; [1965] 2 All ER 472, HL(E)
*R v Inner London Education Authority, Ex p Ali* (1990) 2 Admin LR 822, DC
*R (G) v Barnet London Borough Council* [2003] UKHL 57; [2004] 2 AC 208; [2003] 3 WLR 1194; [2004] 1 All ER 97, HL(E)
*R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin); [2016] PTSR 1523; [2016] 2 All ER 701
*R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin); [2010] LGR 631

**APPEALS** from the Court of Appeal

By a claim form issued on 8 December 2015 the claimant in the first case, Lancashire County Council, sought judicial review of the decision of an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs to register land owned by the claimant and known as Moorside Fields, Lancaster, as a town green following an application under section 15 of the Commons Act 2006 by the interested party, Janine Bebbington. The ground of the claim was, inter alia, that registration under the 2006 Act was incompatible with the statutory purposes by and for which the land was held. By a judgment dated 27 May 2016 Ouseley J [2016] EWHC 1238 (Admin) dismissed the claim. By an appellant's notice filed on 27 June 2016

and pursuant to the permission of the Court of Appeal (Lindblom LJ) granted on 3 May 2017 the claimant appealed.

By a claim form issued on 8 December 2015 the claimant in the second case, NHS Property Services Ltd, sought judicial review of the decision of the registration authority, Surrey County Council, dated 23 September 2015 to register land owned by the claimant and known as Leach Grove Wood, Leatherhead, Surrey, as a town or village green following an application under section 15 of the Commons Act 2006 by Phillippa Cargill and the interested party, Timothy Jones. The ground of the claim was, inter alia, that registration under the 2006 Act was incompatible with the statutory purposes by and for which the land was held. By a judgment dated 13 July 2016 Gilbart J [2016] EWHC 1715 (Admin); [2016] 4 WLR 130 allowed the claim and quashed the registration authority's decision. By an appellant's notice filed on 3 August 2016 and pursuant to permission of the judge the interested party appealed. The appeals in the first and second cases were conjoined.

By judgment dated 12 April 2018 the Court of Appeal (Jackson, Lindblom and Thirlwall LJJ) [2018] EWCA Civ 721; [2018] 2 P & CR 15 dismissed the appeal of the claimant in the first case and allowed in part the appeal of the interested party in the second case.

By notices of appeal dated 9 May 2018 and 24 May 2018, and with permission of the Supreme Court granted on 31 October 2018 by Baroness Hale of Richmond PSC, Lord Carnwath and Lady Arden JJSC, the claimants in both cases appealed.

The issues before the Supreme Court, as stated in the statements of facts and issues agreed by the parties, were: (1) (solely in relation to the first appeal) the basis on which the land was held by the claimant, including whether the inspector's conclusions as to the basis on which the land was held were lawful or correct, on the evidence before her; and (2) (in relation to both appeals) statutory incompatibility, namely the extent to which, applying the approach in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, incompatibility with the statutory purposes for which land was held by a public authority arose, so as to preclude registration of such land as a town or village green.

The facts are stated in the judgment of Lord Carnwath and Lord Sales JJSC, post, paras 12–21.

*Douglas Edwards QC*, *Jeremy Pike* and *Daisy Noble* (instructed by *Sharpe Pritchard llp*) for the claimant in the first case.

*George Laurence QC*, *Jonathan Clay* and *Simon Adamyk* (instructed by *Womble Bond Dickinson (UK) llp, Newcastle upon Tyne*) for the claimant in the second case.

*Tim Buley QC* (instructed by *Treasury Solicitor*) for the Secretary of State in the first case.

*Ned Westaway* (instructed by *Harrison Grant*) for the interested party in the first case.

*Ashley Bowes* (instructed by *Richard Buxton Solicitors, Cambridge*) for the interested party in the second case.

The registration authority in the second case did not appear and was not represented.

The court took time for consideration.

A 11 December 2019. The following judgments were handed down.

**LORD CARNWATH** and **LORD SALES JJSC** (with whom **LADY BLACK JSC** agreed)

*Introduction*

B **1** The principal issue in these two appeals relates to the circumstances in which the concept of "statutory incompatibility" will defeat an application to register land as a town or village green where the land is held by a public authority for statutory purposes. In *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 this court held that the duty under section 15 of the Commons Act 2006 did not extend to an area held under the specific statutes relating to the Newhaven Harbour. We are asked C to decide whether the same principle applies to land held by statutory authorities under more general statutes, relating respectively (in these two cases) to education and health services.

**2** Although the two appeals raise similar issues, they were dealt with by different procedural routes. The first (Lancashire) is within the area of a "pilot" scheme under the Commons Registration (England) Regulations D 2008 (SI 2008/1961), under which, where the registration authority (in this case Lancashire County Council—"LCC") has an interest in the land, applications are referred for determination to the Planning Inspectorate (regulations 27–28). The second case (Surrey) was not covered by the pilot scheme. The application was determined by Surrey County Council as registration authority, following a non-statutory inquiry before a barrister E appointed by the council.

*Modern greens—development of the law*

**3** As will be seen, in the *Newhaven* case the issue was described as one of "statutory interpretation". Unfortunately, interpreting the will of Parliament in this context is problematic, because there is no indication that F the concept of a modern green, as it has been developed by the courts, was part of the original thinking under the Commons Registration Act 1965. Carnwath J reviewed the earlier history, including the Report of the Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462) which preceded the 1965 Act, in his judgment at first instance in *R v Suffolk County Council, Ex p Steed* (1995) 71 P & CR 463 (one of the first cases under the 1965 Act), and later, as Carnwath LJ in the Court of Appeal in *Oxfordshire* G *County Council v Oxford City Council* [2006] Ch 43 ("the *Trap Grounds* case"). As he observed in the latter, at p 51:

> "The concept of a 'modern' classic green, as it has emerged in the cases since 1990, would, I think, have come as a surprise to the Royal Commissioners, and to the draftsman of the 1965 Act. There is no hint of it in the Royal Commission report, or the parliamentary debates on the H Bill. The commissioners' terms of reference were directed to sorting out the problems of the past, not to creating new categories of open land, for which there was no obvious need. By this time, of course, there were numerous statutes conferring on public authorities modern powers for the creation and management of recreational spaces for the public."

Carnwath LJ also noted, at para 52, that, as late as 1975, in *New Windsor Corpn v Mellor* [1975] Ch 380, all three members of the Court of Appeal (including Lord Denning MR) had thought it natural to read the Act as referring to 20 years "before the passing of the Act" (at pp 391 and 395)—an interpretation which would have ruled out the possibility of a modern green being established by more recent use.

**4** It was not until the early 1990s that claims were first put forward based on 20 years' use since the 1965 Act had come into force at the end of July 1970 (apparently following the advice of the Open Spaces Society in their publication *Getting Greens Registered* (1995)). When the first case came before the House of Lords in 1999 (*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335), no one seems to have argued that the Act was directed to pre-1965 use only. In that case, the House of Lords, led by Lord Hoffmann, adopted a relatively expansive view of the new concept. He drew a parallel with the Rights of Way Act 1932, which he thought had reflected Parliament's view "that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use" and the "strong public interest in facilitating the preservation of footpaths for access to the countryside" (p 359D–E). He commented, at p 359E: "in defining class c town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes."

**5** That interpretation of Parliament's thinking would, with respect, have been difficult to deduce from the 1965 Act itself, or from anything said-in Parliament or anywhere else-at the time. However, when the issue came before the House again, in the *Trap Grounds* case [2006] 2 AC 674, Lord Hoffmann was able to claim implicit parliamentary support in the debates which preceded the amendments made by the Countryside and Rights of Way Act 2000. As he said, at para 26:

> "No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the only question raised in debate was whether the locality rule did not make it too difficult to register new village greens."

By then, as he also noted (para 28) the new Commons Bill (the 2006 Act as it became) was before Parliament, providing a further opportunity for legislative reconsideration if thought appropriate. In *Newhaven* [2015] AC 1547, para 18, this fact was cited as a reason for not having given permission to reopen the general approach adopted in the *Trap Grounds* case.

**6** As to the attributes of a modern green, the 2006 Act itself, like the 1965 Act which preceded it, is very sparse in the information it gives. Section 1 of the 2006 Act requires each registration authority to maintain a register of town or village greens. Section 15 indicates that any person can apply to register land as a green where, in subsection (2)(a)—"a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for the period of at least 20 years". As to the purpose of registration, section 2(2)(a) states simply that the purpose of the register is "to register land as a town or village green". The Act offers no further guidance as to the

A interpretation of the section 15 formula, nor as to the practical consequences of registration.

7 An unexplained curiosity is that section 10 of the 1965 Act, which provided that the register was "conclusive evidence of the matters registered, as at the date of registration", is not repeated in the 2006 Act. As things stand the repeal of section 10 has been brought into effect only in the pilot
B areas. (Section 18 of the 2006 Act, headed "Conclusiveness", which has effect in the pilot areas, does not on its face go so far as section 10.) In the *Trap Grounds* case [2006] 2 AC 674, para 43, Lord Hoffmann had agreed with Carnwath LJ's analysis in the Court of Appeal [2006] Ch 43, para 100, that the 1965 Act "created no new legal status, and no new rights or liabilities other than those resulting from the proper interpretation of section 10". It was on the "rational construction of section 10" that he relied
C for his view that land registered as a town or village green "can be used generally for sports and pastimes" (para 50), and was also subject to section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876 (39 & 40 Vict c 56) (para 56). None of the experienced counsel before us was able to offer an explanation for the disappearance of section 10, but none sought to argue that it had made any
D material difference to the rights following registration. Not without some hesitation, we shall proceed on that basis.

8 Lord Hoffmann made clear that, following registration, the owner was not excluded altogether, but retained the right to use the land in any way which does not interfere with the recreational rights of the inhabitants, with "give and take on both sides" (para 51). That qualification was further developed in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)*
E [2010] 2 AC 70, in which it was held that the local inhabitants' rights to use a green following registration could not interfere with competing activities of the landowner to a greater extent than during the qualifying period.

9 One important control mechanism which emerged from the cases was the need for the use to be "as of right". It was established that these words, by analogy with the law of easements, imported the principle "nec vi, nec
F clam, nec precario", or in other words "the absence of any of the three characteristics of compulsion, secrecy or licence" (per Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 245, cited by Lord Hoffmann in *Sunningwell* [2000] 1 AC 335, 355). It followed that in practice an owner could prevent use qualifying under section 15 by making it sufficiently clear to those seeking to use the land (generally by suitable notices) either that their use
G was objected to, or that it was permissive. On the other hand, silent acquiescence in the use, or toleration, did not prevent it being "as of right".

10 More recently (from 25 April 2013) amendments made by the Growth and Infrastructure Act 2013 (embodied in new sections 15A and following of the 2006 Act) have provided some assistance to landowners, first by enabling a formal statement to be made to bring user "as of right" to an end, and secondly by defining certain planning-related "trigger events"
H which suspend or extinguish the right to apply to register a green. In *R (Cooper Estates Strategic Land Ltd) v Wiltshire Council* [2019] PTSR 1980, para 4, Lewison LJ said of these amendments:

> "Ever since the *Trap Grounds* case . . . the courts have adopted a definition of a TVG [town or village green] which goes far beyond what

> the mind's eye would think of as a traditional village green. The consequence of this interpretation of the definition is that there have been registered as TVGs: rocks, car parks, golf courses, school playgrounds, a quarry, scrubland, and part of a working port. If land is registered as a TVG the effect of the registration is, for practical purposes, to sterilise land for development. This became a concern for the Government, because the criteria for registration did not take into account any planning considerations; and because it was thought in some quarters that applications for registration of TVGs were being used as a means of stopping development outside the planning system."

The 2013 amendments are of no direct relevance to the issues in the present appeal, but they are relied on as showing that Parliament has given specific attention to the balance to be drawn between the rights of the various interests involved.

**11** We would draw two main lessons from the historical review. First, whatever misgivings one may have about the unconventional process by which the concept of a modern green became part of our law, the emphasis now should be on consolidation, not innovation. Secondly, the balance between the interests of landowners and those claiming recreational rights, as established by the authorities, and as now supplemented by the 2013 Act, should be respected. Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in *Newhaven* and apply it to the facts of these cases.

*The proceedings and the parties*

*Lancashire*

**12** The land at issue in the first appeal is known as Moorside Fields, in Lancaster. It lies adjacent to Moorside Primary School and extends to some 13 hectares. It is divided into five areas, referred to in the proceedings as Areas A to E, described (by the planning inspector) as follows:

> "Area A, referred to as the meadow was, until recently, an undeveloped plot of land. It is adjacent to Moorside Primary School (the school) and is currently being used to facilitate the construction of an extension at the rear of the school. Area B is a mowed field, referred to as the school playing field and both it and Area A are currently surrounded by fencing.
>
> "Areas C and D border Areas A and B. In the past they have been the subject of mowing tenancy agreements but these ceased in around 2001. They are separated from each other and from Areas A and B by . . . hedges and in places are overgrown with brambles. Area E, also adjacent to the school, is currently overgrown and difficult to access. At some times of the year it contains a pond."

Like the school the land is owned by LCC, the present appellant, which is both education authority and registration authority.

**13** On 9 February 2010 the interested party, Ms Janine Bebbington, a local resident, applied to register the land as a town or village green. Her application was based on 20 years' qualifying use up to the date of registration, or alternatively up to 2008. LCC, as local education authority, objected. Following a statutory inquiry, an inspector appointed by the

A Secretary of State (Ms Alison Lea, a solicitor) in a decision letter dated 22 September 2015 determined that four of the five areas (that is A to D, but not E) should be registered under the Act. She excluded Area E because she found insufficient evidence of its use over the 20-year period. LCC has postponed formal registration of Areas A to D, pending the outcome of the judicial review claim.

B **14** LCC maintains that the land was acquired for and remains appropriated to educational purposes, in exercise of the LCC's statutory powers as education authority. The statutory provisions upon which LCC relied (or now rely) as showing incompatibility were: (1) section 8 of the Education Act 1944 which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character C and equipment; (2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education; (3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education D and outside play; and (4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions . . . are exercised with a view to safeguarding and promoting the welfare of children". (The issue of safeguarding does not appear to have been raised at the inquiry.)

**15** The inspector was not satisfied that the land was held for educational purposes (an issue to which we shall return below), but even on E the assumption that it was she found no incompatibility:

> "119. Furthermore, even if the land is held for 'educational purposes', I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to F enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The school is currently being extended on other land and will, according to Lynn MacDonald [a school planning manager for the county council], provide 210 places which will meet current needs. There is no G evidence to suggest that the school wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.
>
> "120. Areas C and D are marked on LCC's plan as 'Replacement School Site'. However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need H to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her five-year planning phase.
>
> "121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are

surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.

"122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish to make that provision on the Application Land."

She concluded (para 124):

"It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships [in *Newhaven*]. Even if it is accepted that LCC hold the land for 'educational purposes', there is no 'clear incompatibility' between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility."

**16** On the LCC's application for judicial review, the inspector's decision was upheld by Ouseley J [2016] EWHC 1238 (Admin), including her approach to the issue of statutory incompatibility.

*Surrey*

**17** The second appeal relates to some 2·9 hectares of land at Leach Grove Wood, Leatherhead, owned by NHS Property Services Ltd ("NHS Property Services"), a company wholly owned by the Secretary of State for Health. The land adjoins Leatherhead Hospital, and is in the same freehold title. An application for registration under the 2006 Act was made by Ms Philippa Cargill on 22 March 2013, with the support of the second defendant, Mr Timothy Jones, and others. They relied on use over a period of 20 years ending in January 2013 (when permissive signs were erected on the land).

**18** At the time of the application, the land was owned by the Surrey Primary Care Trust. By section 83(1) of the National Health Service Act 2006 primary care trusts were under a duty to provide, or to secure the provision of, primary medical services in their area. The land was held by the Trust pursuant to the statute, for those purposes. On the dissolution of the Trust in 2013, the freehold title of the land was transferred to NHS Property Services, which had been created by the Secretary of State for Health under his power to form companies "to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act": section 223(1) of the National Health Service Act 2006. Following the amendment of the National Health Service Act 2006 by the Health and Social Care Act 2012, functions previously exercised by the Secretary of State acting through a primary care trust fell to be exercised by a

clinical commissioning group ("CCG")—in this case the Surrey Downs CCG. The principal statutory duties of a CCG are defined by section 3(1) of the National Health Service Act 2006; in summary they involve the provision of hospital accommodation and medical services "to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility".

19 Following a non-statutory inquiry, the inspector, William Webster, barrister, in his report dated 9 June 2015, recommended refusal of registration. He rejected the company's objection based on statutory incompatibility (paras 175(d)–(f)). He contrasted the case with *Newhaven* [2015] AC 1547 in which there had been "an obvious and irreconcilable clash as between the conflicting statutory regimes":

> "(e) . . . The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected. (f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has [sic]) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being."

He also accepted that there had been sufficient qualifying use of the land by local inhabitants for more than 20 years, but he held that it was not in respect of a relevant "locality" or "neighbourhood" as required by section 15. Surrey County Council, as registration authority, did not accept his recommendation, but determined to register the land which was done on 5 October 2015.

20 On the application for judicial review by NHS Property Services, on 13 July 2016 Gilbart J [2016] 4 WLR 130 quashed the registration, holding that the county council had failed properly to consider the question of statutory incompatibility. He had before him the judgment of Ouseley J in the Lancashire case [2016] EWHC 1238 (Admin), but distinguished it by reference to the wider powers conferred by the education statutes:

> "134. . . . It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.
>
> "135. Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an

administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities—see section 507A Education Act 1996.

"136. It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there any plans that it should be, but only whether there is incompatibility as a matter of statutory construction. If the land is in fact surplus to requirements, then the use of the [2006 Act] is not the remedy.

"137. Given those conclusions, it is my judgement that there is a conflict between the statutory powers in this case and registration."

*The Court of Appeal*

**21** The appeals in both cases, respectively by LCC and the applicants for registration in the Surrey case, were heard together by the Court of Appeal (Jackson, Lindblom and Thirlwall LJJ). In a judgment dated 12 April 2018 [2018] 2 P & CR 15, given by Lindblom LJ, with whom the others agreed, the court upheld the decision to register in both cases. On the issue of statutory incompatibility, he distinguished the *Newhaven* case [2015] AC 1547, for reasons which are sufficiently apparent from the following short extracts from the judgment:

*Lancashire*

"Crucially, as a matter of 'statutory construction' there was no inconsistency of the kind that arose in [*Newhaven*] between the provisions of one statute and the provisions of the other. The statutory purpose for which Parliament had authorised the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with [the *Newhaven* case], there were no 'specific' statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible." (Para 40.)

*Surrey*

"As in the Lancaster case, therefore, the circumstances did not correspond to those of [*Newhaven*]. The land was not being used for any 'defined statutory purposes' with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a 'statutory incompatibility'. The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and

other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land. And again, it is possible to go somewhat further than that. Although the registration of the land as a village green would preclude its being developed by the construction of a hospital or an extension to the existing hospital, or as a clinic or administrative building, or as a car park, and even though the relevant legislation did not include a power or duty to provide facilities for recreation, there would be nothing inconsistent—either in principle or in practice—between the land being registered as a green and its being kept open and undeveloped and maintained as part of the Leatherhead Hospital site, whether or not with access to it by staff, patients or visitors. This would not prevent or interfere with the performance of any of the relevant statutory functions. But in any event, as in the Lancaster case, the two statutory regimes were not inherently in conflict with each other. There was no 'statutory incompatibility'." (Para 46.)

*Was the Lancashire land held for educational purposes?*

**22** Before we turn to the main issue it is convenient to dispose of a preliminary issue which arises only in respect of the first appeal. For what purposes was the land held? The inspector recorded the evidence on which LCC relied as showing that the land was held for the relevant statutory purposes.

"113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words 'Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944'. The endorsement is dated 12 August 1948.

"114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows 'Education Lancaster Greaves County Secondary School'.

"115. In addition LCC provided an instrument dated 23 February 1925 and a letter from LCC to the school dated 1991. The instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of the land acquired by the council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the [Barton Road Playing Field (land also owned by LCC, to the immediate west of Areas C and D and separated from them by a shallow watercourse, but accessible from them via a stone bridge and also stepping stones)]. An acknowledgement and undertaking dated March 1949 refers to the transfer to the county council of the education functions of the City of Lancaster and lists deeds and documents relating

to school premises and other land and premises held by the corporation. It lists the [Barton Road Playing Field]. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.

"116. At the inquiry LCC provided a print out of an electronic document headed 'Lancashire County Council—Property Asset Management Information' which in relation to 'Moorside Primary School' records the committee as 'E'. I accept that it is likely that this stands for 'Education'. An LCC plan showing land owned by 'CYP education' shows Areas A, B and E as Moorside Primary School and Areas C and D as 'Replacement School Site'. In relation to Areas C and D the terrier was produced, and under 'committee' is the word 'education'. The whole page has a line drawn through it, the reason for which is unexplained."

**23** The inspector stated her conclusions:

"117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald . . . confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.

"118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC's statement that 'the Application Land was acquired and is held for educational purposes and was so held throughout the 20-year period relevant to the application' accurately reflects the legal position."

**24** In fairness to the inspector, we should note that this issue seems to have been raised rather the late in the day, and was less than fully explored in LCC's submissions before her (see Ouseley J [2016] EWHC 1238 (Admin) at [49]), noting Ms Bebbington's evidence as to what took place at the inquiry); the counsel who have appeared for LCC in the court proceedings did not act for it at the inquiry.

**25** Ouseley J indicated that, left to himself, he would have been likely to have reached a different view, at para 57:

"I rather doubt that, confined to the express reasoning in the DL [the decision letter], I would have reached the same conclusion as the inspector as to what could be inferred from the conveyances and endorsements on them in relation to the purpose of the acquisition of the various areas. I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition

A was put forward; there was no suggestion that the parcels were acquired for public open space. I would have inferred that there were resolutions in existence authorising the acquisitions for that contemporaneously evidenced intended purpose, which simply had not been found at this considerable distance in time. It would be highly improbable for the lands to have been purchased without resolutions approving it. The B presumption of regularity would warrant the assumption that there had been resolutions to that effect, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL para 116, which shows the property, after acquisition, to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding."

C

**26** However, he was unwilling to conclude that the inspector's decision was irrational, at para 61:

"As I read the DL, the fundamental problem for the inspector in the LCC evidence was the absence of what she regarded as the primary sources for power under which the acquisition or appropriation of the D land occurred: the resolutions to acquire or to appropriate it for educational purposes. She was entitled to regard those as the primary sources to prove the basis for the exercise of the powers of the authority . . . she approached her decision, as I read it, knowing what transpired before her, not on the basis that resolutions related to acquisition might well have existed but could not be found at this distance in time, but on the basis that none had been produced despite proper E endeavours to find them, endeavours which had none the less produced the conveyances, and other related documents. So she was not prepared to assume that resolutions in relation to acquisition had existed. That was entirely a matter for her, and cannot come close to legal error."

The Court of Appeal in substance adopted Ouseley J's reasoning.

**27** In this court, Mr Edwards QC for LCC accepts that this issue was F one of fact for the inspector. But he submits that her conclusion was unsupportable on the evidence before her, or was vitiated by error of fact (under the principles set out in *E v Secretary of State for Home Department* [2004] QB 1044). For good measure he submits that the courts below were wrong not to admit evidence, discovered after the inquiry, in the form of council minutes from February 1948 recording the resolution to acquire G Areas A and B (and E) for a "proposed primary school".

**28** He starts from the proposition that the LCC, as a statutory local authority, could only acquire land "for the purposes of any of their [statutory] functions" (see now the Local Government Act 1972, section 120(1)(a)); and that in normal circumstances the land would continue to be held for the purpose for which it was acquired unless validly appropriated for an alternative statutory purpose, when no longer required for the first: H section 122. The inspector, he says, gave no weight to that statutory context.

**29** As regards Areas A, B and E, he submits, the evidence before the inspector was quite clear (even without the new evidence). The inspector properly noted that the acquisition had been "Recorded in the books of the

Ministry of Education under section 87(3) of the Education Act 1944". However, she failed to understand or give due weight to the significance of that note. As Mr Edwards explains, the effect of section 87 of the Education Act 1944 (headed "Exemption of assurances of property for educational purposes from the Mortmain Acts") was to exempt from the Mortmain and Charitable Uses Act 1888 and related Acts, land transferred, inter alia, to a local education authority, if the land was to be used for educational purposes. (The law of Mortmain dating back to the Statutes of Mortmain in 1279 and 1290, was not finally abolished until 1960.) A copy of the conveyance or other document by which the transfer of such land was made was required, within six months of its taking effect, to be sent to the Education Minister. Section 87(3) provided that a record should be kept of any conveyance sent to the minister pursuant to the section. Accordingly, says Mr Edwards, the reference to the record under section 87(3) should have been treated by the inspector as clear evidence that the original purpose of the acquisition was for educational purposes, even in the absence of a contemporary resolution to that effect. Against that background, the lack of evidence of any competing purpose to which the land might have been appropriated over the subsequent years pointed to the inference that it continued to be held for its original purpose.

30 As regards Areas C and D, Mr Edwards submits, the indication on the 1961 conveyance of an educational purpose, taken with the references in later documents to its being treated as educational land, and the lack of any evidence of a competing purpose, were sufficient to support the inference, on the balance of probabilities, that education was the purpose for which it had been acquired and subsequently held.

*Discussion*

31 Although Mr Edwards has accepted that this issue was one of fact for the inspector, that concession needs to be seen in context. The inspector's assessment was one depending, not so much on evaluation of oral evidence, but largely on the inferences to be drawn from legal or official documents of varying degrees of formality.

32 In our view, Ouseley J's approach to the natural inferences to be drawn from the material before the inspector was correct, but he was wrong to be deflected by deference to the inspector's fact-finding role. The main difference between them was in the weight given by the inspector to the absence of specific resolutions, from which she found it "not possible to be sure" that the land had been acquired and held for educational purposes. On its face the language appears to raise the threshold of proof above the ordinary civil test to which she had properly referred earlier in the decision. But even discounting that point, she was wrong in our view to place such emphasis on the lack of such resolutions. Her task was to take the evidence before her as it stood, and determine, on the balance of probabilities, for what purpose the land was held. On that approach, Ouseley J's own assessment [2016] EWHC 1238 (Admin) was in our view impeccable. The inspector's assessment was irrational, having regard to the relevant standard of proof and the evidence available. There was no evidence to support any inference other than that each part of the land had been acquired for, and continued during the relevant period to be held for, statutory educational

purposes. An assessment made without any supporting evidence cannot stand: *Edwards v Bairstow* [1956] AC 14, 29.

33 In respect of Areas A and B, furthermore, there was a clear error of law, in the inspector's failure to appreciate, or take account of, the significance of the reference to section 87(3) of the 1944 Act. This may be because she was given little assistance on the point by LCC at the inquiry. It is less clear why the point, having been clearly raised in submissions in the court proceedings (see Ouseley J, para 44), seems to have been ignored in the subsequent judgments. On any view, that reference, and the inferences to be drawn from it, went beyond a pure issue of fact, and were appropriate for review by the court. In agreement with Mr Edwards we would regard it as providing unequivocal support for the conclusion that the land comprising Areas A and B was acquired for educational purposes. There was no evidence to suggest that it had ever been appropriated to other purposes.

34 In respect of Areas C and D, the evidence is less clear-cut, but we agree with Mr Edwards' submission that it is sufficient, on the balance of probabilities, to support the same conclusion and that, in the absence of any evidence to support any other view, it was irrational for the inspector to reach a different conclusion. Again, we think that Ouseley J's assessment of the facts was the correct one.

35 In these circumstances it is unnecessary to consider whether Ouseley J erred in refusing to admit the new evidence. We note, however, that it does no more than support what was already a strong case in respect of Areas A and B; it does nothing to enhance the case for Areas C and D.

*Implied permission*

36 We can also deal more briefly with an issue that arises only in respect of the Surrey site: that is Mr Laurence QC's application for permission to argue (for the first time) that the public's use of the land for recreation should be treated as having implied permission from NHS Property Services or its predecessors, thus showing that the use was "by right" rather than "as of right". This, as he accepts, is a departure from *Sunningwell* [2000] 1 AC 335, where it was held that mere toleration by a landowner of the public's use could not be taken as evidence that the landowner had impliedly consented to that use. He seeks to distinguish the position of land that is held for public purposes such as by his client. We quote his printed case:

> "there is a critical distinction between (i) a private owner (such as the kindly rector in *Sunningwell*) tolerating use of land not held for public purposes—which can provide no evidence of an implied permission—and (ii) a public owner passively responding to recreational use in a statutory context which justifies the inference that that response to the public's use of the land is evidence of an implicit permission so long as the permitted use does not disrupt the public authority's use of the land for its statutory purposes. In such a case it is irrelevant that in a non-statutory, private context such a response might be characterised as toleration."

37 He also relies on section 120(2) of the Local Government Act 1972, which authorises land acquired by agreement by a local authority for a particular purpose to be used, pending its requirement for that purpose, for any of the authority's functions, which, he submits, would include recreational use. It can be inferred, accordingly, that any use by the public

was permitted under that power, and as such was pursuant to the same kind of public law right, derived from statute, as was held in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 and *Newhaven* [2015] AC 1547 to give rise to implied permission.

38 This submission seems to us to face two major difficulties. The first is that no such claim was made before the inspector. As he recorded, at p 174(f):

> "No issue arises on 'as of right'. There were no vitiating features in play which would preclude use as of right and the application land was at no time held by SCC [Surrey County Council] or by any of the various NHS bodies mentioned herein for purposes which conferred an entitlement on members of the public to use the land for informal recreation. For instance, there was no evidence of any overt act or acts on the part of the objector, or its predecessor, to demonstrate that, before January 2013, the landowner was granting an implied permission for local inhabitants to use the wood."

In answer to this, Mr Laurence asserts that the issue is one of law rather than fact. Even if that were so, it would in our view be unfair to all those who took part in the five-day inquiry in 2015 to allow the point to be taken for the first time four years later in this court.

39 However, his main difficulty is that the submission is contradicted by clear authority. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, Lord Walker of Gestingthorpe had accepted the emphasis placed by Mr Laurence himself (appearing on that occasion for the supporters of registration) on "the need for the landowner to do something" (para 78); "passive acquiescence" could not be treated "as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct)" (para 79). Later in the judgment (para 83) Lord Walker accepted that permission might be "implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers", but he found no evidence in that case of "overt acts (on the part of the city council or its predecessors)" justifying the inference of an implied licence.

40 Nothing in *Barkas* or *Newhaven* undermines the principle that passive acquiescence is insufficient. Mr Laurence's then submission that the land-owner must "do something" remains good law, even if there has been some qualification of the form of communication required to the public. The existence in each case of an overt act of the owner was emphasised in the majority judgment in *Newhaven*, para 71:

> "In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was 'by right' and not 'as of right'. The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from

A statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case)."

The law remains, as submitted by Mr Laurence in *Beresford*, that passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough.

**41** Accordingly we would refuse permission for this additional ground
B of appeal.

*Statutory incompatibility*

**42** We turn next to the central issue in the case, based on the *Newhaven* case.

C *The majority judgment*

**43** In the judgment of the majority (given by Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC) the decision not to confirm the registration was supported by two separate lines of reasoning: implied permission and statutory incompatibility. Although the latter was unnecessary for the decision, it was clearly identified as a separate ground of
D decision: [2015] AC 1547, para 74. Lord Carnwath JSC was alone in basing his decision on the implied permission issue alone (para 137), seeing "considerable force" in the contrary reasoning on the latter issue of Richards LJ in the Court of Appeal [2014] QB 186. No one has argued that we should regard the majority's reasoning on this issue as other than binding. Accordingly our decision in the present case depends to a large extent on the correct analysis of that reasoning, and its application to the
E facts of the two cases before us.

**44** The operation of Newhaven Harbour had been subject to legislation since at least 1731. At the relevant time the governing statutes included (inter alia) the Newhaven Harbour and Ouse Lower Navigation Act 1847 (10 & 11 Vict c ix), section 49 of which required the trustees to—"maintain and support the said harbour of Newhaven, and the piers, groynes, sluices,
F wharfs, mooring berths, and other works connected therewith" and section 33 of the Harbours, Docks and Piers Clauses Act 1847 (10 & 11 Vict c 27), which provided that, subject to payment of rates—"the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

**45** The land owned by the harbour company ("NPP") included an area known as West Beach, described in the judgment as "part of the operational
G land of the Harbour" (para 8), although not currently used for any harbour purpose. As the judgment explained, at para 9:

> "The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction
H of the breakwater, accretion of sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach."

**46** Following an application by the Newhaven Town Council to register the Beach as a town or village green, and the holding of a public inquiry, it was found by the inspector that the Beach had been used by residents of the

locality for well over 80 years (save during the war periods) for recreation. On that basis the registration authority resolved to register the land. That decision was subject to an application for judicial review, which succeeded before Ouseley J, but was dismissed by the Court of Appeal. Their decision was in turn reversed by the Supreme Court.

*The judgment of this court in Newhaven*

**47** In the part of their judgment directed to the statutory incompatibility issue, Lord Neuberger PSC and Lord Hodge JSC referred to case law on public rights of way, easements and servitudes by way of analogy, adopting a cautious approach [2015] AC 1547, paras 76–90. None the less, they found it did provide guidance. In English law, public rights of way are created by dedication by the owner of the land, and the legal capacity of the landowner to dedicate land for that purpose is a relevant consideration (para 78, referring in particular to *British Transport Commission v Westmorland County Council* [1958] AC 126; see also para 87). Similarly, in the English law of private easements, the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition, which is based on the fiction of a grant by that owner: para 79. The law of Scotland with respect of creation of public rights of way and private servitudes had also developed on the footing that the statutory capacity of a public authority landowner to allow the creation of such rights was a relevant matter. In particular, in *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620 it was held that it was not possible that a public right of way "which it would be ultra vires to grant can be lawfully acquired by user" [2015] AC 1547, paras 83–84; and in *Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 it was held that the commissioners of the canal did not have the power to grant a right of way which was not compatible with the exercise of their statutory duties, and that this also meant that no private right of way or servitude could arise by virtue of user of the land over many years by those claiming such a right of way (paras 85–86). Although the Scots law of prescription had been reformed by statute, Lord Neuberger PSC and Lord Hodge JSC still regarded the historic position as instructive. Their discussion of English law and Scots law in respect of dedication and prescription at paras 76–90 is significant for present purposes, because the reasoning in the cases in those areas regarding statutory incompatibility is general, and is not dependent on the narrower rule of statutory construction that a general provision does not derogate from a special one (generalia specialibus non derogant), to which they also later referred by way of analogy.

**48** There follows the critical part of the majority judgment, under the heading "Statutory incompatibility: statutory construction", the material parts of which we should quote in full [2015] AC 1547:

> "91. As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging 'as of right' in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired

A land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, *McEvoy v Great Northern Railway Co* [1900] 2 IR 325, (Palles CB at pp 334–336), which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.

B

"92. In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view

C the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

"93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: 'does section 15 of the 2006 Act

D apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?' In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act

E does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281: 'Where the literal meaning of a general enactment

F covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.' While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the

G interpretation of a generally worded statute such as the 2006 Act.

"94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates: section 33 of the 1847 Clauses Act. NPP is obliged to maintain and support the Harbour and its connected works

H (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order.

"95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and

enjoyment as a place for exercise and recreation-section 12 of the Inclosure Act 1857 . . . —or to encroach on or interfere with the green-section 29 of the Commons Act 1876 . . . See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann, at para 56.

"96. In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

We discuss this reasoning in detail below.

**49** Finally in this part of the majority judgment reference is made to cases in which registration of land held by public bodies had been approved by the court: *New Windsor* [1975] Ch 380, the *Trap Grounds* case [2006] 2 AC 674 and *Lewis* [2010] 2 AC 70. The treatment of these cases by Lord Neuberger PSC and Lord Hodge JSC is also significant for present purposes. As regards *New Windsor*, they emphasised that the land was not "acquired and held for a specific statutory purpose", so "No question of statutory incompatibility arose" (para 98). They observed that in the *Trap Grounds* case, though the land was wanted for use as an access road and housing development "there was no suggestion that [the city council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility" (para 99). With respect to the *Lewis* case they pointed out that "[it] was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green"; hence "Again, there was no question of any statutory incompatibility" (para 100).

**50** In relation to each of these cases, Lord Neuberger PSC and Lord Hodge JSC referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. That was the basis on which they distinguished the cases. It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such.

**51** Their discussion concludes, at para 101:

"In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

*Incompatibility—the case for the appellants*

**52** For LCC Mr Edwards submits that the decision in *Newhaven* [2015] AC 1547 is of general application to land held by a statutory authority for statutory purposes, whatever the nature of the Act. He points out that the statutory duties or powers in *Newhaven* were not specific to the Beach itself, but rather applied to all of the land acquired and held, from time to time, by NPP and its predecessors for the operation of the Port. NPP had not, within living memory, used the Beach for its statutory harbour purposes. The critical passage in the majority judgment (para 93) refers generally to land—"which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes". It is not limited to statutory powers directed to a specific location or undertaking. No one has argued that the principle is limited to statutory undertakers, as opposed to public authorities in general. Nor is there any requirement for the land to be in actual use for statutory purposes at the point of registration; it simply has to be held for such purposes. In *Newhaven* the Beach had not been used for harbour purposes nor was there any fixed intention to do so at any particular time in the future: see para 96.

**53** In the present case, notwithstanding the inspector's findings, there was, he submits, clear incompatibility with LCC's functions in respect of the land. The effect of registration would be that there accrues a right vested in the inhabitants of Scotforth East Ward to use the land for lawful sports and pastimes of a variety of forms, including walking and dog walking. LCC could not restrict their entry onto the land, including Area B which was at the time of the inspector's decision used as a playing field by the school: see Decision Letter, para 10. Given the statutory safeguarding obligations towards primary school pupils, the use of that area for play could not continue. Any use of the land to provide a new or expanded school would be precluded. In substance, the land would be no longer available in any meaningful sense for use in fulfilment of the LCC's statutory duties as local education authority.

**54** Mr Laurence makes similar submissions in respect of the Surrey site, supported in that case by the conclusions of Gilbart J [2016] 4 WLR 130.

*Discussion*

**55** In our judgment, the appeals should be allowed in both cases. On a true reading of the majority judgment in *Newhaven* [2015] AC 1547 on the statutory incompatibility point, the circumstances in each of these cases are such that there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green. This has the result that the provisions of 2006 Act are, as a matter of the construction of that Act, not applicable in relation to it.

**56** The principle stated in the key passage of the majority judgment at para 93 is expressed in general terms. The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time-being so held. Although the passage refers to land "acquired by a statutory undertaker", we agree with Mr Edwards that there is no reason in principle to limit it to statutory undertakers as such, nor

has that been argued by the respondents. That view is supported also by the fact that the majority felt it necessary to find particular reasons to distinguish cases such as *New Windsor*, the *Trap Grounds* case and *Lewis*, all of which involved local authorities rather than statutory undertakers. Accordingly, the appellants argue with force that the test is directly applicable to the land acquired and held for their respective statutory functions.

57 The reference in para 93 to the manner in which a statutory undertaker acquired the land is significant. Acquisition of land by a statutory undertaker by voluntary agreement will typically be by the exercise of general powers conferred by statute on such an undertaker, where the land is thereafter held pursuant to such powers rather than under specific statutory provisions framed by reference to the land itself (as happened to be a feature of the provisions which were applicable in *Newhaven* itself). That is also true of land acquired by exercise of powers of compulsory purchase. In relation to the latter type of case, the majority said in terms that "the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes": para 93. On our reading of the majority judgment, it is clear that in relation to both types of case Lord Neuberger PSC and Lord Hodge JSC took the view that an incompatibility between general statutory powers under which land is held by a statutory undertaker (or, we would add, a public authority with powers defined by statute) and the use of such land as a town or village green excludes the operation of the 2006 Act.

58 This interpretation of the judgment is reinforced by the analysis it contains of the English and Scottish cases on dedication and prescription in relation to rights of way, easements and servitudes and the guidance derived from those cases (see paras 76–91): para 47 above. It is also reinforced by the way in which Lord Neuberger PSC and Lord Hodge JSC distinguished *New Windsor*, the *Trap Grounds* case and *Lewis*: paras 49 and 50 above.

59 The respondents in these appeals submit that the reasoning of Lord Neuberger PSC and Lord Hodge JSC is more narrowly confined, and depends upon identifying a conflict between a particular regime governing an area of land specified in the statute itself and the general statutory regime in the 2006 Act. In support of this interpretation the respondents point to the highly specific nature of the statutory provisions governing the relevant land in *Newhaven* and to the reference in para 93 to the rule of statutory construction that a general provision does not derogate from a special one (generalia specialibus non derogant).

60 However, for the reasons we have set out above, this interpretation of the judgment does not stand up to detailed analysis. Lord Neuberger PSC and Lord Hodge JSC stated only that "some assistance" could be obtained from consideration of that rule of construction, not that it provided a definitive answer on the issue of statutory incompatibility. In other words, they treated it as a helpful analogy for the purposes of seeking guidance to answer the question they posed in para 93, just as they treated the English and Scottish cases on prescriptive acquisition as helpful. The way in which they posed the relevant question in para 93 shows that their reasoning is not limited in the way contended for by the respondents, as does their discussion of the prescriptive acquisition cases and the local authority cases of *New Windsor*, *Trap Grounds* and *Lewis*.

A **61** We do not find the construction of the 2006 Act as identified by the wider reasoning of the majority in *Newhaven* surprising. It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect.

B **62** Lord Hoffmann in *Sunningwell* [2000] 1 AC 335 concluded that it could be inferred that Parliament intended to allow for the creation of new rights pursuant to the 1965 Act by reason of the "public interest in the preservation of open spaces which had for many years been used for recreational purposes", but in doing so he recognised that "A balance must be struck" between rights attaching to private property and competing C public interests of this character: p 359. It is natural to expect that where a public authority is holding land for public purposes defined by statute which are incompatible with the public interest identified by implication from the 1965 Act, and now the 2006 Act, that balance will be affected. The proper inference as to Parliament's intention is that the general public interest identified by Lord Hoffmann will in such a case be outweighed by the specific public interest which finds expression in the particular statutory D powers under which the land is held.

**63** As Lord Neuberger PSC and Lord Hodge JSC appreciated, this general point can be made with particular force in relation to land purchased using compulsory purchase powers set out in statute. Such powers are generally only created for use in circumstances where an especially strong public interest is engaged, such as could justify the compulsory acquisition of E property belonging to others. It seems highly unlikely that Parliament intended that public interests of such a compelling nature could be defeated by the operation of the general provisions in the 2006 Act.

**64** In construing the 2006 Act it is also significant that it contains no provision pursuant to which a public authority can buy out rights of user of a town or village green arising under that Act in relation to land which it itself owns. That is so however strong the public interest may now be that it F should use the land for public purposes. Since in such a case the public authority already owns the land, it cannot use any power of compulsory purchase to eradicate inconsistent rights and give effect to the public interest, as would be possible if the land was owned by a third party. Although section 16 of the 2006 Act makes specific provision for "deregistration" of a green on application to the "appropriate national authority", in relation to G land which is more than 200 square metres in area the application must include a proposal to provide suitable replacement land: subsections (2), (3) and (5). This procedure is available to any owner of registered land, public or private; it is not designed to give effect to the public interest reflected in specific statutory provisions under which the land is held. Often it will be impossible in practice for a public authority to make a proposal to provide replacement land as required to bring section 16 into operation. H Again, it would be surprising if Parliament had intended to create the possibility that the 2006 Act should in this way be capable of frustrating important public interests expressed in the statutory powers under which land is held by a public authority, when nothing was said about that in the 2006 Act.

**65** In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in *Newhaven* [2015] AC 1547, LCC and NHS Property Services can show that there is statutory incompatibility in each of their respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see *Newhaven*, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.

**66** Similar points apply in the Surrey case. Although the non-statutory inspector found against the appellant on the statutory incompatibility issue, the registration authority failed to consider it. Gilbart J was satisfied that, within the statutory regime applicable in that case, there was no feasible use for health related purposes, and indeed none had been suggested. The Court of Appeal took a different view, but largely, as we understand it, on the basis that recreational use of the subject land would not inhibit the ability of NHS Property Services to carry out their functions on other land. We consider that Gilbart J was correct in his assessment on this point. The issue of incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purposes for which the land is held, not by reference to how the land happens to be being used at any particular point in time (again, see *Newhaven*, para 96).

**67** As Lady Arden and Lord Wilson JJSC take a different view regarding the effect of the majority judgment in *Newhaven*, we should briefly explain why, with respect, we are not persuaded by their judgments. We are all in agreement that the outcome of these appeals turns upon the proper interpretation of the majority judgment in *Newhaven*. We cannot accept their interpretation of that judgment.

**68** In our view, although the case might have been decided on narrower grounds, Lord Neuberger PSC and Lord Hodge JSC deliberately posed the relevant question in para 93 in wide terms, specifically in order to state the issue as one of statutory incompatibility as a matter of principle, having regard to the proper interpretation of the relevant statute pursuant to which the land in question is held. That is why the heading for the relevant section of their judgment is "Statutory incompatibility: statutory construction". They say in terms in para 93, "The question of incompatibility is one of statutory construction." Nowhere do they say it is a matter of statutory construction *and* an evaluation of the facts regarding the use to which the land has been put. According to their judgment, the issue of incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the land is held with the rights claimed pursuant to the 2006 Act, not by having regard to the actual use to which the authority had put the land thus

A far or is proposing to put it in future. We consider that this emerges from the critical para 93, and also from the paragraphs which follow in their judgment.

69 Thus, in para 94 they identify the relevant incompatibility as that between the 2006 Act and "the statutory regime which confers harbour powers on NPP to operate a working harbour". In para 96, it is to that statutory incompatibility that they refer, not to incompatibility with any use
B to which NPP had as yet put the land in question or might in fact put it in the foreseeable future. As a matter of fact, the Beach had not been used for the applicable statutory purposes. Further, in our opinion, by stating in para 96 that it was not necessary for the parties to lead evidence as to NPP's plans for the future of the harbour "in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we
C have referred", Lord Neuberger PSC and Lord Hodge JSC were seeking to emphasise, contrary to Lady Arden and Lord Wilson JJSC's interpretation of their judgment, that what matters for statutory incompatibility to exist so as to prevent the application of the 2006 Act is a comparison with the relevant statutory powers under which the land is held, not any factual assessment of how the public authority might in fact be using or proposing to use the land.

D 70 The same point can be made about para 97, where Lord Neuberger PSC and Lord Hodge JSC said that it was unnecessary to consider evidence about actual proposed use of the land on the facts, since they were able to determine by looking at the statutory powers "that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour [i e to hold
E under the statutory powers referred to in para 94], and the registration of the Beach as a town or village green". Their discussion at paras 98–100 of *New Windsor*, the *Trap Grounds* case and *Lewis* supports the same conclusion. In each of those cases the relevant land had been held for a very long period without actually being put to use which was inconsistent on the facts with use as a town or village green and without any proposal that it should be put to such use. The implication from what Lord Neuberger PSC and Lord
F Hodge JSC say about them is that if it had been shown that the land was held for specific statutory purposes which were incompatible with registration under the 2006 Act, that would have constituted statutory incompatibility which would have prevented registration. Their treatment of these cases cannot be reconciled with Lady Arden and Lord Wilson JJSC's proposed interpretation of their judgment. We do not think that para 101 can be
G reconciled with that proposed interpretation either. In that paragraph Lord Neuberger PSC and Lord Hodge JSC contrast a case in which a public body might have statutory purposes to which it could in future appropriate the land (but has not yet done so) with the situation in *Newhaven* itself, where in the relevant period NPP held the Beach "for the statutory harbour purposes and as part of a working harbour" (i e under the statutory regime referred to in para 94). In our view they were there emphasising that what matters for
H a statutory incompatibility defence to arise is that the land in question should be held pursuant to statutory powers which are incompatible with registration as a town or village green. Nor, with respect, do we think that Lady Arden and Lord Wilson JJSC have offered any good answer to the points we have made at paras 61–64 above.

71 We also consider that the reading of *Newhaven* proposed by Lady Arden and Lord Wilson JJSC would undermine the very clear test which Lord Neuberger PSC and Lord Hodge JSC plainly intended to state. Instead of focusing on the question of the incompatibility of the statutory powers under which the relevant land is held, Lady Arden and Lord Wilson JJSC would introduce an additional factual inquiry into the actual use to which the authority is putting the land or proposes to put the land in the foreseeable future. Thus, Lady Arden and Lord Wilson JJSC would adopt from the English case of *Westmorland* [1958] AC 126 a test of what use could reasonably be foreseen for the land in question, even though Lord Neuberger PSC and Lord Hodge JSC say nothing to support that in the relevant part of their judgment. They refer to both English and Scottish cases on prescriptive acquisition as being relevant to their assessment of the correct approach to be adopted in interpreting the 2006 Act, and in each case only by way of broad analogy, as they explain at para 91. The Scottish cases they cite do not employ any such test as in *Westmorland* and are consistent with the clear principled test, based on statutory construction, which we understand Lord Neuberger PSC and Lord Hodge JSC to have laid down.

*Future use*

72 Finally, for completeness, we should mention briefly an issue which does not strictly arise within the scope of the appeals, but has been the subject of some discussion. That is the question whether, notwithstanding registration, there might be scope for use by the appellants of the land for their statutory purposes. This arises from a suggestion put forward in Lord Carnwath JSC's minority judgment in *Newhaven* [2015] AC 1547. He noted that in the *Trap Grounds* case [2006] 2 AC 674 it had not been necessary to consider the potential conflict between the general village green statutes and more specific statutory regimes, such as under the Harbours Acts. He said, at para 139:

> "It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour."

73 Mr Edwards, supported by Mr Laurence, seeks to build on that tentative suggestion, taken with the principle of "equivalence" adopted in *Lewis* [2010] 2 AC 70. As he submits, the Supreme Court accepted that there should be equivalence between the use of the land for lawful sports and pastimes in the qualifying period (in that case subject to concurrent use as a golf course) and the extent of rights vested in local inhabitants after registration. That approach was taken a stage further by the Court of Appeal in *TW Logistics Ltd v Essex County Council* [2019] Ch 243, holding that the 19th century statutes, as applied to a registered modern green, are not to be construed as interfering with the rights of the landowner to continue pre-existing uses so far as not inconsistent with the uses which led to registration (per Lewison LJ, paras 63–82).

74 This is not a suitable occasion to examine the scope of the principle of equivalence, so far as it can be relied on to protect existing uses by the landowner. *Lewis* was a somewhat special case. Lord Brown of

A Eaton-under-Heywood JSC was able to draw on "[his] own experience both as a golfer and a walker for over six decades" (para 106) to attest to the feasibility of an approach based on "give and take" in that particular context. The same approach may not be so easy to apply in other contexts, and as applied to other forms of competing use. Permission has been granted for an appeal to this court in *TW Logistics*. That may, if the appeal B proceeds, provide an opportunity for further consideration of this difficult issue. In any event, those cases were concerned with actual uses by the owners, not with potential uses for statutory purposes for which the land is held, as in the present cases.

75 In view of our conclusion that the land in each appeal should not have been found to be capable of being registered under the Act, the issue of what uses might have been open to a statutory owner if it were so registered C does not arise, and we prefer to say no more about it on this occasion.

*Conclusion*

76 For these reasons we would allow the appeals in both cases.

**LADY ARDEN JSC** (dissenting in part)

D

*Identifying the difference of view*

77 My views differ from those of Lord Carnwath and Lord Sales JJSC on these appeals in an important respect. My conclusion is that the question of incompatibility between two sets of statutory provisions (on this appeal, the provisions of the Commons Act 2006 and the statute authorising the holding of land by the public authority in question) involves an assessment E of the facts as well as a proposition of law. The fact that a public authority holds land for statutory purposes which are incompatible with the use of the land as a town or village green ("TVG"), is not of itself sufficient to make the land incapable of being registered under the 2006 Act as a TVG. It must be shown that the land is in fact also being used pursuant to those powers, or that it is reasonably foreseeable that it will be used pursuant to those powers, F in a manner inconsistent with the public's rights on registration as a TVG. That requirement in my judgment follows from *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547. References in this judgment to public authorities exclude public authorities which are subject to a statutory duty to carry out a particular function on specified land, identified by statute, where such land is sought to be registered as a G TVG. Such authorities are outside the scope of this judgment.

*Identifying the correct approach to questions of statutory inconsistency*

78 As a matter of constitutional principle, courts must approach the statute book on the basis that it forms a coherent whole. That means that, when interpreting legislation, courts must, in the absence of an indication of some other intention by Parliament, strive to ensure that the provisions work H together and apply so far as possible to their fullest extent, such extent being judged according to the intention of Parliament demonstrated principally in the words used. (We have not been shown any other admissible evidence as to Parliament's intention, such as ministerial statements in Hansard.) The courts cannot simply decline to enforce parts of a statute because there may

be a conflict with some other statute. It has to be shown that the part sought to be disapplied is irreconcilable with another part of it. If the two can stand together there is no statutory irreconcilability or inconsistency: compare, for example, *Tabernacle Permanent Building Society v Knight* [1892] AC 298. One statute cannot be said to be incompatible with another if the two statutes can properly be read together. So, the test is: can the two statutes in question properly be interpreted so that they stand together and each has the fullest operation in the sense given above?

**79** In *Newhaven*, as I shall demonstrate by reference to the majority judgment in that case in the next section of this judgment, the point was that there was a risk that the statutory undertaking's working harbour would be stymied in its operations if the Beach was held to be a TVG. It was not a case where a statutory authority has acquired land for a statutory purpose but, at the time of the proposed registration as a TVG, it is not likely that the land will be used for that purpose in the reasonably foreseeable future.

*Newhaven and the limits of this court's decision in that case*

**80** The judgments in *Newhaven* in my judgment should be approached on the basis that they are consistent with the principles explained in para 78 above, even though the members of this court in that case did not articulate them. This court should read their decision, if this can properly be done as a matter of statutory interpretation, as leading to the result that where public authority ownership of land and registration as a TVG can co-exist, that course will be available. As a matter again of constitutional principle, land should not be relieved of the burden of an Act of Parliament having (so far as relevant) unqualified application if there is an alternative, properly available interpretation which will lead to the two enactments in question standing together.

**81** On timing, the question whether there is any conflict between public authority powers and TVG legislation must be determined as at the date when the application for registration is made. At that point in time, the public authority may be holding land it has acquired under statutory powers for a particular purpose for which it is not yet required. It is not required to apply the land for that purpose and it may decide not to do so and for example to sell the land or use it for some other purpose. Moreover, even while holding the land for a particular purpose, the local authority may be using it for another purpose because it is not required for the statutory purpose for which it is appropriated at that point in time: Local Government Act 1972, section 120(2).

**82** The factual scenario in *Newhaven* was different: the harbour company was already in operation and the beach was liable to be involved in its then current trading operations. The case shows that incompatibility is not a purely legal matter depending on the existence of statutory powers which if exercised would be inconsistent with use of the land as a TVG. It is necessary on the facts to be satisfied that that is likely to occur after registration. It requires a real-world assessment of the situation. The court is not precluded from looking at the facts subsequent to the acquisition of the land any more than the determination as to the reasonableness of a landlord's refusal to give a consent under a lease is restricted to the facts known to the parties at the date of the lease: see *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180.

A *Interpreting the decision of this court in Newhaven*

83 In *Newhaven* [2015] AC 1547, the harbour company ("NPP") had a statutory duty to maintain a harbour. The dispute concerned a tidal beach in one part of the harbour which as it happened was no longer operational. The Beach had been used for the past 80 years or so by members of the locality. The issue with which these appeals are concerned is the issue in that
B case as to whether the Beach could be registered as a TVG. This court held that the land in issue, namely the Beach, could not be registered as a TVG.

84 In *Newhaven*, Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC jointly gave the leading judgment. The other members of the Supreme Court agreed with them. Lord Carnwath JSC also wrote a concurring judgment. On these appeals, Lord Carnwath and Lord
C Sales JJSC examine the leading judgment in detail. They conclude that Lord Neuberger PSC and Lord Hodge JSC held that, where a person applies to register as a TVG land which is held for statutory purposes which would be inconsistent with the land also being TVG, the land is not capable of being so registered, and that the question is purely one of statutory construction. Thus, Lord Neuberger PSC and Lord Hodge JSC formulated the relevant question as, at para 93:

D

> "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?"

E 85 Having stated that question, Lord Neuberger PSC and Lord Hodge JSC immediately answered it by the following sentence: "In our view it does not." In that sentence, the word "it", as I read it, refers to section 15 itself.

86 The next sentence in the judgment of Lord Neuberger PSC and Lord Hodge JSC states (also at para 93):

F

> "Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."

87 That sentence makes it clear that Lord Neuberger PSC and Lord
G Hodge JSC regarded "use" as a critical issue. That clearly involves fact. Moreover, the expression "continuing use" also makes it clear that they regarded the operations of NPP as constituting use which was being perpetuated and that that was so even though the tidal beach which was in issue was in a part of the harbour which was not itself being used.

88 It is further clear from that sentence, in my judgment, that the Supreme Court was not considering the question what would happen if the
H relevant use had never started or if the relevant land had become surplus to the obligation or power to carry out any particular activity which had been imposed by Parliament. We have not been shown any statutory requirement that a public authority should regularly consider the need for any land and if thought fit dispose of land which is not required for some purpose for which

it was acquired, so it may end up holding land for which it has no further need.

**89** The local authority could voluntarily appropriate the land to some other purpose but, if it fails to reconsider the use for which it acquired land, or appropriates it to some other use, it is likely that the only basis on which the local authority's decision or omission to act could be challenged would be on the basis that its decision attained the standard of irrationality, which is a high standard for an applicant to have to meet. Under the judgment of Lord Carnwath and Lord Sales JJSC, that land would remain immune from the accrual of rights leading to registration as a TVG even though there would not in fact be any irreconcilability between registration and the statutory power for which the land was conferred. It is not clear what on this basis would happen if the local authority accepts that the original purpose is spent and after the application is made decides to appropriate the land to some other statutory purpose.

**90** Furthermore, in *Newhaven* [2015] AC 1547, para 96, Lord Neuberger PSC and Lord Hodge JSC held:

> "In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

**91** It follows that they regarded it as important that the harbour in question was a "working harbour" and that there was a risk of a clash between the registration of the Beach and the use of the harbour for the statutory purposes. They considered that registration would inhibit the use of the adjoining quay to moor vessels. It would prevent the harbour authority from dredging the harbour in a way which affected the enjoyment of the Beach and restrict its ability to alter the existing breakwater. So, I deduce from that paragraph that Lord Neuberger PSC and Lord Hodge JSC also regarded it as important that there was factual evidence establishing the continuing use and the impact of registration on that use. There had to be real, not theoretical, incompatibility.

**92** Lord Neuberger PSC and Lord Hodge JSC continue at the end of that paragraph to observe: "All this is apparent without the leading of further evidence."

**93** The word "further" confirms that the preceding analysis involved a consideration of the evidence on the ground. In fact the further evidence appears to have been evidence as to plans to upgrade the harbour and use it as a container terminal: see the judgment of Ouseley J in *Newhaven* [2014] QB 186, para 127.

**94** In para 97, Lord Neuberger PSC and Lord Hodge JSC continue by summarising further matters on which the harbour company relied, but it was not necessary in the light of the conclusion in para 96 to consider those matters. It is to be noted that in para 97, Lord Neuberger PSC and Lord

A Hodge JSC refer to an incompatibility between the proposed TVG registration and the statutory functions of NPP, which they add: "continues to operate as a working harbour" This is an express reference to the state of fact. It would clearly have been material if the harbour company held the land but had ceased its statutory functions.

**95** In paras 98–101, Lord Neuberger PSC and Lord Hodge JSC refer to previous leading cases to show that the question of statutory incompatibility B had not previously had to be considered. But, importantly for my interpretation, they conclude that (at para 100): "It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green." So, in a case concerned with future use, the court must consider if the statutory purpose would be "likely" to be impeded, not likely C to be impeded if invoked. Lord Neuberger PSC and Lord Hodge JSC clearly envisaged that there would have to be a factual inquiry as to future use and that it would have to be shown that TVG registration would be likely to impede the exercise of those powers. Lack of impediment can logically be shown either by showing that the local authority has acquired the land for purposes (e g recreational purposes) which are not inconsistent with registration as a TVG, or by showing that there is no realistic likelihood of D the land being used for the purposes for which it was acquired.

**96** In addition, at para 101 of their judgment, Lord Neuberger PSC and Lord Hodge JSC held:

> "In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself E sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

**97** In that paragraph, Lord Neuberger PSC and Lord Hodge JSC addressed the question of a future development of the land. The mere power F to undertake such development would not itself be sufficient to create a statutory incompatibility. They contrasted that with the position in *Newhaven*. Lord Neuberger PSC and Lord Hodge JSC again referred to the evidence that the tidal beach was part of the working harbour.

**98** Para 102 dealt with the separate issue of user as of right and para 103 was the summary of the conclusion, which does not take the matter further.

G **99** For the avoidance of doubt, I agree that this court should apply statutory incompatibility, the concept sought to be employed in *Newhaven*, to determine the question of inconsistency between the provisions of the 2006 Act enabling registration of land in issue on these appeals as TVGs and the statutory provisions, also conferred by public general Acts of Parliament, empowering the acquisition and holding of land by the public authorities in both appeals. However, in my judgment, that concept is as a matter of H constitutional principle to be interpreted as I have explained in para 78 above.

*Determination of incompatibility where the issue arises from a future use*

**100** The use relied on by the local authority in the Lancashire case in relation to Areas A and B is, as in *Newhaven*, a current use, and my analysis

of *Newhaven* detailed above does not lead to any different conclusion in relation to those Areas from that reached by Lord Carnwath and Lord Sales JJSC. I would accept the submission of Mr Douglas Edwards QC, for Lancashire County Council, that in practice the land could not be used by the primary school currently using it when there was unrestricted public access as this would not be consistent with the school's safeguarding obligations: this may be inferred from the fact that the site is currently fenced. Schools are responsible for creating and maintaining a safe environment for their pupils. Mr Edwards' submission on this point was not challenged on these appeals.

**101** However, as I shall next explain, where the use is only a use which may occur in the future, my analysis makes it necessary to answer further questions before any conclusion about statutory incompatibility can be reached.

**102** This has a practical impact in relation to Areas C and D in the Lancashire case. Those Areas have never been used for the statutory purpose of education for which they were acquired and are now held.

**103** That raises the question, what test should apply if the case is only one of possible future use? Must it be shown that it is simply possible that the land may be used for the statutory purpose or must it be shown that it is reasonably likely or foreseeable that it will be so used? These questions did not directly arise in *Newhaven*.

**104** In answering these questions, I have found assistance in the decision of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126, in which a railway company contended that it would have been inconsistent with the statutory powers conferred on it for the public to have a right of way over a bridge spanning the railway line (originally built for private benefit) and that accordingly its predecessor (another statutory company) could not have dedicated it to the public. In *Newhaven* [2015] AC 1547, para 87, Lord Neuberger PSC and Lord Hodge JSC cited the judgment of Lord Keith of Avonholm in this case as authority for the proposition that incompatibility with an Act of Parliament is a question of fact:

> "In *British Transport Commission v Westmorland County Council* [1958] AC 126, 164–165 Lord Keith of Avonholm commented on Lord Kinnear's opinion in [*Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620], suggesting that it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined, at p 166, that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility."

**105** The other members of the House also treated it as a question of fact: see Viscount Simonds, at p 144, Lord Morton of Henryton, at p 149, Lord Radcliffe, at p 156, Lord Cohen, at p 163 and Lord Keith, at p 166. Moreover, they held that, to show compatibility, it was not necessary to show that there were no circumstances in which a conflict could arise. That would make it impossible for members of the public ever to acquire a public right of way over land belonging to the railway company. The House also rejected the argument that a statutory company could not grant an easement

A over a footpath over its railway. To hold otherwise "would be a grave impediment to public amenity": per Lord Radcliffe, at p 153. It was unlikely on the facts that the railway company would ever need to pull the bridge down.

106 The relevant question was whether a conflict, or incompatibility, was reasonably foreseeable. Thus, Viscount Simonds, at p 144, Lord
B Morton, at p 149, and Lord Keith, at p 166, rejected the following test: was it *possible* that land would be used in future for a certain purpose? They considered that the normal statutory burden should apply and be discharged, namely that it should be shown that the use was reasonably likely to occur.

107 The House considered the question on a current basis and did not decide whether the critical time was the date of dedication or some other
C date: see for example pp 144–145. At all events it did not seek to determine the question as at the date of the incorporation of the statutory company when its statutory powers were conferred.

108 In my judgment, the test of reasonable foreseeability is the correct test also to apply in this context, i e when asking whether there is incompatibility between registration of land as a TVG and the statutory
D powers of a public authority in relation to the same land where the relevant use that the public authority might make of the land under those powers is a potential future use which has not yet started.

109 It is said by Lord Carnwath and Lord Sales JJSC that this test is not clear. It may not be easy to apply on the facts but that is necessarily so if the law applies a solution which is fact-dependent rather than drawing a bright line as the majority does. Lord Neuberger PSC and Lord Hodge JSC refer to
E the *Westmorland* case at two points in their judgment. In the light of their conclusion that the evidence as to current use was sufficient it was not necessary for them to consider it in any further detail, but they would not have cited it if they did not approve of its approach. If I am right there is no question of the use of land being stymied by the 2006 Act (cf para 61 above). Circumstances may have moved on and the public authority may no longer
F require the land it is holding for any particular statutory purpose.

*Application of the principles to the facts of the appeals*

*(1) The Lancashire appeal*

110 The issue of future use of the land arises on the Lancashire appeal in relation to Areas C and D. The local authority in the Lancashire appeal did
G not adduce evidence that it was reasonably likely that these Areas would be used for educational purposes in the future. There had in the past been a plan to relocate a school on this area but that was not proceeded with and there was no substitute. Moreover, those Areas had never been used for educational purposes. Accordingly, as I see it, those plots should have been registered as a village green. The only objection to doing so was one of statutory incompatibility and as I see it, that fails on the facts.

H 111 The position is different in relation to Areas A and B which are currently used for educational purposes. Importantly, as I read the facts, the sites cannot be registered as TVGs and be school playgrounds at the same time for the reason that this would be inconsistent with the school's safeguarding duty. The school has an obligation to provide outdoor space as

a playground under regulation 10 of the School Premises (England) Regulations 2012 (SI 2012/1943), and that is its current use. The inspector did not reach any conclusion on the question of the compatibility in fact of the current use of Areas A and B with their registration as TVGs, and she expressly left open the door to further evidence on incompatibility.

*(2) The Surrey appeal*

**112** In the Surrey appeal, the result is different because the site in issue lies immediately next to the hospital. On the basis of my judgment, the correct legal test applying to future use was not applied. There have been no findings of fact as to whether it is reasonably foreseeable that even now the land will be used for the statutory purposes for which it is currently held. In those circumstances, in my judgment, this matter should be remitted to the registration authority for a decision on that issue.

*Restrictions on TVG registration in the Growth and Infrastructure Act 2013*

**113** Lord Carnwath and Lord Sales JJSC begin their judgment with an analysis of the development of the law on TVGs since the report of the Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462), chaired by Sir Ivor Jennings QC, which led to the Commons Registration Act 1965. Undoubtedly that Act and its successor, the 2006 Act, have led to the registration of TVGs at a more significant level than can have been envisaged by the Royal Commission.

**114** Accordingly, it is now an inescapable fact that the actual use of the TVG legislation has, in the light of practical experience and the needs and expectations of local communities up and down the country, eclipsed the original conception of a more limited role for TVG registration. The clock cannot be turned back.

**115** Moreover, Parliament has essentially given its approval to that use in later legislation. The Growth and Infrastructure Act 2013 introduced a package of measures designed to restore the balance between the public and landowners but retaining the same basic system of registration.

**116** The three main changes brought about by the 2013 Act in this connection can be summarised, and it will be seen that they were substantial:

(1) The period within which a person may apply to register land as a TVG after the landowner has terminated the use by members of the public without permission has been reduced from three years to one year: 2006 Act, section 15(3A) as amended.

(2) The 2013 Act has inserted a new section 15C into the 2006 Act terminating the public's right to apply to register land as a town or village green after any one of a range of "trigger events" occurs. These include an application for planning permission. The right to apply for registration as a TVG will arise again if a "terminating event" occurs, namely (in the case of an application for planning permission) the planning application is withdrawn, is refused or expires, or the local planning authority ("LPA") does not determine it. (Where the planning application is for a project of public importance under section 293A of the Town and Country Planning Act 1990, the right to make an application to register as a TVG does not arise where the LPA declines to determine it.)

A (3) Landowners have a new right to deposit statements with the appropriate registration authority with respect to any land and this will have the effect of terminating any existing or accruing rights to register that land as a TVG (2006 Act, section 15A, as amended). Landowners already had a right to apply to deregister land as a TVG, but comparable land must be offered in exchange: 2006 Act, section 16.

B 117 Lord Carnwath and Lord Sales JJSC are right to say that these changes are not directly relevant, and there is no information about any fall in the number of TVG registrations. However, these changes are important. It is open to public authorities to take advantage of these changes (and this is my core answer to the points that Lord Carnwath and Lord Sales JJSC make in para 64 above). They show, among other matters, that Parliament did not consider that there should be some special exemption applying in respect of C all publicly-held land. That may be a recognition of the fact that public bodies may be holding land which is surplus to their statutory requirements. While many statutes confer a power on statutory bodies to acquire and hold land, we have not been shown any provision requiring the body on which the power is conferred to sell it when it becomes clear that the land is not required or is no longer required for the purpose for which it was acquired. If a public authority took no action to dispose of land it did not need, it D might well be difficult to obtain judicial review of its action as irrationality may have to be shown.

118 Moreover, Parliament took no steps in the 2013 Act to revise the conditions for registration for TVGs.

*Judgment of Lord Wilson JSC*

E 119 Since circulating the first draft of my judgment I have had the benefit of reading the judgment of Lord Wilson JSC. He agrees with the approach of the Court of Appeal [2018] 2 P & CR 15. I have great admiration for his judgment and that of Lindblom LJ, with which Rupert Jackson and Thirlwall LJJ agreed. In particular, I agree with the three general points made by Lindblom LJ in para 36. In a sense my approach might be described as a halfway house between their judgments and that of F Lord Carnwath and Lord Sales JJSC. The ten judges who have considered the issues on these appeals have unfortunately been very divided. For my own part, I do not consider that the view of the Court of Appeal addresses the effect on incompatibility of the possibility of future use of the sites sought to be registered as TVGs, or the intention of Parliament in such cases. However, if I am wrong on the approach I have taken, I would adopt that of G Lord Wilson JSC and the Court of Appeal in preference to that of Lord Carnwath and Lord Sales JJSC. Respectfully, their approach results in introducing into the legislation a blanket exemption for public authorities which Parliament has not itself expressly given. Parliament has instead provided all landowners with other measures which they can use to protect their position for the future.

H 120 Limiting the issue of incompatibility to a "desktop" exercise of considering the statutory powers of the landowner, without reference to the facts on the ground, runs the risk, to borrow Lord Radcliffe's words in the *Westmorland* case [1958] AC 126, 153, of "a grave impediment to public amenity". There will potentially be a loss of access by the public to land which they have used for very many years.

*Conclusion*

**121** My approach to statutory incompatibility in my judgment strikes a fairer balance between the public interest in the use of land by the public authority for the appropriated statutory purpose and that of the public who are intended by the 2006 Act to have a right of access to recreational spaces than the approach of Lord Carnwath and Lord Sales JJSC. That is my principal answer to the points which they make in paras 61–64 and 67–71 above and my other responses to those paragraphs appear from this judgment. My judgment does not as suggested in any way involve frustrating the intention of Parliament since the statutory powers under which the public authority holds the land will prevail if it is shown that there is a current use of the land in exercise of those powers, or that it is reasonably foreseeable that such use will occur (see para 77 above).

**122** Accordingly, I would hold that the appeal in Lancashire should be allowed in part and that in Surrey the appeal should also be allowed on the basis that the matter remitted to the registration authority for a determination of the application in accordance with this judgment.

**LORD WILSON JSC** (dissenting)

**123** I would have dismissed both appeals.

**124** Although I hold each of my three colleagues in the majority in the highest esteem, I am driven to suggest that today they make a substantial inroad into the ostensible reach of a statutory provision with inadequate justification.

**125** It is agreed that, in their capacity as education authorities, local authorities, such as the appellant in the Lancashire case, can hold land only for specified statutory purposes referable to education; that health authorities, such as the appellant in the Surrey case, can hold land only for specified statutory purposes referable to health; and that, for example, in their capacity as housing authorities, local authorities can hold land only for specified statutory purposes referable to housing.

**126** If public authorities which hold land for specified statutory purposes are to be immune from any registration of it as a green which would be theoretically incompatible with their purposes, the reach of section 15 of the Commons Act 2006 Act is substantially reduced. One would expect that, had such been its intention, Parliament would have so provided within the section. In the absence of any such provision, whence does justification for it come?

**127** It comes, according to today's ruling, from the decision of this court in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, from which the court would in any event be able to depart if necessary. In my view interpretation of that decision by today's majority is controversial. The claim in para 11 above that their interpretation represents no more than consolidation of the law is unfortunately not one to which I can subscribe.

**128** The decision in the *Newhaven* case wrought an exception to the availability of registration under section 15. It is always dangerous to interpret an exception too widely lest it becomes in effect the rule and the rule becomes in effect the exception.

**129** In the *Newhaven* case statutes had cast upon the harbour authority, as the owner/operator of the port, specific *duties* in relation to *that particular*

*harbour*; and the operational land of that harbour included that particular beach. An Act of 1847 obliged the authority to maintain and support that harbour. An Act of 1878 obliged it to keep that harbour open to all for the shipping and unshipping of goods and the embarking and landing of passengers. Incidental to these obligations were statutory powers, including one in an instrument of 1991 to dredge the foreshore of that harbour. Were it to exercise its power to dredge the area of the foreshore to the east of the breakwater, the authority would destroy the Beach.

130 It is therefore no surprise to read within the joint judgment of Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC emphasis on the statutory duties cast upon the authority in relation to that particular harbour; no surprise that, in the opening paragraph they described the relevant point of principle as "the interrelationship of the statutory law relating to village greens and other *duties* imposed by statute" (emphasis added); and no surprise that, at the outset of the crucial paragraph (namely para 93, set out in para 48 above), in which they set out their reason for allowing the appeal on the relevant point, they stated: "The question of incompatibility is one of statutory construction."

131 What did Lord Neuberger PSC and Lord Hodge JSC mean by "statutory construction"? They meant conflict between two statutory regimes. They explained in the same paragraph that, where such conflict existed,

> "some assistance may be obtained from the rule that a general provision does not derogate from a special one . . . which is set out in . . . *Bennion, Statutory Interpretation*, 6th ed (2013), p 281: 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one.' "

In the next paragraph they proceeded to explain that the specific duties conferred by statutes on the authority in relation to that harbour were incompatible with the general provision in the 2006 Act which, on the face of it, permitted registration of the Beach as a green and that therefore the general provision had to give way.

132 By contrast, statutory provisions which confer power to acquire and hold land, not there identified, for educational and health purposes, such as are in play in the present appeals, cannot be said to be incompatible with the general provision in the 2006 Act which, on the face of it, permits registration of the respective parcels of land as greens.

133 No reason for the disapplication of section 15 of the 2006 Act is advanced other than the alleged effect of the decision in the *Newhaven* case. It is in the light of the above circumstances that I would have dismissed the appeals.

134 Let me, however, suppose that my understanding of the decision in the *Newhaven* case is flawed; and that, had I better understood it, its reasoning would extend to the facts in these appeals.

135 Even in those circumstances the majority falls, so I venture to suggest, into error.

136 In *R v Inhabitants of Leake* (1833) 5 B & Ad 469 the issue was whether villagers in the Fenlands were obliged to repair a road. If it had been

dedicated as a public highway, they were obliged to do so. The land on which the road had been constructed was owned by commissioners who had bought it pursuant to statutory powers to drain specified fens and to keep them drained. They had constructed drains on it and, with the excavated earth, had built a wide bank which the villagers had used as a highway for more than 20 years. In the Court of King's Bench the villagers contended that any dedication by the commissioners of the road as a public highway would have been inconsistent with their powers. On behalf of the majority Parke J, later Lord Wensleydale, made clear that the contention should be addressed by means of a practical inquiry on the ground. He said at p 480: "The question then is reduced to this, whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?" The answer was "No".

**137** The *Leake* case demonstrates that for almost 200 years the law of England and Wales in relation to the capacity of a public authority to dedicate its land as a public highway, or indeed as a public footpath, has been to assess its alleged incompatibility with the statutory purposes for which the land is held on a practical, rather than a theoretical, basis.

**138** Such is made clear in the opinions of the appellate committee of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126. A railway company was authorised by statute to buy land in Kendal for the purposes of operating a railway and to build bridges across it where necessary. On one of its bridges it built a footpath, which the public had used for more than 20 years. The question was whether, in the light of the limited statutory purposes for which it could hold land, the company could have dedicated the footpath as a public highway. Applying the *Leake* case, the appellate committee held that the answer was to be found by determining whether the use of the footpath by the public was incompatible with the statutory purposes; that incompatibility was a question of fact (p 143); that the test was pragmatic (p 152); that the question was not whether it was conceivable but whether it was reasonably foreseeable that the public use of the footpath would interfere with the company's use of its land in the exercise of its powers for the statutory purposes (p 144); that the burden lay on the company to establish that it was reasonably foreseeable (p 166); and that, by reference to the case stated by the local justices, the company failed to discharge that burden.

**139** In para 78 of their judgment in the *Newhaven* case [2015] AC 1547, Lord Neuberger PSC and Lord Hodge JSC explained the decision in the *Westmorland* case. In paras 77 and 91 they stressed that, like other decisions which they examined and which related to the acquisition of prescriptive rights under English and Scots law, the decision applied only by analogy to the statutory registration of a green on land owned pursuant to statutory purposes.

**140** Nevertheless, in a case in which the objection to registration as a green is cast as incompatibility with statutory purposes, there is in my view every reason to assess incompatibility in accordance with the approach adopted in the *Leake* case and indorsed in the *Westmorland* case.

**141** I am convinced that in the *Newhaven* case such was also the view of Lord Neuberger PSC and Lord Hodge JSC, and indeed of Baroness Hale of Richmond DPSC and Lord Sumption JSC who agreed with them. I refer to four passages in the joint judgment.

A **142** First, from para 91:

"It is . . . significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes *and continued to carry out those purposes*, where the user founded on would be incompatible with
B those purposes." (Emphasis added.)

**143** Second, from the crucial para 93:

"Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the *continuing use* of the land for
C those statutory purposes." (Emphasis added.)

**144** Third, the whole of para 96:

"In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to [the authority's] plans for the future of the Harbour in order to ascertain whether there is an incompatibility
D between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict [the authority's] ability to alter the existing breakwater. All this is apparent without the leading of further evidence."
E

**145** And fourth, from para 101:

"The ownership of land by a public body . . . which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the
F Beach held the Harbour land for the statutory harbour purposes and *as part of a working harbour*." (Emphasis added.)

**146** It thus seems clear from the *Newhaven* case that registration of the beach as a green was there precluded as incompatible with the existing use of the land as a working harbour; and that, in the absence of existing use of the land, the public authority needs to adduce evidence. What evidence?
G Evidence which makes it reasonably foreseeable that public use of the land as a green would in practice interfere with a proposed exercise of the authority's powers in relation to the land for the statutory purposes.

**147** It follows that I respectfully disagree with the suggestion in paras 65 and 66 of the judgment of Lord Carnwath and Lord Sales JJSC that incompatibility with statutory purposes should be assessed as a theoretical exercise rather than by means of a practical inquiry into interference with
H the authority's existing or proposed future use of the land.

**148** Adopting what I believe to be the correct, practical, approach to the assessment of incompatibility in relation to the present appeals, I agree with the Court of Appeal [2018] P & CR 15 that neither the education authority nor the health authority has established that public use of its land as a

registered green would be likely to be incompatible with its use of it pursuant to its statutory powers. In the Lancashire case the inspector conducted the requisite practical assessment, which led her to reject the alleged incompatibility; and, like the Court of Appeal, Ouseley J in the Administrative Court [2016] EWHC 1238 (Admin) found no fault with her reasoning. I discern no ground upon which this court might have concluded otherwise. In the Surrey case the inspector, while recommending refusal of the application for a different reason later shown to be invalid, also rejected the alleged incompatibility on apparently practical grounds; and the error of law which Gilbart J in the Administrative Court [2016] 4 WLR 130 perceived him to have made in assessing it practically rather than as a matter of statutory construction was in my view correctly held by the Court of Appeal to have been no error at all.

**149** It was with complete passivity that, for no less than 20 years, these two public authorities contemplated the recreational use of their land on the part of the public. Their simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: *Winterburn v Bennett* [2017] 1 WLR 646. In such circumstances it is hardly surprising that they both failed to establish its practical incompatibility with their own proposed use of it.

*Appeals allowed.*

SUSANNE ROOK, Barrister

# Appendix 10.13

# *Easteye Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2066 (Ch)

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.

The legal bases of the Defendants' public law claims.

16. I shall deal with the law in outline at this stage to identify what has to be proved. I will look at the law in greater detail when considering the parties' respective submissions. A similar approach is adopted in relation to the private law claims.

17. The Defendants' case is that the public is entitled to a pedestrian right of way over White Hart Yard and Ship's Entry either as a result of an implied dedication at common law or by operation of s.31 of the Highways Act 1980.

18. It is common ground that in order to establish the existence of a public right of way the Defendants must prove dedication and acceptance by the public, usually by user. To make out the common law claim the Defendants must persuade the court to infer that a qualifying use of the way by the public continued for a period sufficiently long to support a conclusion that the owner dedicated and intended to dedicate a public right over the land. In order to do so the following must be proved;

a. the public had use of the way uninterruptedly;

b. the public used the way as of right, namely without force, secrecy or permission;

c. the public had used the way in such a manner that a reasonable landowner would appreciate that a public right was being asserted;

d. the public's use, even as of right, has been such as to support a finding of an actual intention to dedicate on the part of the landowner.

e. In relation to Ship's Entry, the landowner had capacity to dedicate; this arises in the case of Ship's Entry alone because it was owned by a charity until 1974 which, says the Claimant, is a bar to a finding of dedication.

It is for the Defendants to prove each of these conditions is met save for the existence of permission, where, at the very least, an evidential burden falls on the landowner Claimant in the face of evidence of long public user without interruption; see **Welford and others v Graham and Anor [2017] UKUT 0297 (TCC)** per Morgan J at [43]-[46] on this last point.

19. Statutory dedication arises under section 31 of the Highways Act 1980, subsections (1),(2), (3) and (8) of which provide:

"(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be

deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes".

19. It is apparent from the section that there is no need to prove dedication by the owner as this is deemed to have occurred if the conditions in the section are made out. The presumption can be defeated

on proof that there was no intention to dedicate, but the burden of so proving is upon whomever makes that assertion, usually the landowner. The person claiming the right does, however, have to establish actual enjoyment by the public as of right, i.e. without force, secrecy or permission, for a period of 20 years before the right is brought into question. The 20 year period must be continuous up to the time when the right is called into question; see **De Rothschild v Buckinghamshire County Council (1957) 8 P.&C.R. 317** where it was held that there could be no deemed dedication where albeit there was in excess of 20 years of qualifying user, such user had ceased 8 years before the right was called into question.

20. There is certain evidence which the court is required to consider when faced with a question as to dedication. Section 32 of the Act provides:

" A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

21. Section 31 of the 1980 Act is the statutory successor to section 1 of the Rights of Way Act 1932. That section is not identical to section 31 in that it adds that dedication will be deemed:

"unless during such period of twenty years there was not at any time any such person in possession of such land capable of dedicating such way."

The 1932 Act has been held to affect the substantive law and thus operate retrospectively; see **Fairey v Southampton County Council [1956] 2 Q.B. 439**. Thus, the court can look at any period of 20 years prior to the calling into question of the right. It is not restricted to a period following the commencement of the 1932 Act.

The legal bases of the Defendants' private law claims

22. By the end of the trial, the only disputed rights were those claimed by the First and Second Defendants as owners of 11 – 13 Grey Street to a right of way over the full length of Ship's Entry, or a right of fire escape towards the Cloth Market. The Defendants' case is that until 1991, 11-13 Grey Street and 10 Cloth Market, which includes Ship's Entry, were in common ownership, albeit that no. 11 was let to a third party which ran a restaurant, L'Aragosta, from those premises. In 1991 11-13 Grey Street was conveyed to Patrick Murphy and is alleged that at the time of the conveyance Ship's Entry was used as a way between Grey's Court and the Cloth Market for the benefit of numbers 11 and 13 Grey Street. The Defendants argue that this usage amounted to a quasi-easement which passed to the title owner of 11 and/or 13 Grey Street by the general words implied into conveyances by section 62 of the Law of Property Act 1925 and such rights also passed to number 13 under the rule in **Wheeldon v Burrows (1879) L.R. 12 Ch D 31**. They originally contended that this rule operated in favour of number 11 but now accept that it does not in the light of **Kent v Kavanagh [2007] Ch 1**.

23. Section 62 of the Law of Property Act 1925 provides that save where a contrary intention is shown, every conveyance of land passes all "*easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of the conveyance…enjoyed with …the land or any part thereof."* Save, possibly, in the case of rights to light, the section only operates where there was either diversity of occupation of the dominant and servient tenements, see **Sovmots Investments Ltd v Secretary of State for the Environment [1979] AC 144**, or the right was continuous and apparent;

see **Wood v Waddington [2015] 2 P.&C.R. 11**. Continuous and apparent, in the case of a right of way, means that it shows its presence, such as a made up road or worn track or its use is obvious in connection with the land conveyed; see **Boorman v Griffith [1930] 1 Ch 493** and **Hansford v Jago [1921] Ch 322**. Of its nature, a right of way is not used continuously, i.e. in an unbroken way, but from time to time, but this does not prevent a way from being regarded as continuous and apparent. The word "continuous" is all but superfluous in the case of a right of way; see **Wood v Waddington (above)** per Lewison L.J. at [15]. There must, nevertheless, be evidence of sufficient use prior to the conveyance to justify a finding that there were rights, privileges or advantages enjoyed with the land, which are to be implied into the conveyance; see **Alford v Hannaford & another [2011] EWCA 1099** per Patten LJ at [34]-[35].

24. For the rule in Wheeldon v Burrows to operate, not only must the quasi-easement be continuous and apparent, but it must be necessary for the reasonable enjoyment of the land granted and had been, and was at the time of the grant, used by the grantor for the benefit of the part granted.

The evidence

25. Although there is inevitably some crossover between the claims concerning the two ways in that the evidence came, in part, from the same witnesses, it is convenient, save in relation to the uncontentious history and certain common classes of documents, to deal with the evidence in relation to each separately.

Uncontentious History

26. By 1788 the lower part of the dene, which carried the Lort Burn to the River Tyne, had been culverted and filled in to form what is now Dean Street and Mosley Street. In the early 19th century the northern part of the dene was filled and in 1808 the corporation constructed the New Butcher Market on the reclaimed land. It was following the construction of this market that what had been the Flesh Market was renamed the Cloth Market. A map of 1830 shows an L-shaped passage to the south of the New Butcher Market of which it was said *"A passage for carts into the west side of the new flesh market has just been opened* (i.e. The New Butcher Market), *with a view of disencumbering Mosley Street from the long rows of potatoe (sic) carts which stood there on market days."*[3] This passage runs east to west along the north side of 10 Cloth Market, plot 244 on the map, which is the land of which Ship's Entry forms part, and turns north to run along the eastern boundary of plot 243 which includes White Hart Yard. It is common ground that this is the genesis of Grey's Court.

27. The butchers did not remain long in the new market for in 1835 Richard Grainger, the builder and developer who redeveloped much of the centre of Newcastle in a style dubbed "Tyneside Classical", built the Grainger

Market on Grainger Street to which they moved. He purchased the New Butcher Market and the surrounding land upon which he created Grey Street (originally Upper Dean Street). The building of the new street did not affect White Hart Yard but it did result in the removal of the northeast end of 10 Cloth Market upon which was built 11-13 Grey Street.

Passage from Ship's Entry into Grey's Court was achieved by the construction of the Dog's Leg. The pre-1835 plans are unclear as to whether, prior to this development, Ship's Entry provided a route from Cloth Market to the way leading to the New Butcher Market. A plan of 1830 appears to show a building obstructing the way whereas an 1833

[3] A descriptive and historical account of the Town and County of Newcastle upon Tyne p. 176/7 (E Mackenzie 1827)

plan shows it to be open. Since 1835, the footprint of 10 Cloth Market has remained unchanged although the western end was rebuilt in 1898.

Classes of documents common to both White Hart Yard and Ship's Entry

Highways Records

28. Neither White Hart Yard nor Ship's Entry is recorded in the Highway Authority's records as highways maintainable at public expense. Neither did they appear in the proposed definitive map of public rights of way which the authority is obliged to prepare. To understand the evidence concerning these records it is necessary to look at the statutory context against which it is set.

29. Prior to 1835 all public highways were maintainable at public expense. This state of affairs was changed by section 23 of the Highways Act 1835

which required certain conditions to be met before liability to maintain could fall on the public; in essence the conditions were directed at ensuring that the road was built to a suitable standard and introduced a mechanism of notice and determination to ensure that it was. Footways were not caught by section 23 and remained repairable at public expense.

30. Section 84 of the Public Health Act 1925 required all urban authorities, within 6 months of the commencement of the Act, to cause to be prepared a list of the streets in the district repairable by the inhabitants at large; for this purpose street included footways as they are within the definition of 'street' in section 4 of the Public Health Act 1875, which is applied by section 1 of the 1925 Act. Thus, if Ship's Entry or the pavement of White Hart Yard had become public footpaths by the passing of the 1925 Act they should have been on the section 84 list.

31. By virtue of section 47 of the National Parks and Access to the Countryside Act 1949, as from the date of commencement of the Act, 16th December 1949, all public footpaths became maintainable at public expense whether they were created before or after that date. Mr Laurence took, as an example, White Hart Yard. If the whole of the yard had become a public footpath before 16th December 1949, the footways would have been caught by section 23 of the Highways Act 1835 and the carriageway by section 47. As a whole they would have been maintainable at public expense and should have appeared on the list required by section 84 of the Public Health Act 1925.

32. Section 38 of the Highways Act 1959 and its successor, section 36 of the Highways Act 1980, require the council of an area to cause to be made, and keep corrected, a list of streets in their area which are highways which are maintainable at public expense. The list must include all streets

maintainable at public expense; “streets” includes all highways, footpaths and pedestrian routes, see section 48(1) of the New Roads and Street Works Act 1991 as applied by section 329(1) of the Highways Act 1980.

33. Under Part IV of the National Parks and Access to the Countryside Act 1949, there is a duty on councils to undertake a survey in their area of all lands over which a public right of way is alleged to subsist and prepare a definitive map and statement of footpaths and bridleways over which public rights of way exist. The map and statement have to be continuously reviewed and kept up to date. The survey and draft map were to be produced within 3 years of the commencement of the Act. The usual mechanism for the draft map to become definitive is the making of a successful application for a modification order to add a new path, but that is not the only way. By section 53(2) of the 1949 Act a council is under a duty to consider making a modification order if it becomes aware of evidence which satisfies it that a public path subsists or is reasonably alleged to subsist.

34. The County Borough of Newcastle , as it then was, did not fulfil the Part IV duty. In 1976 the Department of Environment excluded the centre of Newcastle from the requirement to produce a definitive map. That exclusion was removed by section 55 of the Wildlife and Countryside Act 1981. The Act also provides for anyone to apply to the council for a Definitive Map Modification Order if they believe the map is incorrect.

35. There was evidence from Simon Carey, a Public Rights of Way Officer with Newcastle City Council. He told me that the Council have prepared a map and statement of the areas previously excluded. It was approved by the Council on 15th January 2019 and was awaiting the making of the first modification order to become definitive; this was expected to happen in

the next 4 to 8 weeks. Neither White Hart Yard nor Ship's Entry are on the approved version of the map and no-one has, up to the date of trial, asked the Council for either to be included. Mr Carey was unable to say why the map had taken so long to produce as he has only been in post for the last 9 years.

36. Susan Millard works in the Place Directorate of the Council. She has been responsible for maintaining the list of highways which the council are obliged to keep under the Highways Act 1980. The maintained highways, both carriageways and footpaths, are marked on plans which she produced. Neither White Hart Yard nor Ship's Entry is shown as publicly maintained in these records. She has looked for, but been unable to find, the section 84 list. The earliest records she has been able to produce are those marked on a 1951 edition of the Ordnance Survey map.

37. White Hart Yard and Ship's Entry are not included in the non -statutory records kept by the council, in essence its highway inspection and maintenance records. The inspection records show that there were walked inspections of the former in 2009, 2015 and 2016. Pamela Holmes, a principal engineer in the Newcastle City Council's Highway Department told me it was treated as subject to the inspection regime in error. This came to light in 2012 when the council aligned their Local Land and Property Gazetteer, which is a database of property and land within the council's area, with the National Street Gazetteer, which is a dataset of streets requiring, amongst other things, highway maintenance. It was then realised that there were a number of streets which should not have been included in the latter, one of which was White Hart Yard. In consequence, it was marked as *"closed"* which meant it was treated as a private road and not maintainable at public expense.

38. None of the Council's witnesses were challenged as to either the truth or accuracy of their evidence and I accept what they say.

The statutory notice concerning electrical works

39. In November 1882, the London Gazette carried a notice of an application by the Mayor and Aldermen of Newcastle to the Board of Trade to enable the Corporation to, among other acts, break up streets in Newcastle in order to distribute electricity. White Hart Yard and Ship's Entry were listed as private streets not maintainable at public expense.

The Finance Act 1910 Documents

40. I was referred to Field Book entries prepared under the Finance Act 1910. The Act sought to place a value on all land as of 1909 with a view to levying a tax at the time of sale on any increase in value. Mr Carr, the Claimant's highways expert, described how as part of the assessment it was possible to claim deductions for matters which may have an effect on the value of the property, including the existence of a public right of way. In the event the tax was never levied.

41. The process of collecting the information for the Field Books was described in *Land and Society in Edwardian Britain (1997) by Brian Short* at Chapter 4, a copy of which was provided in the bundle. A Form of Return was provided to land owners, usually personally by the Land Valuation Officer. The form required extensive details about the property, including as to the existence of any public rights of way over the land. The owner was compelled to complete and return the form on pain of a fine if they failed. Information from the owner's return was transcribed into the Officer's Field Book. This was subject to checking by Temporary Valuation Assistants who had power to inspect the land. The

valuations placed on the properties were made following inspection. Thus, the information in the Field Book comprised that provided by the owner and the Valuation Assistant. This matches the evidence of Mr Carr to the effect that the information in the Field Book was a composite of the work of surveyors, valuers working for the Inland Revenue and the landowner.

42. The 1910 Field Book entry for White Hart Yard, which is plot 540 in the reference plan, is headed *"12 to 16 Cloth Market, White Hart Hotel"*, but it also lists *"public house, shops, offices and warehouses"*; it clearly include the whole yard. The owner is stated as John Fitzgerald, the occupier, Mr Twibell. Under *"Charges, Easements and Restrictions affecting value in Fee Simple"* there is a blank. In that part of the form which deals with reduction in value due to the presence of a public right of way there is also a blank.

43. In the Field Book for Ship's Entry the heading dealing with public rights of way is left blank but there was a deduction shown for easements.

<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.

Evidence as to modern user of Ship's Entry

127. I have summarised the key lay witnesses evidence and documents for

Ship's Entry in Appendix C. The land of which Ship's Entry forms part was part of a block including 10 Cloth Market and 11-13 Grey Street which had been in the ownership of the trustees of the Thomas Moulton Charity from 1772. On 27th August 1974 the trustees sold their land to Sir John Fitzgerald Limited, which in turn sold the land to 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</u> <u>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

The presence of unlocked gates

323. The authorities relied upon by Mr Pryor establish that what would otherwise be an interference with a public highway if it post-dated dedication is not a bar to the dedication of a highway with such a feature already in existence. **Herrick v Kidner (above)** casts no doubt upon the soundness of this proposition. That was a case of an existing highway where even quite minor interference is impermissible as the public are entitled to use the highway to its fullest extent.

324. What inference one is to draw from unlocked gates in any case is fact sensitive. As a general proposition, however, I regard closed, albeit unlocked, gates in a city centre location as an indication that what lies beyond is private property. The inference is even stronger if the landowner takes it upon themselves to keep the gates open some times and close them at others. In this case, anyone facing the formidable gates at the Cloth Market entrance to White Hart Yard, or the gates which worked in tandem with the high level grille, when closed, would undoubtedly conclude that the yard was shut and they were not to enter. The same goes for the gates at the two ends of Ship's Entry. The suggestion that these gates may have been in place to exclude stray dogs as opposed to people is fanciful.

The private right of way claim

325. There are 3 ways in which the transfer to Mr Murphy, whilst silent as a right of way over Ship's Entry, could have transferred such a right, under section 62 of the Law of Property Act 1925, the rule in Wheeldon v Burrows or by implication based on the common intention of the parties. The first two methods look backwards for uses which amount to quasi-easements. The third method is forward-looking, being concerned as to the contemplated use of the transferred property.

326. I set out the relevant principles for the application of section 62 of the Law of Property Act 1925 and the rule in Wheeldon v Burrows at paragraphs 23 and 24, above. In **Nickerson v Barrowclough [1981] Ch 426** Eveleigh LJ said, at 446:

"Section 62 is a conveyancing section; it passes only that which actually exists already, be it, for example, a right of easement, or be it an advantage actually enjoyed. In some cases that which is enjoyed is enjoyed by the

exercise of the general right of ownership, and may become a particular legal right of some kind in the purchaser. None the less, the section envisages something which exists and is seen to be enjoyed either as a specific right in itself, or as an advantage in fact."

In **Wheeldon v Burrows [1879] L.R. 12 Ch. D. 3**, Thesiger LJ said at p.49:

"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant…

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant."

The common feature of implication by section 62 and Wheeldon v Burrows is that the enjoyment of the benefit over the servient land, or quasi- easement, has to have existed at the time of conveyance and for such an easement to exist it must have been used.

327. **Wood v Waddington [2015] 2 P.& C.R. 11** was a case in which modest use was proved but an issue arose as to whether it was sufficient for

the purposes of section 62. Relying upon **Nickerson** (above), Lewison LJ said, at 52/53

"52. Where there has been no use at all within a reasonable period preceding the date of the conveyance (whether or not there had been use outside that period) it is clear that s.62 cannot operate to create an easement: I do not accept Mr Karas' submission to the contrary…

53. But on the judge's findings of fact the claimed route from point D to Old Dinton Road had been used once a month in the period immediately preceding the transfers. On the face of it that is both apparent use and a regular pattern of use."

328. In **Sovmots Investments Ltd v Secretary of State for the Environment [1979] A.C. 144** Lord Wilberforce said of Wheeldon v Burrows, at 169:

" for the rule to apply there must be actual, and apparent, use and enjoyment at the time of the grant."

This statement, though obiter in the context of the decision in **Sovmots** has been held to be authoritative and one which ought to be followed: see per Roch LJ in **Payne v Inwood [1997] 74 P&CR 42** at 47. It was acknowledged in **Payne** that the existence of the quasi-easement can be proved by evidence of user or a state of affairs which indicates its existence, see per Roch LJ at p.47.

329. In **Wood (above)** Lewison LJ considered what the court is looking for and during what period. He said, at 49:

"What, then, of the extent of use? In *Green v Ashco Horticulturalist Ltd [1966] 1 W.L.R. 889* at [898] Cross J said:

> "One ought not, I think, in a case like this to confine oneself to a single moment of time — when possibly there might have been no user at all. One ought to look at a reasonable period of time before the grant in question in order to see whether there was anything over that period which could be called a pattern of regular user in any particular way or ways."

50. In *Costagliola v English (1969) 210 E.G. 1425* Megarry J said that:

> "One must look at a reasonable period of time before the conveyance was made to see if there were any apparent or regular user."

51. Both these passages were approved by this court in Pretoria Warehousing Co Ltd v Shelton (Unreported 21 June 1993)"

330. I agree with the Claimant that it is not sufficient to prove that the way was reputed to be enjoyed with the servient land and that **Clarke v Barnes** does not have this effect. **Gale** must be correct in suggesting that Luxmoore J was not introducing a new test. Luxmoore J stated the correct test when quoting from the section. He said, at p.380, section 62 "*operates to grant to the purchaser…any privilege which was reputed to exist or which was in fact being enjoyed with the property conveyed at the time of conveyance."* He was clear that these are different tests. The reference *"to reputed to be enjoyed"* follows his recording that the track was not being used at the date of the

conveyance as the tenant had given up occupation by that time. He could not find that it was being enjoyed at the time of the conveyance, hence he found for the defendant on the basis of 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

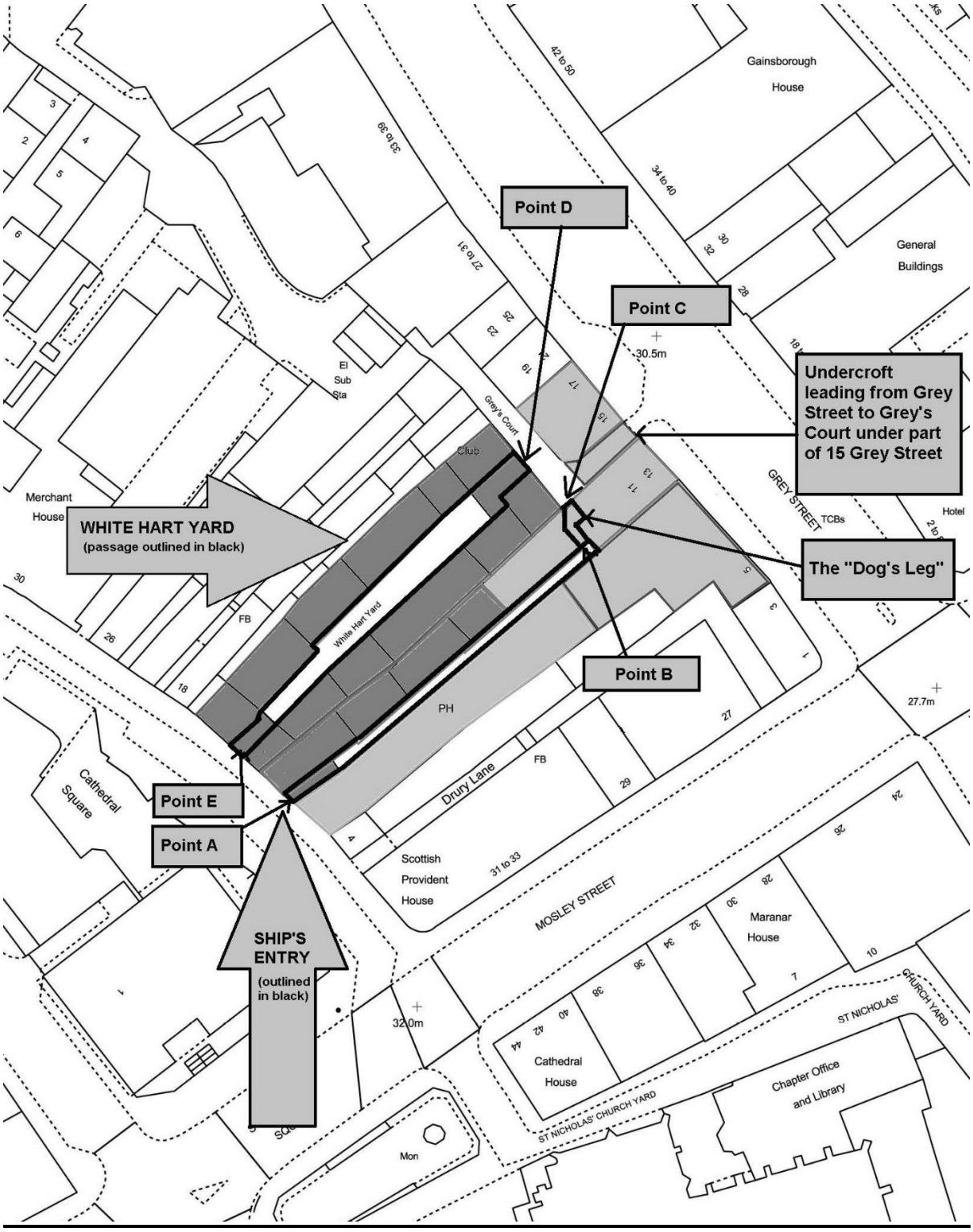
350. The date of calling into question in the modern era can be no later than 2002, based on my factual conclusions, so I look at the period back to 1982. What can be seen in that period is that although Bass, in the guise of Balmbra's, were abusing their access to the alley, the landowner was taking 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
30.5m
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
Grey's Court
Club
El Sub Sta
Merchant House
White Hart Yard
PH
FB
Drury Lane
Scottish Provident House
31 to 33
MOSLEY STREET
Maranar House
Cathedral Square
Cathedral House
ST NICHOLAS' CHURCH YARD
Chapter Office and Library
GREY STREET
TCBs
Hotel
27.7m
32.0m
Mon

# 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."*

## APPENDIX D
## INDEX TO JUDGMENT

19 44 **The evidence in relation to White Hart Yard**

| Page | Para | Heading | Sub-heading | Sub-subheading | Sub-subsubheading | Sub-subsub-subheading |
|---|---|---|---|---|---|---|
| | | | Ship's Entry | | | |

# Appendix 10.14

# *British Transport Commission v Westmoreland County Council* [1958] AC 126

A

# BRITISH TRANSPORT COMMISSION v. WESTMORLAND COUNTY COUNCIL.

# BRITISH TRANSPORT COMMISSION v. WORCESTERSHIRE COUNTY COUNCIL.

B

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), March 4, 5, 6, 11, May 14, 1957.]

*Highway—Dedication—Footpaths over and under railway—Presumption of dedication—Whether dedication incompatible with objects of statutory corporation—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.

C

A bridge over a railway and a bridge under a railway were constructed by statutory railway undertakers at about the time of the construction of the railways. The bridges afforded accommodation crossings over and under the railways and were constructed under statutory obligation for the convenience of the owners and occupiers whose lands were severed by the

D

railways, but there were no public or private rights of way at the crossings when they were constructed. Subsequently, members of the public so used the crossings and paths leading thereto and therefrom as to justify the inference of dedication of public rights of way if the railway undertakers and their successors in title had capacity to dedicate. The footpaths over and

E

under the railways by means of the bridges were marked on provisional maps by both the respondents pursuant to their obligations under the National Parks and Access to the Countryside Act, 1949. The appellants, who were the successors in title to the railway undertakers, sought declarations that no public rights of way existed over or under the bridges in question.

F

**Held:** the test whether a statutory corporation, such as the appellants, could validly dedicate to the public a right of way over their land was whether the dedication was compatible with the statutory purposes for which the corporation had acquired the land; the question of incompatibility was one of fact to be determined by a consideration of the probabilities reasonably foreseeable or of the likelihood whether the right of way would

G

interfere with the adequate fulfilment of the statutory purposes, and, in the present cases, the dedication of the rights of way was not incompatible with the appellants' statutory purposes.

*R.* v. *Inhabitants of Leake* ((1833), 5 B. & Ad. 469) and *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* ([1926] A.C. 355) applied.

*Ayr Harbour Trustees* v. *Oswald* ((1883), 8 App. Cas. 623) and *Paterson* v.

H

*St. Andrews Provost* ((1881), 6 App. Cas. 833) distinguished.

Dictum of SIR GEORGE JESSEL, M.R., in *Mulliner* v. *Midland Ry. Co.* ((1879), 11 Ch.D. at p. 623) disapproved (see, particularly, p. 365, letter F, post).

**Semble:** the question whether the grant of a right of way was in fact incompatible with a corporation's statutory purposes should be determined at the date when it is before the tribunal of fact (see p. 361, letter H,

I

to p. 362, letter C, p. 365, letter A, p. 369, letter H, and p. 372, letter A, post).

Decision of the COURT OF APPEAL ([1956] 2 All E.R. 129) affirmed.

[ As to capacity of statutory corporations to dedicate the surface land vested in them for use as a highway, see 16 HALSBURY'S STATUTES (2nd Edn.) 222, para. 268; and for cases on the subject, see 26 DIGEST 290-292, *225-243*.

For the Railways Clauses Consolidation Act, 1845, s. 16, see 19 HALSBURY'S STATUTES (2nd Edn.) 603.]

Cases referred to:

(1) *R.* v. *Leake (Inhabitants)*, (1833), 5 B. & Ad. 469 (110 E.R. 863); 2 Nev. & M.K.B. 583; 26 Digest 290, *225.*

(2) *Ayr Harbour Trustees* v. *Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, *5.*

(3) *Grand Junction Canal Co.* v. *Petty*, (1888), 21 Q.B.D. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 26 Digest 290, *226.*

(4) *Foster* v. *London, Chatham & Dover Ry. Co.*, [1895] 1 Q.B. 711; 64 L.J.Q.B. 65; 71 L.T. 855; 11 Digest (Repl.) 123, *151.*

(5) *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 11 Digest (Repl.) 139, *210.*

(6) *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council*, (1905), 93 L.T. 126; 69 J.P. 351; 26 Digest 291, *228.*

(7) *South Eastern Ry. Co.* v. *Cooper*, [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 19 Digest 108, *687.*

(8) *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.*, [1926] A.C. 355; 95 L.J.Ch. 587; 134 L.T. 673; 90 J.P. 77; Digest Supp.

(9) *Mulliner* v. *Midland Ry. Co.*, (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 11 Digest (Repl.) 122, *145.*

(10) *Paterson* v. *St. Andrews Provost*, (1881), 6 App. Cas. 833; 26 Digest 292, *241.*

(11) *R.* v. *Wycombe Ry. Co.*, (1867), L.R. 2 Q.B. 310; 36 L.J.Q.B. 121; 15 L.T. 610; 31 J.P. 197; 11 Digest (Repl.) 112, *73.*

(12) *Pugh* v. *Golden Valley Ry. Co.*, (1880), 15 Ch.D. 330; 49 L.J.Ch. 721; 42 L.T. 863; 30 Digest (Repl.) 218, *607.*

(13) *Emsley* v. *North Eastern Ry. Co.*, [1896] 1 Ch. 418; 65 L.J.Ch. 385; 74 L.T. 113; 60 J.P. 182; 11 Digest (Repl.) 146, *252.*

(14) *Great Western Ry. Co.* v. *Solihull Rural District Council*, (1902), 86 L.T. 852; 66 J.P. 772; 26 Digest 290, *227.*

(15) *Great Western Ry. Co.* v. *Talbot*, [1902] 2 Ch. 759; 71 L.J.Ch. 835; 87 L.T. 405; 19 Digest 111, *714.*

(16) *South Eastern Ry. Co.* v. *Warr*, (1923), 21 L.G.R. 669; 26 Digest 291, *232.*

(17) *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council, A.-G.* v. *Great Central Ry. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 26 Digest 292, *240.*

(18) *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 19 Digest 26, *112.*

(19) *Midland Ry. Co.* v. *Gribble*, [1895] 2 Ch. 827; 64 L.J.Ch. 826; 73 L.T. 270; 19 Digest 81, *490.*

(20) *A.-G.* v. *London & South Western Ry. Co.*, (1905), 69 J.P. 110; 26 Digest 292, *239.*

(21) *Caledonian Ry. Co.* v. *Turcan*, [1898] A.C. 256; 25 R. (Ct. of Sess.) 7; 35 Sc. L.R. 404; 11 Digest (Repl.) 195, *489.*

(22) *Edinburgh Magistrates* v. *N.B. Ry. Co.*, (1904), 6 F. (Ct. of Sess.) 620; 41 Sc. L.R. 492; 12 S.L.T. 20; 26 Digest 281, *177r.*

**Appeals.**

Consolidated appeals by the British Transport Commission from orders of the Court of Appeal (SINGLETON, JENKINS and HODSON, L.JJ.), dated Mar. 22, 1956, and reported [1956] 2 All E.R. 129, affirming orders of the Queen's Bench Divisional Court (LORD GODDARD, C.J., STABLE and ASHWORTH, JJ.), dated Jan. 23, 1956, and reported [1956] 1 All E.R. 321, on Cases Stated by justices for the County of Westmorland and justices for the County of Worcester, respectively. The facts in *British Transport Commission* v. *Westmorland County*

*Council* are set out in the opinion of VISCOUNT SIMONDS, p. 356, letter A, to p. 357, letter C, post. The facts in *British Transport Commission* v. *Worcestershire County Council* are set out in the report of the Divisional Court (see [1956] 1 All E.R. at pp. 323, 324).

*Sir Andrew Clark, Q.C., Sir Frank Soskice, Q.C.*, and *J. P. Widgery* for the appellants.

*Michael Rowe, Q.C., Harold Williams, Q.C.*, and *E. S. Temple* for the respondents.

The House took time for consideration.

May 14. The following opinions were read.

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

The appeal in the *Westmorland* case is brought from an order of the Court of Appeal whereby that court unanimously dismissed an appeal from a decision of the Divisional Court of the Queen's Bench Division which had been given on a Case Stated by Quarter Sessions of the Peace for the County of Westmorland. The Case Stated was consequent on an order of sessions dismissing an application by the appellants for a declaration that no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the appellants in the Borough of Kendal in the same county.

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

Pursuant to their obligations under this Act, the respondents, the Westmorland County Council, prepared a provisional map of the Borough of Kendal and showed on it a footpath numbered 29 which crossed certain lines of railway owned and occupied by the appellants by means of an overbridge, which I will presently describe. The relevant date for the purpose of the Act was Aug. 1, 1952. On Nov. 12, 1954, the appellants applied to the justices of the County of Westmorland

* By ibid., s. [illegible].

† By ibid., s. 30.

‡ See ibid., s. 31 (1) (a), (3).

sitting as an Appeal Committee of Quarter Sessions for the county for a declaration that on Nov. 1 no public right of way existed over the overbridge. This application was heard on Apr. 5, 1955, and was refused, and in due course a Case was, pursuant to the Act, stated for the opinion of the High Court.

It is necessary that I should recite the facts precisely as they are found in the Case Stated. After reference to the application, the Case proceeded as follows:

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

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

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

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

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

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

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

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

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

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

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

By way of amplification of the facts as stated it should be added that the Kendal and Windermere Railway Act, 1845, incorporated (inter alia) the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. B Section 68 of the latter Act required the railway company to make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway (inter alia) so many bridges over the railway as might be necessary for the purpose of making good any interruptions caused by the railway to the lands through which it was made. The bridge over which the footpath numbered 29 runs (which has been called "the overbridge") was con- C structed pursuant to this section.

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

E These being the facts the contentions of the parties may now be stated. It was contended by the appellants that the dedication of a public right of way over the said bridge would be incompatible with the purposes of their railway undertaking in that: (A) It would commit the appellants in perpetuity to all such expense in the maintenance of the said bridge as might from time to time be necessary which expense could be avoided if the same were demolished. (B) It F would fetter the appellants' powers to expand their said railway undertaking by the construction of additional lines of rails if and when they might require to do so. (C) It would deprive the appellants of their statutory powers to discontinue the said bridge and crossing pursuant to s. 16 of the Railways Clauses Consolidation Act, 1845.

G It was contended by the respondents that—(A) there having been user of the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place; (B) the user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution H of the purposes for which the bridge and adjoining railway land is and was vested in the appellants and their predecessors; (C) the dedication of a public right of way over the bridge would only be incompatible with the execution of the functions of the appellants and their predecessors if it were to involve the appellants in a material increase in expenditure and, on the facts, the appellants would not be involved in any increase in expenditure whatever; (D) section 16 of the I Railways Clauses Consolidation Act, 1845, did not have the effect contended for it by the appellants; otherwise its effect would be that railway undertakers as a matter of law could in no circumstances dedicate a right of way across any part of their railway; this proposition was not supported in any decided case.

On these facts and contentions the justices were of opinion that there had been dedication, and accordingly refused to make the declaration sought by the appellants. The question they submitted for the opinion of the High Court was "whether on the facts aforesaid a dedication of the alleged public right of way

was incompatible with the statutory objects of the appellants." As I have already said, the Divisional Court and Court of Appeal in turn dismissed the appellants' appeal. In effect, both courts answered the question submitted to them in the negative.

I must for a moment recur to the appellants' contentions as they appear in the Case Stated. Contention (A) is no longer advanced as a separate contention. Contentions (B) and (C) may fairly be said to be directed to the general question submitted by the justices, but learned counsel for the appellants found it convenient to argue the case on the alternative pleas: (A) that the dedication of public rights of way in the circumstances of the case would amount to a repeal of the appellants' statutory power to discontinue the bridge in certain events and would thus be ultra vires; and (B) that such dedication would have been incompatible with the public or statutory purposes for which the appellants and their predecessors held their lands. It is, however, clear that the two pleas interlock: for one aspect of incompatibility might consist in such a surrender of power as to debar the performance of the statutory purpose. I propose, therefore, to examine the case on the footing that the real question is that which was submitted by the justices, not, however, closing my mind to the aspect of the question to which I have just referred. Before I refer to the authorities, which are numerous, it is, perhaps, desirable to state that, in my opinion, they are by no means irreconcilable, as has been suggested, but that the single difficulty is to ascertain from them what is the test of incompatibility which is to guide the court in determining whether an act proposed to be done by a railway or other statutory company is incompatible with the statutory purpose for which it was authorised to acquire and acquired its land.

Any examination of this question must begin with *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469), which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of PARKE, J., in that case (ibid., at p. 478):

> " If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

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

This, at least, is the view which has been consistently taken for over one hundred years, and I do not doubt that any departure from it would be fraught with most serious consequences to assumedly well-established public rights. Amongst the cases to which reference might be made, some have a particular value because they were later in date than *Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623), on which the appellants strongly relied, and were decided in the light of that binding decision. I may mention such cases as *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273); *Foster* v. *London,*

A *Chatham & Dover Ry. Co.* (4) ([1895] 1 Q.B. 711); *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439); *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126); *South Eastern Ry. Co.* v. *Cooper* (7) ([1924] 1 Ch. 211); *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355). If, in *Mulliner* v. *Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611), there are to be found observations by SIR GEORGE JESSEL,
B M.R., which do not conform with this long line of authority, they cannot be given the weight which is usually accorded to the decisions of that very learned judge. They have, in fact, been the subject of judicial criticism and explanation: see, e.g., *Gonty's* case (5) and *Petty's* case (3).

It was, however, on the *Ayr* case (2) that counsel for the appellants mainly relied, suggesting, if I understood the argument, that a proper under-
C standing of that case must lead to a decision in his favour. I think, on the contrary, that this contention is based on a radical misunderstanding of it. For it appears to me that in the *Ayr* case (2) it was plain that the proposed agreement by the statutory body, which had acquired land for a particular purpose, that they would not use it so as to interfere with the access from other property of the vendor to the sea, was regarded as incompatible with the statutory purpose.
D It was, in fact, an example of incompatibility, not a decision to the effect that incompatibility does not supply a test. This was clearly the view of LORD SUMNER in the *Birkdale* case (8). Similar observations may be made on *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833), which gives equally little support to the appellants.

If I am right in saying that the principle of *Leake's* case (1) must be applied
E here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appel-
F lants directed his attack. He urged that there could only be compatibility if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant
G facts.

My Lords, I am satisfied that this argument is misconceived. In the first place in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. PARKE, J.'s use of the word " never " in *Leake's* case (1) was clearly not intended to have so dramatic an effect. But, in the second place, to
H give to incompatibility such an extended meaning is, in effect, to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be
I given to a jury. But after all we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. And it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired. At an earlier stage of this opinion I set out at length

the facts found by the justices in order that it might be seen how far they had correctly directed themselves in reaching their conclusion that there had been a dedication of the way in question. In para. 2 (H), (I), (J) and (K) of the stated Case they find the facts as they are now and as they are in their view likely to be. I do not think that there is any sin of commission or omission to be found in them, or that it can be said that, on the basis that I have attempted to lay down, they were not well entitled to reach their conclusion.

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

My Lords, I come now to that part of the argument for the appellants, which, though it is comprehended in the broad question of incompatibility, was treated as an independent plea. It was to the effect that, in the circumstances of the present case, the dedication of a right of way over the overbridge in question would amount to a repeal of the appellants' statutory power to discontinue the bridge, and would thus be ultra vires. This plea looks back to s. 16 of the Railways Clauses Consolidation Act, 1845, to which I have already referred, and it is stated in a way which gives it a superficial attraction. But it is not accurate to say that, if a statutory body puts it out of its power to act in an authorised manner in a particular case, that amounts to a repeal pro tanto of the Act of Parliament. This appears to me to be involved in the larger conclusion that I have already reached that land acquired for a particular statutory purpose may yet be used for another purpose which is not incompatible with it. The argument here, too, could be that user for another purpose precludes user for the statutory purpose and, therefore, pro tanto amounts to a repeal of the Act. But such an argument is rejected because the statutory purpose is not defeated so long as the secondary user is compatible with it. A fortiori, where the question is not of the main purpose of the undertaking but of the exercise of a power under s. 16, the question is whether its non-exercise, or such an act as will preclude its exercise, is consistent with the statutory purpose for which the land was acquired. The answer must be precisely that which has already been given. It is consistent: it is not incompatible. The single new fact which might in some other case be of importance is that the continued existence of a bridge, which the appellants would in other circumstances demolish, might involve them in certain costs of maintenance. But in the present case it was disclaimed as a separate ground of incompatibility, and I have been unable to discern its relevance in any other way. Nor do I think it necessary to consider what may be the respective obligations of the appellants and the local authority in the event of the bridge being no longer required as an accommodation work but being still necessary to support the public way. This is a question which has not arisen and may never arise.

Reference was made in the course of the argument before the House to s. 1 of the Rights of Way Act, 1932, sub-s. (7) of which provides:

> " Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate any such way where such way would be incompatible with such public or statutory purposes."

A I agree with SINGLETON, L.J., and HODSON, L.J., that the sub-section does not help the appellants but, on the contrary, by preserving the existing law and recognising that incompatibility of a public way with statutory purposes is the test, confirms the view that the principle of *Leake's* case (1) prevails.

For these reasons, which shortly adopt the judgments of the Divisional Court and the Court of Appeal, I am of opinion that both appeals should be dismissed.

B I cannot conclude without saying how much I have owed in preparing this opinion to the careful and exhaustive judgment of the late SINGLETON, L.J.

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

C The bridge over which the alleged public right of footway runs was constructed by the predecessor in title of the appellants solely as a private accommodation crossing for the benefit of the owners or occupiers of lands severed by the construction of the Kendal and Windermere railway. Since the construction of that railway members of the public have used the bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a

D public footpath if the owner of the bridge were capable of such dedication. See finding (E) in para. 2 of the Case Stated.

Counsel for the appellants submitted that neither the appellants nor the railway company which was their predecessor in title, were capable of such dedication. His reasons were (i) that a dedication of a public right of way over the bridge would prevent the undertakers from exercising at any time a statutory power,

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

My Lords, in my opinion, the only rule applicable to the present case is that

F a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469), and has been recognised by this House in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355).

G It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Counsel for the appellants submitted that the question should be

> " whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out

H to the best advantage the purposes of its special Act ";

counsel for the respondent council submitted that the question should be

> " whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of

I way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of counsel for the appellants' version, and I find several cases in which the court appears to have acted on the view that counsel for the respondents' version is the right one. As examples, I would mention *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273), and *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439).

I do not find this result surprising, for, if counsel for the appellants' version is correct, it would, I think, be impossible ever to presume dedication of a public right of way by a statutory railway company over any part of the land which it had acquired for the purposes of its Act. A right of way is a burden on the land. I cannot think that it would be possible for a tribunal of fact honestly to find that the existence of such a right could never at any time, and in any possible circumstances, hamper the undertaker; yet there are many cases in which a dedication of a public right of way has been presumed against a statutory railway company.

I, therefore, accept counsel for the respondents' submission, and turn to consider whether, on the facts found in the Case Stated, there is any likelihood that the existence of a public right of way over the bridge would interfere with the adequate and efficient discharge of the appellants' statutory duties.

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

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

Finally, the findings of fact (H), (I), (J) and (K) in para. 2 of the Case Stated make it clear that it is extremely unlikely that the appellants will ever find it necessary to discontinue the bridge for the purposes of their undertaking. I use the word " necessary " because it has been held that each one of the powers conferred by s. 16 of the Railways Clauses Consolidation Act, 1845, can be exercised only when it is necessary for making, maintaining, altering or repairing and using the railway. See *R.* v. *Wycombe Ry. Co.* (11) ((1867), L.R. 2 Q.B. 310), approved in *Pugh* v. *Golden Valley Ry. Co.* (12) ((1880), 15 Ch.D. 330), *Emsley* v. *North Eastern Ry. Co.* (13) ([1896] 1 Ch. 418).

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

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

**LORD RADCLIFFE:** My Lords, I agree that these appeals ought to be dismissed. I should not say more but for the fact that the principles of law which bear on their subject appear to me to stand so curiously related that I do not want to part with the appeals without saying something as to what I conceive to be involved in the decision now proposed. It means, I think, that we must cut down two very far-reaching general propositions of law, valuable in themselves, to proportions that are manageable in relation to the particular set of circumstances with which we are now confronted. Both these general propositions support the appellants' argument. One proposition is that laid down by SIR GEORGE JESSEL, M.R., in *Mulliner* v. *Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611 at p. 623). It is to the effect that a railway company, which operates under statutory powers of managing its railway conferred on it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do. It has not, generally speaking, the full capacity of disposition enjoyed by a private owner of land. The other proposition, which is distinct

from the first, is that no body, corporate or unincorporate, which holds property or rights under powers conferred on it for the public benefit can make a disposition or agreement effective in law by which it abdicates its freedom to exercise those powers at any time in the future. The second proposition rests principally on two decisions of this House in Scottish cases, *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833); *Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623).

*Mulliner's* case (9) was decided in 1879. It has been referred to again and again in other cases, both in argument and in judgments of the court. It has certainly never been overruled; on the contrary, SIR GEORGE JESSEL'S statement of the law has twice been made the very foundation of unanimous decisions in the Court of Appeal—see *Great Western Ry. Co.* v. *Solihull Rural District Council* (14) ((1902), 86 L.T. 852) and *Great Western Ry. Co.* v. *Talbot* (15) ([1902] 2 Ch. 759). More than that, part of his reasoning (though not directly his reasoning on this point) was quoted with approval by LORD BLACKBURN when making the first speech in this House in the *Ayr Harbour* case (2) (8 App. Cas. at p. 635). In any ordinary combination of circumstances one would say that the legal principle laid down in *Mulliner's* case (9) was firmly established. On the other hand, it is equally certain that for many years there has been a tendency to treat *Mulliner's* case (9) as having stated the law in terms different from those actually employed. It has been subjected to a process of judicial explanation. Few authorities can have been explained so often with such little fidelity to the original source. In 1888, in *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273), the court treated *Mulliner's* case (9) as being a decision in which (21 Q.B.D. at p. 275) " the facts of the case . . . pointed to a different conclusion of fact from that on which the decision in *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469) was founded." In *South Eastern Ry. Co.* v. *Cooper* (7) ([1924] 1 Ch. 211) SIR ERNEST POLLOCK, M.R., referred to *Mulliner's* case (9) as (ibid., at p. 223) " a case . . . of a very special character " and WARRINGTON, L.J., in the same case, similarly discounts the significance of SIR GEORGE JESSEL'S intended proposition of law by describing it as made (ibid., at p. 232) " . . . in reference to the facts of that case . . ." That, I suppose, could be said with as much or as little force about all judgments. Yet two things at least are plain from a reading of *Mulliner's* case (9), first, that there was nothing special about the facts—they related to a purported grant of a right of way through arches forming the substructure of a station—and, secondly, that SIR GEORGE JESSEL rested his decision on what he himself called " the general law ". The question that he put and answered in the negative was (11 Ch.D. at p. 619): Has a railway company power by law to alienate, either for value or without value, any portion of the land actually used for the railway or works, except so far as express provision to that effect is made in its regulating Act? From that he deduced, as was pointed out and approved by RIGBY, L.J., in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439 at p. 450), that the grant of any easement was similarly forbidden.

*Gonty's* case (5) is yet another Court of Appeal case in which *Mulliner's* case (9) was commented on. The case itself amounted to a decision that, in considering whether part of a building could be severed from the rest " without material detriment thereto ", that being the only condition on which a railway company could effect the severance under a special statutory power, it was legitimate to treat the railway company as having legal power to grant a right of access over the portion proposed to be taken, and to assess compensation accordingly. I have not sufficient ingenuity at my command to be able to say how this decision can be good law in the face of *Ayr Harbour Trustees* v. *Oswald* (2), in which it was decided by this House that, in assessing compensation for injurious affection of land retained arising from compulsory acquisition

of other land previously part of the same holding, it was not legitimate to treat the undertakers as having legal power to grant a right of access over the land acquired. However that may be, in *Gonty's* case (5), LORD ESHER, M.R., appeared to regard *Mulliner's* case (9) as being inconsistent with the view that the undertaker could grant the right of access but as being an authority which he was not prepared to follow. A. L. SMITH, L.J., said ([1896] 2 Q.B. at p. 447) that he was not going to controvert *Mulliner's* case (9), but thought that, if it were to be "cited as a case which says that the railway company cannot give an easement through its own embankment from one side to the other", he could not agree with it. Unfortunately, the learned lord justice did not say what, in his view, *Mulliner's* case (9) could be cited for if not for that, and his illustration of the power or duty of a railway company to create an accommodation access through its embankment, when it severs land, does nothing to clear up the matter since, of course, in such a case there is a statutory obligation to provide just such accommodation. RIGBY, L.J., as I have said, thought (ibid., at p. 450) that *Mulliner's* case (9) did decide that no perpetual right of way could lawfully be created by a railway company over land taken and required for its purposes. "That . . . is all that case was intended to decide, and the case has no bearing on that before us." For completeness, I ought to add that there have been further comments on or proffered explanations of *Mulliner's* case (9) in *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126) and in *South Eastern Ry. Co.* v. *Warr* (16) ((1923), 21 L.G.R. 669). Neither, I think, enables one to say with any confidence just how far it stands as an authority today or for what proposition.

How flickering is the illumination which these authorities throw on the main principle of law can be seen if one compares the decision of JOYCE, J., in 1912 in *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council* (17) ([1912] 2 Ch. 110) with the decision of SWINFEN EADY, J., in 1909 in *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers (1900), Ltd.* (18) ([1910] 1 Ch. 12). In the former, the learned judge, after referring to *Mulliner's* case (9) and *Gonty's* case (5), held it to be clear law that a railway company could not grant or dedicate a right of way over its lines of rails. In the latter, the learned judge, after referring to the same two cases, thought ([1910] 1 Ch. at p. 25) that there was "nothing whatever in that point" that a railway company "could not grant to somebody else the easement of tunnelling under" its line.

In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of SIR GEORGE JESSEL'S proposition that a railway company lacks legal capacity to grant an easement over railway land "except with a view to the traffic of their railway." Side by side with this proposition and without explicitly rejecting it, they have, in fact, been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *R.* v. *Inhabitants of Leake* (1). I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today, I should feel much doubt about that. But I think that we are bound to recognise that for very many years and on many occasions courts have taken as their test the words of PARKE, J. (5 B. & Ad. at p. 478):

> "if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power",

A and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognise this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

Such a rule has many drawbacks. It means that the validity of any easement B must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance on what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works—railway lines, reservoirs, canals, tow- C paths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and, therefore, necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, D although the test derived from *R.* v. *Inhabitants of Leake* (1) has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is *South Eastern Ry. Co.* v. *Cooper* (7); but the judgments delivered by the Court of Appeal in that case E are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo F even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that *Mulliner's* case (9) cannot stand today as a binding decision, in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way. I think, myself, that the error in the reasoning of that case lay in treating any G grant of an easement as equivalent to an alienation for this purpose. Technically, as a matter of conveyancing, such a grant is, no doubt, a form of alienation. But, in the context of the powers of a railway company over the whole extent of the railway lands, a grant of an easement and an outright sale may amount to very different things. It seems to me better to say baldly that, on this H occasion, a great judge laid down a proposition of law in terms that are too comprehensive to be maintainable than to continue to explain his decision in language that he did not use to justify conclusions which contradict his expressed opinion.

Now the other proposition which fortifies the appellants' arguments is that laid down in the two cases, *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. I Cas. 833) and *Ayr Harbour Trustees* v. *Oswald* (2). *Paterson's* case (10) is the earlier in date, though *Oswald's* case (2) is, I think, the one more often referred to. Both cases related to the question whether bodies holding land for purposes beneficial to the public interest could abdicate the potential exercise of certain powers over part of the land by ceding rights in it to other persons or to the public. In *Paterson's* case (10), the land concerned was the links at St. Andrew's which were held by the magistrates of the burgh for behoof of the inhabitants, subject to the obligation of preserving them for the purposes of the game of

golf and for the recreation and amusement of the inhabitants. What the magistrates were proposing to do was to construct a macadamised road along the boundary of the links. The learned Lords who heard the appeal, assisted by a volume of evidence from those skilled at golf, were evidently satisfied that there was no reason to fear that the addition of this feature would " interfere with the due prosecution of the game ". LORD SELBORNE, L.C., said (6 App. Cas. at p. 843):

> " . . . such variation in the state of the ground as it would introduce, would, in the event of balls finding their way there, rather add to than detract from the interest of the game . . .";

while LORD WATSON, speaking with something like levity, observed (ibid., at p. 853) that

> " . . . really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is after all rather a matter of fancy than a question having any substance in it."

It followed that there was nothing in law to prevent the magistrates from making up their road and allowing people the use of it.

On the other hand, it was the clear view of all the members of the House who took part in that decision that it was not within the power of the magistrates to abdicate any part of their control of the site of the road or, consequently, to dedicate it as a public highway; and the judgment approved by the House was worded accordingly. The whole point of the decision was to establish the distinction between the competence of the magistrates to make a road and allow passage over it and their incompetence to grant to the public or to individuals, or to allow them to acquire, any title to a right of way over it. Their opinion on this point is, I think, contained in the following words of LORD WATSON (ibid., at p. 853):

> " . . . such a change may come over St. Andrews that it may become necessary in the due exercise of their administrative powers for the town council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and those who have the right to take recreation, and to play golf upon the links, are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with their rights over this piece of land . . ."

That imposes a very stern test. It does not depend on evidence. It looks to possibility, not to any standard of reasonable probability.

The facts of *Oswald's* case (2) are so familiar that I do not need to set them out. The Harbour Board had acquired part of his land, and the question arose what amount of compensation they ought to pay him for injurious affection of the remainder. To reduce the damage, and so his compensation, they were ready to secure him a right of permanent access to that remainder over the part they had taken. There was no evident reason why they should not so lay out the projected wharves and roads as to leave space for access by this means. They did not have to fill up the land taken with buildings. Nevertheless this House decided that they had no power to grant Oswald any permanent right over that land, because to do so would amount to depriving the present trustees and their successors of the discretion which their Act had vested in them, the power of using that land as the site of buildings if at any time the needs of their undertaking should require it. That would be to renounce " a part of their statutory birthright ", as LORD SUMNER said in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8)

([1926] A.C. 355 at p. 372). Striking as the phrase is, it does not seem to me to offer much help in deciding which are the cases in which the principle of *Paterson's* case (10) and *Oswald's* case (2) is to be applied, where as he says (ibid.), " the very nature of the grants or the contract itself " provides the answer, and which are those many other cases in which the test to be applied is the humbler one of incompatibility proved by evidence. The birthright of a statutory corporation includes all those powers and rights with which it is thought proper to invest it at its creation; and I do not think it easy for a court of law to decide merely by the nature of the thing which of those powers are inalienably entailed and which can be disentailed and disposed of by ordinary grant.

In my opinion, we are bound to recognise that the principle of these two cases cannot be applied in all circumstances and on all occasions to all statutory corporations and public bodies. That, indeed, has already been recognised by the decision of this House in the *Birkdale* case (8), in which the electric supply company had certainly made a contract which deprived themselves and their successors of power at any future time to raise the charges for their supply beyond a fixed limit, however much the needs of their undertaking might require it. It is of some importance to remember, when searching for a dividing line, that the two cases which " spoke for themselves " were both concerned with defined areas of land of no great extent, and the possible consequence of renouncing powers over such areas could be stated as a matter of practical observation. But nothing like the same observation can be brought to bear when the factors of the problem are, on the one hand, all the general powers derived by a railway company from the Railways Clauses Consolidation Act, 1845, and, on the other hand, many miles of railway line covering great varieties of setting. In such cases what I have called the pragmatic test is, I think, to be preferred.

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

> " . . . the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway . . . "

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

**LORD COHEN:** My Lords, I need not restate the facts. It is sufficient to say that it is common ground that (i) the facts found by quarter sessions in the *Westmorland* case would raise a presumption of dedication of the footpath in question as a public right of way provided that it was not ultra vires for the appellants or their predecessors in title so to dedicate it, and (ii) there is no material distinction between the *Westmorland* case and the *Worcestershire* case. Quarter sessions, the Divisional Court and the Court of Appeal have all held that dedication was not ultra vires. LORD GODDARD, C.J., delivering the judgment of the Divisional Court, adopted the test laid down by PARKE, J., in *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469 at p. 478) as follows:

> " If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such

trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

The Lord Chief Justice pointed out ([1956] 1 All E.R. at p. 325) that that case had been followed again and again and went on to say that the question of incompatibility must be a question of fact to be decided by jury or judge, whichever in the particular case be the tribunal of fact. After distinguishing *Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623), he held that on their findings of fact quarter sessions came to a correct decision. In the Court of Appeal, each of their Lordships delivered a judgment. They adopted the same test as that which I have already cited from the judgment of the Lord Chief Justice and held that, on the facts found by quarter sessions, they were bound by authority to uphold the decision of the courts below.

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

The first of these submissions is founded on s. 16 of the Railways Clauses Consolidation Act, 1845, which Act was, by s. 1 of the Kendal and Windermere Railway Act, 1845, incorporated in the last-mentioned Act. Section 16 sets out the various works which a railway company may execute and the section applies both to works for the construction of the railway and to accommodation works. The provision relied on by counsel was a provision that the company might from time to time alter, repair or discontinue the works and substitute others. This provision is followed by a provision conferring power to do all other acts necessary for making, maintaining, altering or repairing and using the railway. I pause here to observe that it has been held that this last limb of s. 16 is in reality a proviso on the whole section, and that the works authorised by the section must be works necessary for making, altering, repairing or using the railway. See *Emsley* v. *North Eastern Ry. Co.* (13) ([1896] 1 Ch. 418, per A. L. SMITH, L.J., at p. 434).

Counsel argued that, since it has been held that the obligation on a railway company to provide an accommodation way when its line severs a landowner's property remains in force only so long as the property on the two sides of the railway is in common ownership (see *Midland Ry. Co.* v. *Gribble* (19), [1895] 2 Ch. 827), the effect of dedicating a right of way over the accommodation bridge might be to prevent the exercise of this power of discontinuing the bridge. This he said amounted to the abandonment or modification of the statutory power. Dealing with this argument, the Lord Chief Justice said ([1956] 1 All E.R. at p. 325):

> "If this contention be right, it is indeed strange that it has never before been the subject of a decision or even mentioned in any of the judgments on the subject. There does seem to be a trace of an argument on this point in *A.-G.* v. *London & South Western Ry. Co.* (20) ((1905), 69 J.P. 110), but it

A can hardly have been pressed, as the judgment of FARWELL, J., does not refer to it. If the point had been taken in *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126), it would have afforded a short and complete answer."

With these observations I respectfully agree.

B Counsel for the respondents countered counsel for the appellants' argument based on s. 16 by two propositions. (i) First he said that s. 16 does not confer a bare power to discontinue but only a power to discontinue and substitute another work. He admits that the company could discontinue without substituting another bridge, but he says that it would do so not under the section but in exercise of the power which any landowner would have if by discontinuance he C disturbs no existing right. Section 16, the argument ran, is directed to conferring on a railway company a power which merely qua landowner it would not have, i.e., a power against the will of the person entitled to the accommodation way to discontinue it and replace it by another accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Counsel submitted that, since counsel for the appellants' argument connoted discontinuance without D substitution, s. 16 had no relevance. (ii) Counsel submitted that, since the power to discontinue conferred by s. 16 is ancillary to the power to make, alter, repair or use the railway (see *Emsley's* case (13)), it would be incredible that the existence of this ancillary power can prevent dedication in a case where, as here, on the facts it is held that the dedication of the right of way is not incompatible with the main purpose of the railway.

E I agree with the second submission and do not, therefore, find it necessary to express a concluded opinion on the first. For the reasons I have given, I would reject the first of counsel for the appellants' reasons for distinguishing this case from *R.* v. *Inhabitants of Leake* (1). If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects F prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Counsel for the appellants, however, says that his proposition is supported by the language of PARKE, J., in *R.* v. *Inhabitants of Leake* (1) (5 B. & Ad. at p. 481), where he says,

> G "But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public."

Counsel stresses the word "never". The sentence, divorced from its context, lends some support to his argument, but, reading the judgment as a whole and having regard in particular to the next following paragraph thereof, I think it is H clear that PARKE, J., regards the question as one of fact, to be determined, no doubt, not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes.

Counsel also relied on the language of SIR GEORGE JESSEL, M.R., in *Mulliner* v. *Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611), where he said (ibid., at p. 623):

I

> "It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purpose of their Act, that is to say, with a view to the traffic of their railway."

The dispute in that case was as to a right of way granted by the railway company under one of the arches on which one of the company's railway stations was built. The evidence clearly established that the existence of the right of way

would interfere with the company's railway undertaking and the grant was held to be ultra vires. The correctness of the decision has never been challenged, but the dictum to which I have referred, if divorced from the facts of the case, in my opinion goes too far. This view is supported by the observations of the members of the Court of Appeal in *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273), and in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439). In the former case it was held that the dedication of land as a public footpath was not inconsistent with its use by the canal company as a tow-path, and in the latter it was held that the giving of a private right of way over certain lands of the railway company was not inconsistent with the purposes of the railway company. In the former case, LORD ESHER said (21 Q.B.D. at p. 275) that he did not think that in *Mulliner's* case (9) the late Master of the Rolls meant to decide anything in contravention of what was decided in *R.* v. *Inhabitants of Leake* (1).

Counsel for the appellants also relied on the decision of this House in *Ayr Harbour Trustees* v. *Oswald* (2). This case had been relied on by Sir Frank Soskice before the Divisional Court. LORD GODDARD, C.J., dealing with his argument said ([1956] 1 All E.R. at p. 326):

> " In our opinion, that case has no application to the present case. The harbour trustees were empowered by statute to acquire compulsorily an area of land for the purpose of their undertaking on payment of compensation to the owner of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on, or using, a considerable portion of the land which the Act permitted them to take. To this the owner objected, and claimed that he was entitled to be compensated for what he had lost, and that the company had no power to sterilise the land, to use a convenient expression, and to covenant not to use that which the statute authorised them to acquire. It was held, to use LORD SUMNER'S expression in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355), that the company could not thus dispose of their statutory birthright. Here the dedication does not prevent the use of the land by the railway though it burdens it, as must always be the case where there is dedication."

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

It is also to be observed that LORD HERSCHELL did not regard the decision in *Ayr Harbour Trustees* v. *Oswald* (2) as inconsistent with the line of authorities following *R.* v. *Inhabitants of Leake* (1), for in *Caledonian Ry. Co.* v. *Turcan* (21) ((1898), 25 R. (Ct. of Sess.) 7), he said (ibid., at p. 18):

> " In my view, without expressing any opinion upon the decision in that case [*Gonty's* case (5)], it does not conflict, as has been supposed, with the case of *Ayr Harbour Trustees* v. *Oswald* (2)."

The last case to which I need refer is *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833). It was not cited in either of the courts below, but counsel for the appellants submitted that it was really conclusive in his favour. The question at issue was as to the powers of the corporation in relation to the links, the property in which was vested in the corporation, subject to the obligation admitted to have subsisted from time immemorial of preserving the links for the purposes of the game of golf and for the recreation and amusement of the inhabitants. The case is somewhat remote from the present case, but, properly

understood, it seems to me to support the respondents' case. I would refer to a passage from the speech of LORD WATSON where he says (ibid., at p. 851):

> " Now, my Lords, although they hold it subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of their proprietary rights, and are therefore entitled either to make or to sanction any other uses to which the property is convertible so long as those uses are not inconsistent with the due enjoyment by the burgesses of the rights vested in them by law. What uses they may so sanction will depend to a very great extent upon the amount of population and the amount of the golf played or recreation taken. Uses which would be perfectly legitimate and proper in a thinly populated burgh may become very illegitimate and very improper, and may constitute invasions of the burgesses' rights, when practised where there is a large population.
>
> " My Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears to me to have been this, they were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.
>
> " The appellants brought this action no doubt with a view to stop the threatened proceedings, but they did not limit the conclusions of their summons to the actual proceedings which the council were threatening to take, but made them so wide that, if given effect to, they would establish this proposition, that wherever a right of golfing or of recreation exists the magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights of the burgesses."

I read that passage as laying down that it was a question of fact whether what the corporation proposed to do would interfere with the rights of the burgesses. LORD WATSON no doubt stressed that, in reaching a conclusion on that issue of fact, the court must have regard not only to the position as it was at the moment of trial but also to what was likely to happen in the future, but I find nothing in *Paterson's* case (10) disapproving of the statement of the law by PARKE, J., in *R.* v. *Inhabitants of Leake* (1), or of the application of that statement of the law in the many cases to which reference was made in the course of the argument.

*Paterson's* case (10) was referred to by LORD BIRKENHEAD in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. at p. 364), and he did not suggest that it conflicted with *R.* v. *Inhabitants of Leake* (1). In the same case, LORD SUMNER referred with approval to *R.* v. *Inhabitants of Leake* (1) and (ibid., at p. 372), explained the *Ayr Harbour* case (2) as being a case where the res ipsa loquitur maxim applied and the question of competence did not depend on a proved incompatibility between statutory purposes and the proposed user. It was in this case that LORD SUMNER used the picturesque phrase " statutory birthright " and explained the *Ayr Harbour* case (2) as being one in which the trustees were proposing to renounce a part of their statutory birthright. It is, however, plain from his speech that he considered that the question whether a company was renouncing or seeking to renounce its statutory birthright would normally be a question of fact to be decided on the evidence. Reading his judgment as a whole, I think he was approving the decision in *R.* v. *Inhabitants of Leake* (1), and stating in other language the principle there laid down by PARKE, J., that the question whether there is power to dedicate a right of way

depends on whether the user by the public of that right of way would be compatible with the object prescribed by the statute appointing commissioners or creating the statutory company as the case might be. The question remains as to the test of compatibility. On that I cannot usefully add anything to what has been said by my noble and learned friend on the Woolsack and by LORD MORTON OF HENRYTON. I agree with the test they propose. As I read the Case Stated, that was the test applied by quarter sessions in the present case.

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

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

The Scottish case nearest in its facts is *Edinburgh Magistrates* v. *N.B. Ry. Co.* (22) ((1904), 6 F. (Ct. of Sess.) 620). LORD KINNEAR in that case held that the necessary user to establish a public right of way over a railway within the confines of Edinburgh had not been established. He expressed, however, an alternative ground of judgment which is stated in the headnote to the case as:

> " *Opinion* that a public right of way cannot be acquired by user over lands held by a railway company for the purposes of the railway, and that it makes no difference that the lands have been acquired by private agreement, and not by the exercise of compulsory powers."

If LORD KINNEAR was intending to lay down as a matter of law that in no circumstances could the public acquire a right of way over railway property, I think, with all respect to the great authority of that eminent judge, that such an opinion is not consistent with the train of authority to which your Lordship on the Woolsack has referred. There are, however, in LORD KINNEAR'S opinion passages that suggest he was perhaps influenced by the fact that, in the circumstances of that case, a public right of passage was incompatible with the conduct of the traffic on the railway, and if that was the ground of his opinion, it was entirely consistent with English authority.

*Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623) creates no difficulty. That was a very plain case of ultra vires. It did not turn on any question of conflict of rights, but on whether harbour trustees had any power to sterilise land which they proposed to acquire compulsorily by binding themselves and their successors not to use it for the statutory purposes for which alone it could be acquired. LORD SUMNER in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355) covers such a case where he says (ibid., at p. 370) " . . . in default of proof of incompatibility in the present case, some other consideration of a cogent kind must be found." Another consideration of a cogent kind existed in the *Ayr Harbour Trustees* case (2), as LORD SUMNER himself recognised. I would only add that the observations of LORD WATSON and LORD HERSCHELL in *Caledonian Ry. Co.* v. *Turcan* (21) ((1898), 25 R. (Ct. of Sess.) 7) do not suggest that they thought the creation of a right of way over land acquired under statutory powers was so obviously impossible that it could be condemned out of hand. They leave the decision in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439) not, it is true, approved, but at least undisturbed.

*Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833) was much relied on by appellants' counsel, but I doubt whether it is apt as an authority in the territory with which the present appeal is concerned. The magistrates of St. Andrews held certain land for the enjoyment by the inhabitants of St. Andrews of

A golfing and recreation thereon. They were, in effect, trustees of the land for these purposes. The point at issue was focussed by LORD WATSON in the following passage (ibid., at p. 851):

> "... they [the magistrates and town council] were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to
B preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time."

C That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect, they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links
D from one public place to another for an uninterrupted period of forty years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and, accordingly, it is not possible, in my opinion, to build up on *Paterson's* case (10) any argument favourable to the appellants.

On the facts proved here, the assumed inconsistency of the existence of a
E right of way with the subsidiary powers conferred on the appellants by s. 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridges does not at the moment call for consideration. Even if they could, and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the
F railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of LORD SUMNER in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. at p. 367), though given in a somewhat
G different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

I would dismiss these appeals.

*Appeals dismissed.*

Solicitors: *M. H. B. Gilmour* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Clerks of the Worcestershire and Westmorland County Councils* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

# Appendix 10.15

# *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547

A

Supreme Court

# Regina (Newhaven Port & Properties Ltd) *v* East Sussex County Council

[2015] UKSC 7

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2014 Nov 3, 4;
2015 Feb 25

Lord Neuberger of Abbotsbury PSC,
Baroness Hale of Richmond DPSC, Lord Sumption,
Lord Carnwath, Lord Hodge JJSC

*Commons — Town or village green — Registration — Operational port land comprising tidal beach wholly submerged for part of day — Application to register as town or village green — Whether user of land regulated by or in breach of byelaws capable of being "as of right" — Whether land registrable as town or village green if registration inconsistent with statutory functions for which land held — Harbours, Docks and Piers Clauses Act 1847 (10 & 11 Vict c 27), ss 33, 83, 88 — Newhaven Harbour and Ouse Lower Navigation Act 1847 (10 & 11 Vict c ix), s 49 — Newhaven Harbour Improvement Act 1878 (41 & 42 Vict c lxxi), ss 2, 57 — Commons Act 2006 (c 26), s 15(4) — Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991 (SI 1991/1257), arts 10, 11*

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The claimant company was the owner and operator of a port which included an area of land known as West Beach, which formed part of the foreshore. Pursuant to the powers conferred, in particular, by section 33 of the Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Clauses Act")[1], section 49 of the Newhaven Harbour and Ouse Lower Navigation Act 1947 ("the 1847 Newhaven Act")[2], sections 2 and 57 of the Newhaven Harbour Improvement Act 1878[3] and articles 10 and 11 of the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991[4], the claimant and its predecessors as port authority had maintained the port and, pursuant to sections 83 and 88 of the 1847 Clauses Act, made byelaws for its regulation, including West Beach. After the claimant had fenced off public access to it in April 2006, the town council applied to have West Beach registered as a town or village green pursuant to section 15 of the Commons Act 2006[5]. The claimant objected to the application and the defendant registration authority held a non-statutory public local inquiry. The inspector who conducted the inquiry recommended that the application for registration be accepted, finding that West

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[1] Harbours, Docks and Piers Clauses Act 1847, s 33: see post, para 5.
S 83: "The undertakers may from time to time make such byelaws as they shall think fit for all or any of the following purposes; . . . For regulating the use of the harbour, dock, or pier: . . . And the undertakers may from time to time, as they shall think fit, repeal or alter any such byelaws: Provided always, that such byelaws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or the provisions of this or the special Act; and such byelaws shall be reduced into writing, . . . and, if affecting other persons than the officers or servants of the undertakers shall be confirmed and published as herein provided."
S 88: see post, para 13.

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[2] Newhaven Harbour and Ouse Lower Navigation Act 1847, s 49: see post, para 3.

[3] Newhaven Harbour and Improvement Act 1878, s 2: "the Harbours, Docks and Piers Clauses Act 1847 . . . [is] incorporated with and forms part of this Act."
S 57: see post, para 5.

[4] Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991, arts 10(1), 11(1): see post, para 7.

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[5] Commons Act 2006, s 15: "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection . . . (4) applies . . . (4) This subsection applies . . . where— (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; (b) they ceased to do so before the commencement of this section; and (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b)."

Beach had been used by a significant number of local inhabitants as of right for lawful sports and pastimes for at least 20 years expiring in April 2006, for the purposes of section 15(4) of the 2006 Act. The registration authority accepted the inspector's recommendation. The claimant sought judicial review of that decision. The judge allowed the claim on the sole ground that the land could not be registered as a town or village green under the 2006 Act because it was reasonably foreseeable that registration would conflict with the statutory functions for which the land was held. The registration authority and the town council appealed. By a majority the Court of Appeal allowed their appeal on the ground that, since the byelaws had not been communicated to the public, use of West Beach by local inhabitants for bathing and associated recreational activities was enjoyed, not "by right", that is, by licence, but "as of right", namely, without either express or implied permission, and that, accordingly, West Beach was capable of registration as a town or village green under section 15(4) of the 2006 Act.

On the claimant's appeal—

*Held*, (1) allowing the appeal, that, assuming without deciding that the majority of the Court of Appeal and the judge had been correct to hold that the general common law gave the public, and therefore the local inhabitants, no right to use West Beach for bathing and leisure activities, the wide words of section 83 of the 1847 Clauses Act and the provisions of the Newhaven Harbour Improvement Act 1878 empowered the owners and operators of the harbour to make and enforce byelaws which could properly grant rights over the land; that, although no byelaw expressly permitted members of the public to use West Beach for leisure activities, such user might be permitted by implication if such implication were necessary or obvious; that the prohibitions contained in the byelaws against bathing in a specified area of the harbour and of doing acts which might impede use of the harbour impliedly permitted bathing elsewhere in the harbour and associated activities which did not impede its use; that, although section 88 of the 1847 Clauses Act required notification of the byelaws by public display, they became effective when they were confirmed, and publication and display were intended to follow such confirmation; that Parliament had not intended that the byelaws would not apply if such notification were not or were no longer displayed and, while it might be necessary to show that the byelaws were displayed for the purposes of justifying prosecution for their infringement, they were nevertheless effective in the sense of representing the local laws applicable to the harbour even though they were not displayed as required by section 88 of the 1847 Clauses Act; that, in any event, a landowner did not necessarily have to draw to the public's attention that their use of the land was permitted in order for it to be "by right" rather than "as of right"; and that, accordingly, since the byelaws had conferred an implied revocable permission to go onto West Beach and use it for recreational activities, its use by the inhabitants of the locality had been "by right" and not "as of right" and therefore West Beach was incapable of registration under section 15 of the Commons Act 2006 (post, paras 56, 57, 60–63, 66, 69–74, 102, 105, 136, 140).

*R (Barkas) v North Yorkshire County Council* [2015] AC 195, SC(E) applied.

(2) Per Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Sumption and Lord Hodge JJSC, that section 15 of the Commons Act 2006 did not apply to land acquired by a statutory undertaker and held for statutory purposes which were inconsistent with its registration as a town or village green; that, since powers were conferred on the claimant to carry out its functions of operating and maintaining a working harbour under section 33 of the 1847 Clauses Act, section 49 of the 1847 Newhaven Act, section 57 of the 1878 Act and articles 10 and 11 of the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991, and since the effect of registration under the 2006 Act was to create criminal offences in respect of damage to the registered site or interruption to its use and enjoyment, there was a clear incompatibility between the 2006 Act and the statutory regime applying to the harbour; and that, accordingly, the 2006 Act did not enable the public to acquire user

rights over West Beach which were incompatible with the continued use of the land for the statutory purposes on which it was held by the port authority (post, paras 93–97, 101, 102, 103–104).

Observations as to the long-established jurisprudence concerning, and the difficulties inherent in, the question whether the public had a right to use the foreshore for bathing and associated recreational activities as a matter of general common law or by presumed licence of the owner of the foreshore, or whether members of the public had no such right and were trespassers if they used the foreshore for such purposes (post, paras 26, 46, 50, 105–135).

*Blundell v Catterall* (1821) 5 B & Ald 268 and *Brinckman v Matley* [1904] 2 Ch 313, Buckley J and CA considered.

Decision of the Court of Appeal [2013] EWCA Civ 276; [2014] QB 186; [2013] 3 WLR 1389; [2013] 3 All ER 677, CA reversed.

The following cases are referred to in the judgments:

*Arnold v Mundy* (1821) 6 NJL 1
*Attorney General v Antrobus* [1905] 2 Ch 188
*Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623, HL(Sc)
*Beckett (Alfred F) Ltd v Lyons* [1967] Ch 449; [1967] 2 WLR 421; [1967] 1 All ER 833, CA
*Behrens v Richards* [1905] 2 Ch 614
*Blundell v Catterall* (1821) 5 B & Ald 268
*Brinckman v Matley* [1904] 2 Ch 313, Buckley J and CA
*British Transport Commission v Westmorland County Council* [1958] AC 126; [1957] 2 WLR 1032; [1957] 2 All ER 353, HL(E)
*Crawford v Lecren* (1868) 1 NZCAR 117
*Edinburgh (Magistrates of) v North British Railway Co* (1904) 6 F 620, Ct of Sess
*Ellenborough Park, In re* [1956] Ch 131; [1955] 3 WLR 892; [1955] 3 All ER 667, CA
*Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325, Ct of Sess
*Hope v Bennewith* (1904) 6 F 1004, Ct of Sess
*Housden v Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200; [2008] 1 WLR 1172; [2008] 3 All ER 1038, CA
*Jones v Bates* [1938] 2 All ER 237, CA
*Kinross County Council v Archibald* (1899) 7 SLT 305, Ct of Sess
*Kruse v Johnson* [1898] 2 QB 91, DC
*Llandudno Urban District Council v Woods* [1899] 2 Ch 705
*Mace v Philcox* (1864) 15 CBNS 600
*M'Evoy v Great Northern Railway Co* [1900] 2 IR 325
*McGregor v Crieff Co-operative Society Ltd* 1915 SC (HL) 93, HL(Sc)
*Mann v Brodie* (1885) 10 App Cas 378; 12 R (HL) 52, HL(Sc)
*Matthews v Bay Head Improvement Association* (1984) 95 NJ 306; 471 A 2d 355
*Mills v Silver* [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA
*Neptune City (Borough of) v Borough of Avon-by-the-Sea* (1972) 61 NJ 296; 294 A (2d) 47
*New Windsor Corpn v Mellor* [1976] Ch 380; [1975] 3 WLR 25; [1975] 3 All ER 44, CA
*Officers of State v Smith* (1846) 8 D 711, Ct of Sess
*Oxfordshire County Council v Oxford City Council* [2005] EWCA Civ 175; [2006] Ch 43; [2005] 3 WLR 1043; [2005] 3 All ER 961, CA; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817, HL(E)
*R v Doncaster Metropolitan Borough Council, Ex p Braim* (1986) 57 P & CR 1
*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)

*R (Barkas) v North Yorkshire County Council* [2012] EWCA Civ 1373; [2013] 1 WLR 1521, CA; [2014] UKSC 31; [2015] AC 195; [2014] 2 WLR 1360; [2014] 3 All ER 178, SC(E)
*R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)
*R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28; [2008] AC 221; [2007] 3 WLR 85; [2007] 4 All ER 273, HL(E)
*R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70; [2010] 2 WLR 653; [2010] 2 All ER 613, SC(E)
*Raleigh Avenue Beach Association v Atlantis Beach Club Inc* (2005) 185 NJ 40; 879 A 2d 112
*State ex rel Thornton v Hay* (1969) 89 Or 687; 462 P 2d 671
*White v Hughes* (1939) 139 Fla 54; 190 So 446

The following additional cases were cited in argument:

*Adair v National Trust for Places of Historic Interest or Natural Beauty* [1998] NI 33
*Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409; [1956] 3 WLR 1104; [1957] 1 All ER 35, CA
*Attorney General v Dyer* [1947] Ch 67; [1946] 2 All ER 252
*Attorney General v Emerson* [1891] AC 649, HL(E)
*Attorney General v Richards* (1794) 2 Anst 603
*BDW Trading Ltd (trading as Barratt Homes) v Spooner* [2011] EWHC 1486 (QB); [2011] JPL 1247
*Bagott v Orr* (1801) 2 Bos & P 472
*Bakewell Management Ltd v Brandwood* [2004] UKHL 14; [2004] 2 AC 519; [2004] 2 WLR 955; [2004] 2 All ER 305, HL(E)
*Barker v Richardson* (1821) 4 B & Ald 579
*Birkdale District Electricity Supply Co Ltd v Southport Corpn* [1926] AC 355, HL(E)
*Blount v Layard (Note)* [1891] 2 Ch 681, CA
*Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, Ct of Sess
*Evans v Wimbledon and Putney Commons Conservators* [2014] EWCA Civ 940; [2014] 2 P & CR 285, CA
*Fitzhardinge (Lord) v Purcell* [1908] 2 Ch 139
*Folkestone Corpn v Brockman* [1914] AC 338, HL(E)
*Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618; [1968] 2 WLR 842; [1968] 1 All ER 979; [1968] 1 Lloyd's Rep 343, CA
*Gloucester (Bishop of) v Cunnington* [1943] KB 101; [1943] 1 All ER 61, CA
*Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL(E)
*Hall v Beckenham Corpn* [1949] 1 KB 716; [1949] 1 All ER 423
*Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 1976 (Admin); [2012] ACD 311
*Macpherson v Scottish Rights of Way and Recreation Society Ltd* (1888) 13 App Cas 744, HL(Sc)
*Mulliner v Midland Railway Co* (1879) 11 Ch D 611
*National Guaranteed Manure Co Ltd v Donald* (1859) 4 H & N 8
*Nicol v Blaikie* (1859) 22 D 335, Ct of Sess
*Oakley v Boston* [1976] QB 270; [1975] 3 WLR 478; [1975] 3 All ER 405, CA
*Paddico (267) Ltd v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch); [2011] LGR 727; [2012] EWCA Civ 262; [2012] LGR 617, CA
*Paterson v Provost etc of St Andrews* (1881) 6 App Cas 833, HL(Sc)
*Pole-Carew v Craddock* [1920] 3 KB 109, CA
*R v Inhabitants of Leake* (1833) 5 B & Ad 469

*R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587; [1999] LGR 299
*R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396
*Roberts v Roberts* [1986] 1 WLR 437; [1986] 2 All ER 483
*Roberts v Swangrove Estates Ltd* [2008] EWCA Civ 98; [2008] Ch 439; [2008] 2 WLR 1111, CA
*Staffordshire and Worcestershire Canal Navigation (Proprietors of) v Proprietors of Birmingham Canal Navigations* (1866) LR 1 HL 254, HL(E)
*Sturges v Bridgman* (1879) 11 Ch D 852, CA
*Turner v Walsh* (1881) 6 App Cas 636, PC
*Western Power Distribution Investments Ltd v Cardiff City Council* [2011] EWHC 300 (Admin); [2011] NPC 25

**APPEAL** from the Court of Appeal

By a claim form filed on 15 February 2011 the claimant, Newhaven Port & Properties Ltd, sought judicial review by way of (i) an order to quash the decision of the defendant registration authority, East Sussex County Council, dated 22 December 2010 to accept the recommendation of an inspector to register land known as West Beach as a town or village green on the application of Newhaven Town Council made pursuant to section 15 of the Commons Act 2006, and (ii) a declaration that section 15(4) of the 2006 Act was incompatible with article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as an interference with the landowner's existing property rights. The Secretary of State for Environment, Food and Rural Affairs was joined to respond to the claim for a declaration of incompatibility. On 21 March 2012 Ouseley J [2012] EWHC 647 (Admin); [2014] QB 186 allowed the claim on the sole ground that the land could not be registered as a town or village green under the Commons Act 2006 since it was reasonably foreseeable that registration would conflict with the statutory functions for which the land was held.

By appellants' notices, dated 18 and 28 May 2012 respectively, and pursuant to permission granted by the judge, the town council and the registration authority appealed. By a respondent's notice, the claimant sought to uphold the judge's order and to challenge the adverse findings on the remaining issues. On 27 March 2013 the Court of Appeal (Richards, McFarlane LLJ, Lewison LJ dissenting) allowed the appeal [2013] EWCA Civ 276; [2014] QB 186 and refused permission to appeal.

By permission of the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Hodge JJSC) granted on 17 December 2013, the claimant appealed. The issues for the Supreme Court, as agreed by the parties in their statement of facts and issues, were (1) whether the use of the application site was not as of right because it was by virtue of a permission presumed to arise where the land in question formed part of the foreshore; (2) whether byelaws in the form of the byelaws made in the instant case would, if communicated, have had the effect of giving those who used the land a revocable licence so that use of the land would not have been "as of right"; (3) if so, whether it was necessary that the existence of the byelaws should have been communicated to those who used the land in order to render the use of the application site not "as of right;" and (4) whether, if it were reasonably foreseeable that registration of the application site as a town or village green would conflict with the future

exercise of the claimant's statutory powers, there was a bar to registration of the application site as a town or village green. A

The facts are stated in the judgment of Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC.

*Charles George QC* and *Philip Petchey* (instructed by *DMH Stallard LLP, Crawley*) for the claimant.

Two questions lie at the root of the present issue: (1) can land of a statutory undertaker such as the claimant be registered as a village green where that would conflict with the future exercise of its powers? and (2) if so, is the registration of West Beach precluded by implied licence, whether arising from its nature as foreshore or from the byelaws made by the claimant's predecessors and in force throughout the relevant 20-year period? B

The position is now significantly different from that before the Court of Appeal, since the Supreme Court in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 has overruled *R (Beresford) v Sunderland City Council* [2004] 1 AC 889. C

The first issue is whether the use of the site was not "as of right" because it was by virtue of a permission presumed to arise where the land in question forms part of the foreshore. In Scotland public rights over the foreshore go further than rights of navigation or fishing, such that the public enjoy rights of recreation over such land: see *Nicol v Blaikie* (1859) 22 D 335 and *The Laws of Scotland, Stair Memorial Encyclopaedia* (1993), vol 18, para 526. But there is conflicting authority in England and Wales: see *Halsbury's Laws of England*, 4th ed reissue, vol 12(1) (1998), para 242. The starting point in Roman law (see *Justinian* book 2, tit 1, sec 1) was that, by natural law, the air, running water, the sea and accordingly the shores, were the common property of all and no one was denied access to the seashore provided that he did not interfere with the buildings and monuments on it. Bracton in the 13th century drew on that approach in *De Legibus et Consuetudinibus Angliae*. But even in Roman law, and early English common law, rights of ownership of the seashore were asserted by local landowners and by the Crown. [Reference was made to Hale's assertion of the right of the Crown to legal ownership of the foreshore and to *Attorney General v Richards* (1794) 2 Anst 603; (1795) 3 Anst 753, which followed it.] Thus it was said that there was a presumption of ownership in the Crown's favour and that the burden of proving the contrary lay with the claimant: see *Halsbury's Laws of England*, 4th ed reissue, vol 12(1), para 243; *Adair v National Trust for Places of Historic Interest or Natural Beauty* [1998] NI 33 and *Bagott v Orr* (1801) 2 Bos & P 472. D E F G

However the Crown's right was not unqualified and did not inhibit fishing or navigation. But the practice of bathing, and incidental to that, of crossing the foreshore to do so, was held not to be a right enjoyed by the public: see *Blundell v Catterall* (1821) 5 B & Ald 268 and *Brinckman v Matley* [1904] 2 Ch 313. Similarly use of the foreshore for meetings was held to be a matter of trespass (see *Llandudno Urban District Council v Woods* [1899] 2 Ch 705, though in that case injunctive relief was regarded by the court as inappropriate). The general thrust of the authorities is that public use of the foreshore was and is permissive by the Crown and its successors; permission was presumed for members of the public to use the H

A foreshore for activities such as bathing unless implied permission was revoked: see also *Behrens v Richards* [1905] 2 Ch 614; *Folkstone Corpn v Brockman* [1914] AC 338; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449; *Goodman v Saltash Corpn* (1882) 7 App Cas 633; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; *Mills v Silver* [1991] Ch 271 and *R v Oxfordshire County Council,Ex p Sunningwell Parish Council* [2000] 1 AC 335, which, inter alia, overruled the requirement in *Jones v Bates* [1938] 2 All ER 237 for a subjective belief in the exercise of the right claimed.

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Whether the users of a beach are trespassers arises in the context not only of whether land is or is not registrable as a town or village green but also of the law of tort. No duty of care was owed to trespassers save in respect of reckless or intentional injury; and, even after the Occupiers Liability Act 1984, an occupier owes a modified duty of care towards trespassers. A common sense approach has long been taken by the courts to the definition of a trespasser: see *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409.

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The inference of a revocable licence can and should readily be drawn in the case of recreational use of the foreshore. If users are not properly to be regarded as trespassers, their use cannot be as of right. The foreshore is to some extent a special case. There is a number of reasons for that: the nature of the land is such that it cannot readily be enclosed; historically it is Crown property and has been so since time immemorial; even where an owner of the foreshore attempts to enforce his right there are serious impediments to his obtaining an injunction; in no case has a recreational right over the foreshore been established; thus the implication is that use is permissive by virtue of an implied licence: see Lewison LJ [2014] QB 186.

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The second issue is whether byelaws made in the present case would, if communicated, have had the effect of giving those who used the land a revocable licence so that use of the land would not have been as of right.

In the Court of Appeal the claimant and the town council, but not the registration authority, accepted that byelaws 70 and 71 were permissive so that (1) a reasonable reader of byelaw 70 would understand it to mean that, as long as the playing of games or sports did not obstruct or impede the use of the harbour, they were permitted under the byelaws, and (2) a reasonable reader of byelaw 71 would understand it to mean that, as long as a dog was on a lead, it was permitted to bring it into the harbour.

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The Court of Appeal was correct to answer that issue in the affirmative: the byelaws not only set out what the public may not do, but also give them an implied revocable permission to go into the harbour, to play games and sports there provided they did not impede the use of the harbour; and to bring dogs into the harbour so long as they are kept under control. The implied permission under the byelaws is revocable, as was the statutory permission considered in *R (Barkas) v North Yorkshire County Council* [2015] AC 195.

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The third issue is whether, if the answer to the second issue is affirmative, it was necessary that the existence of the byelaws should have been communicated to those who used the land in order to render use of the site not "as of right"

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The byelaws were made under section 83 of the Harbours, Docks and Piers Clauses Act 1847. By the procedure under which they were made, they

could not come into operation until they were confirmed (see section 85), and they were not to be confirmed unless notice to apply for confirmation had been advertised in the local press for a specified period prior to application for confirmation: see section 86. A copy of the proposed byelaws had to be available for inspection at the port's offices, and when confirmed, the byelaws had to be published in the manner prescribed or otherwise printed: see sections 87–88. Copies were placed on boards which were to be renewed as required from time to time. Applying the presumption of regularity, the inspector held that the byelaws were properly made and there was no challenge to that finding. But the inspector held that there were no signs in place during the relevant 20 years which would have indicated to users of the land that their use was regulated by byelaws. The Court of Appeal rightly rejected the town council's submission that byelaws ceased to be binding in the event of a subsequent failure to maintain their display [2014] QB 186, paras 71, 102, 133. If the act of communication were necessary, it was satisfied once and for all when the byelaws were publicised in advance of their confirmation and published when confirmed. It cannot have been the intention of Parliament that they would cease to be valid or enforceable if the boards were, for example, destroyed in a storm, or that they would go in and out of a state of invalidity depending on the physical condition of the boards. Nor could it have been Parliament's intention that if the boards disappeared for whatever reason, byelaws would have to be made all over again.

Alternatively, even if the byelaws were ineffective because of their non-display before 1993, non-display following the repeal of section 89 no longer mattered. Accordingly in respect of local inhabitants' use during the period November 1996 to April 2006, when access to West Beach was fenced off, the byelaws were effective in all their aspects without the need to remake them following the repeal of section 89. Applying the law in its current state, the users of the land were not trespassers, and their use was by right or of right, but not "as of right". [Reference was made to the Supreme Court's decision in *R (Barkas) v North Yorkshire County Council* [2015] AC 195, departing from *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, to *R v Secretary of State for the Enviroment, Ex p Billson* [1999] QB 374 and to Leslie Blohm QC, "The 'By Right' Doctrine and Village Green Applications—a Response" [2014] 78 Conv 40, 47.]

The effect of the inspector's unchallenged finding, that, applying the presumption of regularity, the byelaws were properly made, was that users of the beach after 1931 would not have been trespassers. Nor were they subsequently: it would appear to a reasonable landowner that such use was being permitted. It is therefore unrealistic to suggest that the use by local people was by way of trespass and such as to suggest the assertion of village green rights.

The fourth issue is whether, if it be reasonably foreseeable that registration would conflict with the future exercise of the statutory powers of the landowner, there is a bar to registration.

The claimant is a statutory port authority in respect of the maintenance and operation of the port: see section 49 of the Newhaven Harbour and Ouse Lower Navigation Act 1847; section 2 of the Newhaven Harbour Improvement Act 1878; section 33 of the Harbours, Docks and Piers Clauses

A Act 1847 and the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991. The effect of registration will be to confer rights on local people to use the land and that the use will be protected by criminal sanctions. That may interfere with the ability of the port authority to develop the port. The port authority's powers were conferred in the public interest so that, as in the analogous situations of the creation of public highways and the B creation of easements, Parliament cannot have intended that the registration regime for town and village greens could potentially negative the powers under which the undertakers hold the land. If it is reasonably foreseeable, at the date of the registration application, that registration will conflict with the future exercise of statutory powers under which the land is held, it cannot have been intended that the registration regime should apply.

Since in conferring statutory powers Parliament recognises that their C exercise is for the public good, the undertaker cannot usually fetter those powers by contract: see *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623. That high constitutional principle does not inhibit statutory authorities from entering commercial contracts: see *Birkdale District Electricity Supply Co Ltd v Southport Corpn* [1926] AC 355. Whether it does will depend on the context in the particular circumstances, but the principle is one of public D policy and is derived from what courts consider must have been the intention of Parliament.

Nothing in the registration regime for village and town greens states that it does or does not apply to land held by statutory undertakers. But in an appropriate case, the courts will hold that it was not intended that a subsequent Act should repeal an earlier one or affect a particular legal situation: see *Pole-Carew v Craddock* [1920] 3 KB 109; *Bishop of* E *Gloucester v Cunnington* [1943] KB 101 and *Roberts v Roberts* [1986] 1 WLR 437. Thus, the registration provisions of the Commons Act 2006 did not trump the provisions regarding village greens in the Town and Country Planning Act 1990, even though the 2006 Act did not specifically preserve those provisions: see *BDW Trading Ltd (trading as Barrett Homes) v Spooner* [2011] JPL 1247. The question is whether and, if so, how F Parliament intended the 2006 Act to apply.

Similar issues arise in relation to the creation of public highways and easements. What in each situation the court should do is to ensure that the public rights of way, or private easement regime or town or village green regime, does not apply in its full rigour to the land of a statutory undertaker. Its does not depend on whether the statutory power pre-dates or post-dates G the regulatory regime: ultimately it is all about public policy applied through the medium of the intention of Parliament. [Reference was made to *British Transport Commission v Westmoreland County Council* [1958] AC 126 and *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519.]

The creation of highways in English law, which proceeded on the basis of the legal fiction of dedication, raised the question: does a statutory corporation with limited powers have power to dedicate a highway where H such dedication would inhibit its ability in the future to carry out the statutory purposes Parliament intended? [Reference was made to *R v Inhabitants of Leake* (1833) 5 B & Ad 469 and *Mulliner v Midland Railway Co* (1879) 11 Ch D 611.] The answer was that a public highway could not be dedicated if at the relevant time it was reasonably foreseeable that such

dedication was incompatible with the objects of the statutory undertaker: see *British Transport Commission v Westmoreland County Council* [1958] AC 126. That was a pragmatic test reflecting the court's consideration of the relevant conflicting issues of public policy which rested, as its jurisprudential basis, on the conclusion that such a result reflected the intention of Parliament.

The position in Scotland, although derived from different principles, applied the same pragmatic test. [Reference was made to *Mann v Brodie* (1885) 10 App Cas 378; *Macpherson v Scottish Rights of Way and Recreation Society Ltd* (1888) 13 App Cas 744; *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620; *Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 and *Paterson v Provost etc of St Andrews* (1881) 6 App Cas 833.]

In respect of the creation of easements, the starting point in English law is that acquisition occurs by reference to the legal fiction of the lost modern grant on an actual grant: a landowner who has no power to grant has no power to acquiesce so that it is not possible to acquire by lost modern grant an easement which the owner of the servient tenement has no power to grant: see *Barker v Richardson* (1821) 4 B & Ald 579 and *Oakley v Boston* [1976] QB 270. Accordingly, at common law a limited owner enjoyed in effect absolute protection against the establishment by long use of an easement over his land: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. That protection was not lost by statutory intervention: see the Prescription Act 1832: see *Proprietors of Staffordshire and Worcestershire Canal Navigation v Proprietors of Birmingham Canal Navigations* (1866) LR 1 HL 254; *Housden v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172; *M'Evoy v Great Northern Railway Co* [1900] 2 IR 325; *National Guaranteed Manure Co Ltd v Donald* (1859) 4 H & N 8; *Gale on Easements*, 19th ed (2012), p 340; *Jackson, The Law of Easements and Profits* (1978), p 191 and the Law Commission Report: *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) (Law Com No 327) (HC 1067).

Scots law, while rejecting the doctrine of implied or presumed grant, uses language which is consistent with the *M'Evoy* case in holding that it would be ultra vires a statutory undertaker to create servitude rights: see *Ellice's Trustees v Comrs of the Caledonian Canal* 6 F 325. The creation of servitudes by prescription is now the subject of express statutory provision: see the Prescription and Limitation (Scotland) Act 1973 which contains no exception in respect of lack of capacity of the owner of the servient tenement. It is a matter of controversy whether the old law continues to apply: see *Cusine and Paisley, Servitudes and Rights of Way* (1998), para 4.02.

In view of those analogous positions, it would be odd if, in the present context, the land of a statutory undertaker were protected from the establishment of a footpath or easement across it, but not from the registration of a town or village green. If the court is satisfied that Parliament is unlikely to have intended new greens to be registrable over the land of a statutory undertaker in circumstances where it is reasonably foreseeable that the land might reasonably be required for the future purposes of the undertaker there was not only scope for holding that the

A 2006 Act did not have that effect but it would be perverse to interpret the Act as having the effect of making the land registrable in those circumstances: see *R (Barkas) v North Yorkshire County Council* [2015] AC 195 and *R v Doncaster Metropolitan Borough Council, Ex p Braim* (1986) 57 P & C R 1. The pragmatic test applied in cases where the court has considered the establishment of long user both of a public highway and a servitude applies equally to town and village greens.

B That approach achieves a common sense result: Parliament did not intend, by making statutory provision for the registration of a new town or village green to create a situation where such registration could frustrate the exercise of pre-existing statutory powers. Accordingly the beach cannot be registered as a town or village green.

C *Stephen Sauvain QC* and *John Hunter* (instructed by *Director of Legal and Democratic Services, East Sussex County Council, Lewes*) for the defendant registration authority.

As to the first issue raised by the claimant, whether use of the relevant land was not "as of right" because it was by virtue of a permission presumed to arise where the land was part of the foreshore, it is neither doubted nor disputed that the Crown can dispose of its interest in the foreshore: see

D *Attorney General v Richards* (1794) 2 Anst 603; (1795) 3 Anst 753 and *Attorney General v Emerson* [1891] AC 649. The courts have always accepted that a possessory title can be acquired against, and by, the Crown: see *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618 and *Roberts v Swangrove Estates Ltd* [2008] Ch 439. The courts have not considered that rights cannot be acquired by prescription against the Crown: see *Alfred*

E *F Beckett Ltd v Lyons* [1967] Ch 449. The fact that the foreshore might have been within the Crown's ownership cannot therefore be in itself a reason why prescriptive rights cannot be acquired against the Crown's interest.

With respect to the acquisition of public rights, it has always been possible at common law to establish highway rights against the Crown: see *Turner v Walsh* (1881) 6 App Cas 636. The statutory presumption in

F section 31 of the Highways Act 1989 only applies to the Crown by agreement with the appropriate Crown authority. By contrast the Commons Act 2006, in common with its predecessor legislation, the Commons Registration Act 1965, contains no indication that town and village green rights cannot be gained against the Crown. Such rights can be gained in England and Wales in respect of "land" which includes "water"; and no

G statutory intention to exclude the foreshore from the categories of "land" to which the provisions apply can be found in the legislation. The case law, far from being couched in terms of defining any permissive rights which the public might have, is generally consistent in denying the existence of any rights. There is nothing to indicate that the foreshore is to be treated any differently. The relevant principle appears to be that harmless and inconsequential usage of the land may be ignored by the landowner without

H leading to the establishment of a claim of right. There is no support for any special principle of law applicable to the foreshore: it would be odd if a different principle applied to the parts of the beach respectively above and below high water mark. In many cases the use of the beach may be considered trivial and sporadic so that tolerance of the unimportant does not

give rise to the outward appearance of a claim, despite the increasing awareness of landowners of the potential for usage of their land to crystallise into the new category of public rights created by the Act: see *Blundell v Catterall* (1821) 5 B & Ald 268; *Llandudno Urban District Council v Woods* [1899] 2 Ch 705; *Brinckman v Matley* [1904] 2 Ch 313; *Behrens v Richards* [1905] 2 Ch 614; *Blount v Layard (Note)* [1891] 2 Ch 681; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449; *Mills v Silver* [1991] Ch 271 and *Sturges v Bridgman* (1879) 11 Ch D 852. Subjective belief in the existence of the right is not a necessary element in establishing a claim to its usage: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. Accordingly use here is, as the majority of the Court of Appeal held, as of right, and the claimant's argument on the first issue should be rejected.

As to the second and third issues, whereby the claimant raises the questions whether byelaws as made in the present case would, if communicated, have had the effect of giving rise to a revocable permission so that the use of the land would not have been as of right and, if so, whether it was necessary that the existence of the byelaws should have been communicated to the users so as to render the use not as of right, the claimant is wrong to assert that the byelaws were effective to convey an implied permission which rendered the use of the beach precatory in circumstances where the byelaws were not displayed, enforced or otherwise brought to the attention of the public using the beach at any time during the relevant 20-year period.

The byelaws are an insufficient basis for implying a permission to use the land as it was in fact used. They are prohibitory in character and not specific to the beach. They do not address the range of activities which the inspector found to have occurred during the relevant period. It would seriously erode the distinction between acquiescence and permission, on which the law of prescription depends, to find that the absence of prohibition in the case of other activities implies not merely toleration of, but permission for, all the activities in fact carried on.

A landowner must make those using the land aware of any licence or permission if that is to vitiate their claim to use as of right. That principle is not displaced by the departure from *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 in *R (Barkas) v North Yorkshire County Council* [2015] AC 195. The byelaws in the present case were made before the start of the relevant 20-year period and were not drawn to the public's attention at any point during those years. No one could reasonably ascribe the public's use to them during that time.

A byelaw is, by definition, not only an instrument which restricts the freedom an individual would otherwise have whether to choose to act in a certain way, either by ordering something to be done or prohibiting it from being done, accompanied by some sanction or penalty for non-observance (see *Kruse v Johnson* [1898] 2 QB 91), it is possible, depending on the circumstances, for byelaws to confer permission to do some activity. But it does not follow that a byelaw which does not prohibit an activity is to be interpreted as granting permission for it. Something more is required for it to confer actual permission for a particular activity. Here the byelaws are entirely prohibitory. References to permission and consent refer to the

A separate permissions obtained or not from the harbour master. The byelaws are limited in scope and do not prohibit recreational activities such as walking, picnicking and sunbathing, and do prohibit some activities but only in certain parts of the site or if carried out in a certain manner.

There is nothing in the byelaw-making power in section 83 of the 1847 Act to indicate that the port's power was intended to be used so as to grant B the public permission to engage in any recreational activity within the port. Even if the byelaws had been brought to the public's attention, the proper inference would not have been that the port had granted permission for the non-prohibited activities, but instead that they were not of sufficient concern to the port to require them to be made the subject of byelaws: that the port, having had power to prohibit them, chose not to and acquiesced in them. In any event the scope of the byelaws is far more limited than the range of C recreational activities found by the inspector to have been carried on during the relevant period. All such activities must have been carried on as of right.

In any event, if they were to be relied on, the byelaws had to be published to the public during that period by some overt act or positive conduct: see *R (Beresford) v Sunderland City Council* [2004] 1 AC 889; *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT D 1035; *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] AC 221; *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; *R (Barkas) v North Yorkshire County Council* [2015] AC 195 and *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70.

The making of the byelaws was not in itself sufficient; that does not amount to a positive act or overt conduct which defeats a claim to use as of E right. There is no inconsistency in finding that the byelaws might be effective to give effect to an express prohibition and a finding that they were ineffective to convey an implied permission: see the majority decision of the Court of Appeal [2014] QB 186, 267, 271. As a result the inspector and the registration authority were entitled to conclude that use of the beach during the relevant period was not by permission arising from the byelaws.

F As to the fouth issue, whereby the claimant raises the question whether, if it is reasonably foreseeable that registration would conflict with the claimant's future exercise of statutory powers, there is a bar to registration, the proposition for which the claimant contends is very wide, unlike and to be contrasted with the principle of incompatibility with the objects of the statutory undertaker in *British Transport Commission v Westmoreland* G *County Council* [1958] AC 126. As stated, the proposition would be capable of removing from the law relating to town and village greens significant areas of land owned by public bodies, and possibly by trustees. It would also bring into question existing registrations. Although the width of its effect should not deter the court from identifying a parliamentary intention or a hitherto disguised principle of common law, it makes it all the more surprising that Parliament itself did not address or recognise the issue when H legislating in 1965 and 2006. [Reference was made to *Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs* [2012] ACD 311.]

With regard to town and village greens, usage as of right requires only acquiescence in the landowner. Acquiescence over the required period is a

statement of historical fact, a state of affairs which has existed, a failure to have acted. It does not depend on capacity to grant rights or to dedicate, it is dependent on how usage of the relevant land by those claiming town and village green rights would have appeared to the objective observer. If the proposition for which the claimant contends were correct, a new and different analysis would have to be formulated which would be at odds with the decisions in *R v Oxfordshire County Council,Ex p Sunningwell Parish Council* [2000] 1 AC 335; *R (Barkas) v North Yorkshire County Council* [2015] AC 195 and *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70. [Reference was made to *R v Doncaster Metropolitan Borough Council, Ex p Braim* (1986) 57 P & CR 1.] There is no consistent line of authority to support such a proposition.

The judge reached his conclusion in favour of such a proposition, following an argument advanced primarily by reference to *British Transport Commission v Westmoreland County Council* [1958] AC 126 and *Western Power Distribution Investments Ltd v Cardiff City Council* [2011] EWHC 300 (Admin); [2011] NPC 25. He considered himself bound by the former case to find that the port lacked capacity or power to grant rights that would accrue to the land once registered [2014] QB 186, 224–225, paras 144, 147. The Court of Appeal, correctly, held that it was impossible to read any such limitation into the provisions and overturned the judge's conclusion: see pp 245–246, paras 13–15, pp 249–250, para 28 and p 272, para 106. The scheme of the 2006 Act is, on its face, clear: section 15 applies without qualification to any land in England and Wales, including land held by the Crown and land covered with water, so long as the relevant conditions are satisfied.

The claimant's argument based on the *British Transport Commission* case is misconceived for the reasons given by the Court of Appeal. [Reference was made to *R v Inhabitants of Leake* (1833) 5 B & Ad 469; *Paterson v Provost etc of St Andrews* (1881) 6 App Cas 833; *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623; *Birkdale District Electricity Supply Co Ltd v Southport Corpn* [1926] AC 355 and *Mulliner v Midland Railway Co* (1879) 11 Ch D 611.]

Parliament did not intend to exempt public land from registration as a town or village green: see *R (Barkas) v North Yorkshire County Council* [2015] AC 195. But it is equally clear that registration of such land will in many cases conflict, or may potentially do so, with the statutory purpose for which the land is held and the exercise of statutory powers over it. The present case is accordingly far from unique and no problem seems to have arisen from registrations already made: see *New Windsor Corpn v Mellor* [1976] Ch 380; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 and *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70. The settled understanding of the law is inconsistent with the claimant's argument of the fourth issue. It is irrelevant to the statutory conditions for registration as a town or village green, whether or not it is reasonably foreseeable, that registration of the land would conflict with the future exercise of the statutory powers for which it is held.

Nor does the law of prescription support such a proposition: see *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620; *Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 and

*M'Evoy v Great Northern Railway* [1900] 2 IR 325, as explained by Richards LJ in the Court of Appeal [2014] QB 186, paras 23, 24; *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 354; *Housden v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172; *Evans v Wimbledon and Putney Commons Conservators* [2014] 2 P & CR 285, para 12 and *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519.

*George Laurence QC* and *Edwin Simpson* (instructed by *Hedleys Solicitors LLP, East Horsley*) for the town council, an interested party.

On the first issue, whether the use of the site was not as of right because it was by virtue of a permission which was presumed to arise where the land in question formed part of the foreshore, the authorities prior to *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 are all one way: they establish that no one has a right to be on a beach. In the *Beckett* case the taking away of coals from the foreshore was treated as a matter of permission, to be explained by tolerance of the foreshore owner and long permitted practice.Toleration is not a species of permission: it is a species of acquiescence; it is not therefore inconsistent with use being as of right: see *Mills v Silver* [1991] Ch 271; *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; *Blount v Layard (Note)* [1801] 2 Ch 681 and *Attorney General v Dyer* [1947] Ch 67. The *Beckett* decision can be supported on the basis that the owner's non-intervention in the activities complained of was tolerance properly so called: see the *Sunningwell* case at p 359A, per Lord Hoffmann and *Folkestone Corpn v Brockman* [1914] AC 338, 353, 358. The decision in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 to depart from *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 in no way undermines the rule that toleration is to be equated not with permission but with acquiescence. [Reference was made to *Behrens v Richards* [1905] 2 Ch 614 and *Brinckman v Matley* [1904] 2 Ch 313.] The reasoning of the majority of the Court of Appeal [2014] QB 186 is to be preferred to that of Lewison LJ. His analysis that the foreshore is a special case is overstated and the reasons he gives at para 128 of his judgment are not sustainable. [Reference was made to *Paddico (267) Ltd v Kirklees Metropolitan Council* [2011] LGR 727; [2012] LGR 617.]

On the second issue, whether byelaws, in the form made here, would, if communicated, have had the effect of giving those who used the land a revocable licence so that use of the land would have not been "as of right", the inspector's findings do not permit a presumption that the notification requirements were ever complied with during the relevant period. Compliance is essential to the enforceability of the byelaws and, on the facts, the claimant has not been able to demonstrate that they were enforceable at any time in the 20-year period. Section 88 of the 1847 Act was evidently drafted on the basis that it would be wrong to make people potentially liable to criminal sanctions at a time when the enforcement obligations were not complied with. Section 89 is irrelevant to that conclusion. Before its repeal that section neither governed nor dictated the construction of section 88 and its subsequent repeal left that position unchanged. Apart from their unenforceability, the byelaws, on a true construction, would permit recreational activities not prohibited by byelaw 68 as long as they did not

obstruct or impede the use of the harbour, and provided that dogs were on leads or otherwise under control

On issue 3, on the basis that issue 2 produced an affirmative response, the claimant asks whether it is necessary that the existence of the byelaws be communicated to the users of the land in order that their use was not as of right. There are certain circumstances when a statutory entitlement to use land for recreation will arise; for example, the quasi-recreational trust created when land is made available under section 164 of the Public Health Act 1875 (see *Hall v Beckenham Corpn* [1949] 1 KB 716); the recreational trust which arises when land is held under section 10 of the Open Spaces Act 1906; *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 and *R (Barkas) v North Yorkshire County Council* [2015] AC 195; the rights of access for air and exercise which arise on execution of a revocable deed under section 193 of the Law of Property Act 1925 (see *R v Secretary of State for the Enviroment, Ex p Billson* [1999] QB 374); and making land available for recreation under section 12 of the Housing Act 1985 and its predecessors: see the *Barkas* case. In such circumstances it is impossible also to permit such use: although use will then be nec precario, the claim to register will nevertheless fail owing to there being no statutory entitlement. Moreover, no landowner could reasonably be expected to intervene to prevent use because he would have no right to do so. In those cases entitlement exists without the need for communication.

Promulgation of byelaws which prohibit certain activities but on their true construction permit certain others does not operate to confer a statutory or equivalent entitlement to use the land for those other activities. While application of the presumption of regularity means that people would have known about the byelaws when they were made in 1931, on the unchallenged findings of the inspector there was no sign of them on the beach in 1986 when the relevant 20-year period began and no evidence that they were ever displayed before that time. [Reference was made to *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396.]

The departure from the *Beresford* case by the *Barkas* case does not mean that overt acts supporting the implication of permission to use land claimed as a green has become unnecessary: the effect is that when a local authority exercises its power to provide facilities for recreational use during the 20-year period, that will usually be enough to support the implication of a permission to use. No such facilities were provided in the present case, neither were there any other acts from which a revocable permission could be implied.

In any event, on the inspector's finding, the conduct of the users, indulging in recreational activities as of right on the land was sufficient to bring home to the landowner that a right was being asserted: there was nothing ambiguous about that conduct and nothing was done to encourage members of the public to believe that their use of the beach was with the claimant's permission.

*Simpson* following.

The judge erred in holding that there was a reasonably foreseeable possibility of future conflict which was fatal to registration [2014] QB 186, 224–225, paras 145–148. The Court of Appeal was correct unanimously to

A disagree and to hold that no such incompatibility arose in that context. The high constitutional principle associated with the decision in *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623 is not so broad as to justify such a conclusion. Issues similar to those arising in the creation of highways and easements do not arise: unlike the law relating to public highways and easements, registration does not depend on dedication or an actual or
B presumed lost grant but on use of a specified character over a specified period. The claimant had the power, and the duty, to take the appropriate action to prevent the land becoming registrable as a green so as to prevent the possibility of future conflict with its powers. There is no reason why registration should not follow. Scottish case law does not assist the claimant. The underlying logic of prescription (see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335) is respected but,
C in the context of greens, section 15 of the 2006 Act allows no role for any fiction of grant or dedication or for statutory incompatibility. Parliament when it enacted the 2006 Act had clear mechanisms available if it had wished to provide for a "defence" of reasonably foreseeable incompatibility. It is not odd that Parliament chose to act as it did. In any event, it is a question of fact whether there is such incompatibility (see *British Transport*
D *Commission v Westmoreland County Council* [1958] AC 126) and accordingly that was a matter for the inspector. She made no finding on that question, since it only arose during the hearing before the judge. The registration decision should not be impugned retrospectively and, at the very most, the question should be remitted to the inspector for the relevant facts to be determined.

E *George QC* replied

The court took time for consideration.

25 February 2015. The following judgments were handed down.

F **LORD NEUBERGER OF ABBOTSBURY PSC** and **LORD HODGE JSC** (with whom **BARONESS HALE OF RICHMOND DPSC** and **LORD SUMPTION JSC** agreed)

*Introductory*

**1** The specific issue raised by this appeal is whether East Sussex County Council ("the County Council") was wrong in law to decide to register an
G area of just over 6 hectares (or 15 acres) known as West Beach at Newhaven ("the Beach") as a village green pursuant to the provisions of the Commons Act 2006. The points of principle raised by the appeal are, potentially at least, far more wide ranging. Those points are (i) the nature of the public's rights over coastal beaches, (ii) whether byelaws can give rise to an implied consent to the public to use land, and (iii) the interrelationship of the statutory law relating to village greens and other duties imposed by statute.

H

*The factual background*

**2** Newhaven is a port town on the mouth of the River Ouse in East Sussex, and its harbour ("the Harbour") has existed since the mid-sixteenth century, after a storm blocked the original mouth of the River Ouse, some

three miles to the east. Since at least 1731, the operation of the Harbour has been subject to legislation. The Newhaven Harbour and Ouse Lower Navigation Act 1847 ("the 1847 Newhaven Act") repealed the earlier legislation, and established harbour trustees ("the trustees"), to whom it gave powers to maintain and support the harbour and associated works.

3 Section 49 of the 1847 Newhaven Act is in these terms:

> "[The] trustees shall maintain and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith, and also maintain and support the open navigation of the River Ouse between Newhaven Bridge and Lewes Bridge . . ."

4 The Newhaven Harbour and Ouse Lower Navigation Act 1863 (26 & 27 Vict c clxxxiv) ("the 1863 Newhaven Act") gave the trustees powers to construct and maintain and support the Harbour and associated works.

5 The Newhaven Harbour Improvement Act 1878 ("the 1878 Newhaven Act") established the Newhaven Harbour Company to which were transferred the rights, powers and duties of the trustees. Under section 57 of the 1878 Newhaven Act it is provided: "The company may hire or purchase and use any dredging machine for the purpose of deepening and cleansing the harbour . . ." Section 2 of the 1878 Newhaven Act applied to the port section 33 of the Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Clauses Act"), which provides:

> "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

6 By virtue of the Southern Railway Act 1926, the Harbour Company was vested in the Southern Railway Company. Pursuant to the Transport Act 1947, the Southern Railway Company was nationalised, and the Harbour was vested in the British Transport Commission. As a result of subsequent statutory and contractual arrangements, the Harbour subsequently vested in British Railways Board (1962), Sealink (UK) Ltd (1979), Sea Containers Ltd (1984), and, most recently, in 1991, Newhaven Port and Properties Ltd ("NPP"), pursuant to the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991 ("the 1991 Newhaven Order").

7 Articles 10 and 11 of the 1991 Newhaven Order provide:

> "10(1) The company, subject to obtaining the necessary rights in or over land, may execute, place, maintain and operate in and over the transferred harbour such works and equipments as are required for or in connection with the exercise by it of any of its functions and may alter, renew or extend any works so constructed or placed . . .
>
> "11(1) The company may deepen, widen, dredge, scour and improve the bed and foreshore of the transferred harbour and may blast any rock within the transferred harbour or in such approaches."

8 The Beach is part of the operational land of the Harbour, which is currently owned and operated by NPP, and is subject to statutory provisions and byelaws. The extent of the Harbour area includes (i) a substantial

breakwater and lighthouse, seawall and the Beach which form the west of the entry into the port, (ii) a pier, a much longer (and naturally created) shingle beach which form the east of that entry, (iii) the mouth of the River Ouse and the next thousand metres or so of the river, and (iv) land running either side of the river, which includes (v) a car park, marina and fishing berth to the west, and (vi) two quays, a ferry dock, a cool store, a harbour railway station, and harbour offices to the east. NPP's current strategic plan for development of the port is contained in its masterplan (2012).

**9** The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction of the breakwater, accretion of sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach. To the north, the Beach is bounded by a harbour wall. On top of the harbour wall is an area of hard standing and a car park, which is now owned and operated by NPP. There are physically two means of access to the Beach: first, by steps leading down from the top of the wall, and, secondly, by another set of steps leading down from the top of the breakwater.

**10** The Beach is substantially covered by the sea for periods of time either side of high tide. Inevitably, as the tide ebbs and flows, the amount of the land uncovered varies, and the amount of the land uncovered at low tide and the period for which the whole of the Beach is covered with water varies between spring (high) and neap (low) tides. On average, the Beach is wholly covered by water for 42% of the time and for the remaining 58% of the time it is uncovered to some extent, but it is entirely uncovered by water only for a few minutes at a time.

**11** The steps leading down to the Beach from the top of the harbour wall were accessible in practice by members of the public from shortly after the end of the Second World War (during which time it was closed) until it was fenced off by NPP in April 2006. Thereafter, access by the public was no longer possible, because access from the steps leading from the top of the breakwater had been closed off before 2006.

*The making of byelaws relating to Newhaven Harbour*

**12** Section 58 of the 1878 Newhaven Act conferred on the Harbour Company the power to make byelaws which were to be approved and published in the manner prescribed by the 1847 Clauses Act. Section 83 of the 1847 Clauses Act gives to the "undertakers" in whom a harbour is vested the power to make byelaws "as they shall think fit" for various purposes, including "[for] regulating the use of the harbour, dock, or pier". Section 84 provides for criminal sanctions at the suit of the undertaker for breach of such byelaws. Section 85 of the 1847 Clauses Act states that the byelaws should not "come into operation until the same be confirmed" as required by that Act. Sections 86 and 87 of that Act are concerned with advertising and providing copies of the byelaws before confirmation.

**13** Provisions relating to the publication and display of such byelaws were contained in sections 88 and 89 of the 1847 Clauses Act:

> "88. The said byelaws when confirmed shall be published in the prescribed manner, and when no manner of publication is prescribed they

shall be printed; and the clerk to the undertakers shall deliver a printed copy thereof to every person applying for the same without charge, and a copy thereof shall be painted or placed on boards, and put up in some conspicuous part of the office of the undertakers, and also on some conspicuous part of the harbour, dock, or pier, and such boards, with the byelaws thereon, shall be renewed from time to time, as occasion shall require, and shall be open to inspection without fee or reward . . .

"89. All byelaws made and confirmed according to the provisions of this and the special Act, when so published and put up, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same."

Section 89 was repealed by the Statute Law (Repeals) Act 1993. Section 90 of the 1847 Clauses Act provides: "The production of a written or printed copy of the byelaws" appropriately authenticated "shall be evidence of the existence and due making of such byelaws", and "with respect to the proof of the publication of any such byelaws, it shall be sufficient to prove that a board containing a copy thereof was put up and continued in manner by this Act directed . . ."

**14** In February 1931, the Southern Railway Company made byelaws for the Regulation of Newhaven Harbour ("the Byelaws"), which were confirmed by the Minister of Transport the following month. The following byelaws are germane to the present appeal:

"51. No person shall enter or remain on the quays of the harbour unless he has lawful business thereon, or has received permission from the harbour master to do so; and every person entering or who shall have entered on such quays, shall, whenever required so to do by any duly authorised servant of the company, truly inform him of the business in respect of which such person claims to be entitled to be thereon. Any person committing a breach of this byelaw may be forthwith removed from the quays and be excluded therefrom . . .

"52. No person shall, without the consent of the harbour master, enter or remain within any part of the piers or quays which may, under a reasonable direction of the harbour master, be enclosed by chains, or by a barrier."

"68. No person, without the permission of the harbour master, shall fish in the harbour; and no person shall bathe in that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse."

"70. No person shall engage in or play any sport or game so as to obstruct or impede the use of the harbour, or any part thereof, or any person thereon; nor (except in case of necessity or emergency) shall any person, without the consent of the harbour master, wilfully do any act thereon, which may cause danger or risk of danger to any other person.

"71. No person shall bring any dog within the harbour, or permit it to be within the harbour, unless it is securely fastened by a suitable chain or cord, or is otherwise under proper and sufficient control."

**15** As regards publication and enforcement of the Byelaws, according to the Inspector who wrote the reports referred to in para 19 below, there were no byelaw signs in place during the relevant 20-year period that would have

A indicated to users of the Beach that their use was regulated by byelaws. She also concluded that there was no evidence of active enforcement of the Byelaws during that period; and that there was no other suggestion of any other overt act on the part of the landowner during that period to demonstrate that he was granting an implied permission for local inhabitants to use the Beach.

B

*The Commons Act 2006*

**16** Town and village greens have been protected by statute since at least 1857. However, the currently applicable legislation is to be found in the Commons Act 2006, and in particular in section 15 of that Act, which replaced the preceding governing legislation, which was contained in the C Commons Registration Act 1965.

**17** Section 15(1) of the 2006 Act provides that "Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies." Subsections (2), (3) and (4) each refer to cases where: "(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and D pastimes on the land for a period of at least 20 years." Subsection (2) only applies where this use was continuing at the date of the application; subsection (3) only applies where the use had ceased after section 15 commenced, provided that the application was made within two years of such cesser; and subsection (4) only applies where the land ceased to be so used before section 15 commenced, provided (i) the application is made E within five years of the cesser and (ii) an inconsistent planning permission has not been granted and implemented. It is, of course, subsection (4) which is relied on in this case. By section 61 of the 2006 Act, it is provided that "land" includes "land covered by water".

**18** It was argued below on behalf of NPP that a tidal beach cannot be a "town or village green" within the meaning of the 2006 Act. A speaker of F ordinary English might well think that there is very considerable force in that argument. However, substantially for the reasons given by Ouseley J in the High Court [2014] QB 186, 197–204, paras 11–39 and by Richards LJ in the Court of Appeal [2014] QB 186, 250–253, paras 31–42, the argument must be rejected. In summary, the argument is inconsistent with the reasoning of the majority of the House of Lords in *Oxfordshire County Council v Oxford* G *City Council* [2006] 2 AC 674, a case on the 1965 Act (as amended in 2000), which, for the purposes of the point at issue was identically worded to the 2006 Act: see per Lord Hoffmann, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe respectively at paras 39, 115 and 128. It might have been appropriate for this court to reconsider the *Oxfordshire* case were it not for the fact that it was decided while Parliament was considering the Bill which became the 2006 Act, and Lord Hoffmann, Lord Rodger and H Lord Walker each expressly observed (in the paragraphs just mentioned) that, if Parliament was unhappy with the decision, the Bill could be amended appropriately, and it was not. Implied Parliamentary approval of a court's decision should not be lightly inferred, but in the present case, we thought it inappropriate to grant permission to appeal on this issue.

*The application to register*

**19** On 18 December 2008 Newhaven Town Council ("the Town Council") applied to the County Council, as the statutory registration authority, to register the Beach as a town or village green. The application was supported by evidence that the Beach had been used by a significant number of local inhabitants as of right and for a period of at least 20 years down to April 2006. NPP objected to the proposal, and the County Council appointed an Inspector, Ruth Stockley, a barrister experienced in this area of the law, to hold a public inquiry. The inquiry was held between 6 and 8 July 2010, following which Ms Stockley produced a report dated 6 October 2010 and an addendum report dated 14 December 2010, recommending that the Beach be registered as a town or village green. Ms Stockley's two reports were very full and clear. Importantly, she concluded that members of the public, and, crucially residents of the locality, had used the Beach for well over 80 years as a place to play, sunbathe, swim from, picnic and the like (save during much of the First and Second World War periods, when the port area, including the Beach, were inaccessible).

**20** On 22 December 2010, the two reports and recommendation were put before the County Council's Commons and Village Green Registration Panel ("the Panel"), together with an officer's recommendation that the County Council accept the application and register the land as a town or village green. The Panel resolved to accept the application to register the Beach, but the actual registration awaits the outcome of these proceedings.

**21** NPP then applied to the High Court for judicial review of the decision to register the Beach as a town or village green. The application came before Ouseley J who, in a comprehensive and carefully considered judgment [2014] QB 186, rejected a number of arguments raised by NPP, but granted their application on one ground, namely that it was reasonably foreseeable that the registration of the Beach would conflict with the statutory functions for which the Beach was held by NPP, namely as part of Newhaven Harbour.

**22** The County Council and the Town Council appealed that decision to the Court of Appeal, who, in the course of their impressive judgments, unanimously disagreed with the judge's reason for granting the application [2014] QB 186. Accordingly, the majority of the Court of Appeal (Richards and McFarlane LJJ) allowed the appeal. Lewison LJ would have dismissed the appeal on the ground that the use of the Beach by members of the public, and therefore by inhabitants of the locality, up to 2006 had not been "as of right", but by implied licence, for two different reasons, namely (i) because members of the public had enjoyed an implied licence to use coastal beaches in the UK for recreational and associated purposes, and/or (ii) by virtue of the provisions of the Byelaws governing the harbour area.

*The issues on this appeal*

**23** The provisions of section 15 of the 2006 Act only enable land to be registered as a town or village green if it has been used for recreational and similar purposes by inhabitants of the locality for more than 20 years "as of right". As was explained most recently by this court in *R (Barkas) v North Yorkshire County Council* [2015] AC 195, paras 14–19 and 58–68, that expression, perhaps somewhat confusingly, is to be contrasted with "by

A right", and generally connotes user without any right, whether derived from custom and usage, statute, prescription or express or implied permission of the owner. Accordingly, where the inhabitants of the locality have indulged in sports and pastimes on the land in question with the licence of the owner for at least part of the relevant 20-year period, section 15 will not apply.

**24** Three issues arise on this appeal. The first is whether the fact that the B Beach is part of the foreshore defeats the contention that the user by local inhabitants for sports and pastimes can have been "as of right", on the ground that the public had an implied licence to use the foreshore for such purposes and the implied right was never revoked in the case of the Beach. The second issue is whether, if that is not right, the public none the less had an implied licence to use the Beach, as part of the Harbour, in the light of the Byelaws. The third issue is whether, in any event, section 15 of the 2006 Act C cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function to which the land was to be put.

**25** We will take these three issues in turn.

*Public rights over the foreshore: the arguments*

D **26** The foreshore around England and Wales, by which is meant the area between the high water and low water mark, is owned by the Crown, although it is open to the Crown to alienate it, either permanently by conveying or transferring it, or temporarily by granting leases over it: see e g *Halsbury's Laws of England*, 4th ed reissue, vol 12(1) (1998), para 242. During the course of argument, we were informed that the Crown retained E ownership and possession of more than half the foreshore around England and Wales. Most of the foreshore which the Crown no longer owns was at some point conveyed or transferred away. But to describe the Beach in this case as having been alienated in this way may be slightly misleading, as the Beach only came into existence as a beach in 1883 in the circumstances described in para 9 above.

**27** However, that does not impinge on NPP's argument, which is that F there is a rebuttable presumption that the public use of the foreshore is by permission of the owner of the Beach—that is, the Crown or its successors in title. This proposition was rejected by Ouseley J at first instance and by the majority of the Court of Appeal, Richards and McFarlane LJJ. However, it was accepted by Lewison LJ.

**28** The state of the law relating to public rights over the foreshore of G England and Wales is more controversial than one might have expected. It appears clear that there is, at least normally, "a public right of navigation and of fishing in the sea and rights ancillary to it": *Halsbury*, para 243. However, the question in this case is the existence and nature of any further or greater rights, and in particular the right to use the foreshore for the purpose of bathing and the sort of familiar activities which people indulge in on a beach—at least in good weather.

H **29** At least where there is no express permission from the owner of the foreshore, there are in principle at least three possible conclusions in relation to the issue of the public's right to use the foreshore for bathing, by which we mean using the foreshore as access to the sea at low tide, or bathing in the sea over the foreshore at high tide (or a combination of the two), plus associated

recreational activities. The first is that members of the public have, as a matter of general law and irrespective of the wishes of the owner of the foreshore, the right to use the foreshore for the purpose of bathing, as a matter of general common law. The second possibility is that the owner of the foreshore is presumed to permit members of the public to use of the foreshore for the purpose of bathing, unless and until the owner communicates a revocation of its implied permission. The third possibility is that members of the public have no right to use the foreshore for bathing, in which case they are trespassers.

30 NPP would succeed on the first issue on this appeal if the first or second of these possibilities is correct. If local inhabitants (a subset of members of the public) had been using the Beach because they were entitled to do so as a matter of common law (the first possibility), or because they had an implied permission to do so (the second possibility), then, in so far as they were inhabitants of the locality, they would not have been doing so "as of right", but "by right". On the other hand, if the third possibility is correct, NPP would fail because the user by local inhabitants would have been as trespassers, and therefore "as of right", at least subject to the other two issues on this appeal.

31 So far as the relevant cases on the issue are concerned, none is binding on this court, but they tend to be against the first possibility and somewhat unclear as between the second and third possibilities. Presumably for that reason, Mr George QC, on behalf of NPP, does not argue for the first possibility and takes his stand on the second possibility.

*Public rights over the foreshore: the authorities*

32 The leading, and it may be said the only, reported case where the topic of the rights of members of the public to bathe on the foreshore has been considered in any detail is *Blundell v Catterall* (1821) 5 B & Ald 268. In that case, the defendant used the beach "between the high-water mark and the low-water mark of the River Mersey" at Great Crosby in Lancashire for the purpose of providing bathing facilities (including bathing machines and carriages for members of the public who wished to swim in the sea). The plaintiff, as Lord of the Manor of Great Crosby and owner of the beach in question, sought an injunction to restrain this use. The defendant argued that all members of the public had the right to use a beach for the purpose of gaining access to, and bathing in, the sea.

33 The Court of King's Bench, Best J dissenting, decided that, unless such a right could be established by usage and custom, there was no "common-law right for all the King's subjects to bathe in the sea, and to pass over the seashore for that purpose". The leading judgment has long been regarded as that of Holroyd J who gave the extent of the rights of the public over the seashore impressively full and detailed consideration, although Abbott CJ and Bayley J also delivered full judgments, as did the dissenting Best J.

34 Best J in effect followed the view expressed in *Bracton's De Legibus et Consuetudinibus Angliae*, where it is written: "Naturali vero iure communia sunt omnium haec: aqua profluens, aer et mare et litora maris, quasi mari accessoria. Nemo igitur ad litus maris accedere prohibetur" (By natural law these are common to all: running water, air, the sea, and the

A shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore). However, Holroyd J considered that this represented the civilian law, but not the common law.

35 Essentially, as we see it, the reasoning of the majority can be justified by reference to the well-established common law proposition that rights over land can normally only be obtained by grant, custom and usage, or B prescription. Custom and usage required a long period of use for the specified purpose, and prescription could (at any rate until 1832) normally only be invoked if it could be shown that the use had continued since "time immemorial" which, at least normally, meant 1189. Bathing in the sea, unlike fishing and navigation, was a comparatively recent popular activity, which seems to have started as such around the middle of the 18th century. Although Joseph Strutt in *Sports and Pastimes of the People of England* C (1802) refers to "swimming" as "an exercise of great antiquity", the first recorded instance of people bathing in the sea for pleasure, according to NPP in this case, was in Scarborough in 1732: *Crane, Coast: Our Island Story: A Journey of Discovery Around Britain's Coastline* (2010), p 218. Accordingly, bathing could rarely be a right obtained by custom and usage or (at least until the Prescription Act 1832 (2 & 3 Will 4, c 71), which D introduced the 20-year and 40-year rules) by prescription.

36 The decision in *Blundell* 5 B & Ald 268 was not concerned with the second possibility canvassed in para 29 above, namely whether there was, or could be taken to be, some sort of tacit licence on the part of the owner of the seashore permitting members of the public to use it for bathing, recreations and pastimes. The point could not have arisen in that case, because it would not have availed the defendant, as any such licence would have been revoked E by the plaintiff's objection to the defendant's use of the beach.

37 None the less, there are observations in the judgments in *Blundell*, which appear to imply that the right to use the foreshore for bathing or for access to the sea for bathing could be acquired by prescription. For instance, at p 301, albeit in a passage whose clarity is not assisted by a double negative, Holroyd J said "nor, if [the present claim] were [supported by F custom or usage], would it follow that it was such a common law right as might not, by prescription at least, be otherwise appropriated". It seems to us that that observation carries with it the implication that a member of the public would be trespassing on the foreshore if he used it for that purpose, as otherwise they could not raise a claim by prescription. However, it would not be safe to make much of what is little more than a throw-away obiter G observation.

38 Further, in what may be seen as a hint at the possibility of an implied licence at p 300, Holroyd J said:

> "Where the soil remains the King's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint on the H subjects would, in that respect, be enforced by the King, the parens patriae."

This provides some apparent assistance to NPP's argument that there is an implied licence from the owner of a beach to use it for purposes which do not interfere with the interests of the owner. However, it would be wrong to

place much weight on it, as, once again, it was not really relevant to the issue which the court had to decide, and it is not clear quite what the legal characterisation of the owner's indulgence Holroyd J had in mind.

**39** In *Mace v Philcox* (1864) 15 CBNS 600, Williams J appears to have treated *Blundell* as a decision limited to the presence or use of bathing machines. In the same case, Erle CJ was apparently unenthusiastic about the majority view in *Blundell*, saying "I am desirous of guarding my judgment so as not to restrict the valuable usage or right of Her Majesty's subjects to resort to the seashore for bathing purposes", although he followed the majority view. So did Cozens-Hardy J in *Llandudno Urban District Council v Woods* [1899] 2 Ch 705, albeit without any expressed lack of enthusiasm. However, it could be said that he demonstrated a degree of restraint by refusing an injunction to restrain the activity in question (preaching on the foreshore) although concluding, in accordance with the reasoning in *Blundell*, that it was a trespass.

**40** In *Brinckman v Matley* [1904] 2 Ch 313, 317, Buckley J, after referring to the fact that it had been applied in two first instance decisions of *Mace* and *Llandudno*, followed the judgment of Holroyd J in *Blundell*, and proceeded on the basis that members of the public did not have the right to go on the foreshore for the purpose of bathing or getting access to the sea for bathing. In the Court of Appeal in *Brinckman*, Vaughan Williams LJ said at p 322 that the majority view in *Blundell*, even if technically obiter, "has been recognised ever since by the whole of the profession as an accurate and binding statement of the law". Accordingly, he concluded, "I do not think that we ought now, after the lapse of eighty years, to upset the law thus settled". Romer and Cozens-Hardy LJJ took the same view: see at pp 326 and 327.

**41** Shortly after this, Buckley J in *Behrens v Richards* [1905] 2 Ch 614 refused an injunction sought by the owner of land leading to the foreshore against fishermen who used the land to gain access to the foreshore, although he held that the fishermen had established no public right of way by long user. Buckley J said, at pp 619–620:

> "I cite again, as I did in *Brinckman v Matley*, Bowen LJ's words in *Blount v Layard (Note)* [1891] 2 Ch 681, 691, 'that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood,' and 'that, however continuous, however lengthy, the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence.' In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred."

This observation may give some support for the notion of an implied licence, the second possibility identified in para 29 above, but it refers to the use of

land as a public means of access to the foreshore, not to the use of the foreshore itself.

**42** In *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 the Court of Appeal declined to hold that gatherers of coal on the foreshore for personal use were trespassers. Coal-gathering by local inhabitants went back to 1895, and, if they had been trespassers, the coal-gathering would have been carried on "as of right" for more than 20 years. However, as it was held that there was no trespass, no prescriptive right could have been obtained. The judgments therefore provide support for the second possibility referred to in para 29 above, and in particular there are dicta which support the notion that the use of the seashore for purposes other than fishing and navigation would be pursuant to an implied licence from the owner of the foreshore. Thus, Harman LJ observed at p 469A that it was "notorious that in many and indeed most places the use of the foreshore by the public for purposes of recreation and bathing is tolerated", and at p 472F that

> "The practice may be sufficiently explained by tolerance of the foreshore owner, who would have been churlish indeed if he had stopped a poor man climbing up the cliff with a bag of small coals picked up on the shore to nourish his evening fire."

Accordingly, at p 474A, he held that there was no prescribed right to collect coal from the beach as "toleration is a sufficient explanation". Russell LJ, who said pithily, at p 476A, "the only reasonable conclusion is mere tolerance of the unimportant", and Winn LJ, who referred at p 485G to collecting coal as being "a practice which had been long permitted" took the same view.

**43** In passing, it is worth noting that Harman and Winn LJJ considered that a fluctuating group of people (such as local inhabitants) could not claim the right to gather coal by prescription: see at pp 474B–D and 479C–D respectively. Harman LJ based his reasoning on the fact that the right would be a profit à prendre. However, Winn LJ quoted from a judgment of Farwell J in *Attorney General v Antrobus* [1905] 2 Ch 188, 198 which suggested that an easement could not be obtained for recreational purposes. However, that may not be right in the light of *In re Ellenborough Park* [1956] Ch 131. Having said that, it is questionable whether, under common law as opposed to statute, a right to use the foreshore for bathing could be claimed by a fluctuating group of people such as the inhabitants of a neighbourhood or locality, as opposed to each owner of an alleged dominant property establishing a prescriptive easement arising from more than 20 years of such use as of right by that owner and/or his predecessors.

**44** While the reasoning in *Beckett* [1967] Ch 449 provides some support for the second possibility identified in para 29 above, it has a number of features which render it at least arguably of limited assistance. First, it was not concerned with the right to bathe. Secondly, as is clear from what was said at pp 465A–D and 469B–D, the right to gather coal was treated as acknowledged in two deeds of grant from the Crown. Thirdly, it appears to have been accepted that the public rights over the foreshore were limited as held in *Blundell*, but the point was left open at least by Winn LJ at p 486C. Fourthly, the court in *Beckett* proceeded on the basis that *Jones v Bates* [1938] 2 All ER 237 was correct, i e that the subjective belief of the person

claiming a prescriptive right was relevant, indeed often determinative, on the question whether he had been acting "as of right", which is wrong: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 358H, per Lord Hoffmann.

**45** Furthermore, in *Mills v Silver* [1991] Ch 271, 279G–280B, Dillon LJ pertinently observed in relation to the reasoning in *Beckett* that if "there is an established principle of law that no prescriptive right can be acquired if the user by the dominant owner of the servient tenement . . . has been tolerated without objection by the servient owner", it would be "fundamentally inconsistent with the whole notion of acquisition of rights by prescription". This passage was cited with approval in *Sunningwell* at p 358F, in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, paras 5–6, 79–82, and in *Barkas* [2015] AC 195, para 28.

*Public rights over the foreshore: discussion*

**46** The choice between the three possibilities identified in para 29 raises an issue which is both difficult and important. The importance of conclusively deciding the nature and extent of the public's rights over the foreshore of England and Wales is self-evident. The difficulty arises because each of the three possibilities gives rise to problems.

**47** There is a great deal to be said for the third possibility, namely that the public have no rights to use the foreshore for bathing, on the basis that their rights are limited to access for navigation and fishing, given the reasoning in, and long-standing nature of, the majority judgments in in *Blundell*. The reasoning speaks for itself, and the judgments have generally been followed by judges and have been assumed to be correct. However, the decision is not binding on this court, the dissenting judgment of Best J is not without force, and, as was reportedly stated on behalf of the unsuccessful appellant in *Brinckman* [1904] 2 Ch 313, 320:

> "The decision in *Blundell v Catterall* has been disapproved by text-writers, e g, *Hall on the Seashore*, 2nd ed, pp 156 et seq. The same view is taken in *Phear's Rights of Water*, pp 44 et seq, *Stuart Moore on the Foreshore*, pp 833 et seq".

Quite apart from this, it can be said that the second (implied licence) possibility mentioned in para 29 above is somewhat artificial and was only developed because it was assumed that the majority view in *Blundell* represented the law. Further, the law of Scotland appears consistent, or at least more consistent, with Best J's dissenting view: see *Officers of State v Smith* (1846) 8 D 711, 719 per Lord Glencorse, Lord Justice-Clerk. Having said that, it would be a strong thing to depart from the majority view in *Blundell*, given that it has been treated as being the law for nearly 200 years.

**48** The second possibility, namely a rebuttable presumption of a licence, has some support in the cases (see paras 41–43 above), but it may well be based on somewhat shaky legal foundations: see paras 44–45 above. It would also be rather curious, as it would mean that the position with regard to the foreshore is the opposite of the position with regard to almost all other land: a permission for the public to use is to be assumed for the foreshore, but not for any other land. There are some possible reasons for treating the foreshore in a special way for present purposes, as Lewison LJ mentioned in

A para 128 of the Court of Appeal judgment, but, Mr Sauvain QC, for the County Council argues with some force that they do not seem to be overwhelmingly powerful. Further, if the rebuttable presumption of permission applied to the foreshore, it would either also apply to any part of a beach above high water mark, or one would have what may be a rather odd dichotomy between the foreshore and the upper part of many beaches.

B **49** As to the first possibility, the notion that members of the public have the right to use the foreshore for bathing would, as mentioned, align the law of England and Wales with that of Scotland, and it may well accord with the views and expectations of many non-lawyers. However, it might risk upsetting the effect of decisions and actions based on the not unreasonable assumption that the majority view in *Blundell* represented the law. And it may give rise to other problems for owners of the foreshore. It would also

C give rise to the arguable dichotomy mentioned at the end of para 48 above.

**50** In all these circumstances, it seems to us that, unless it is necessary to do so for the purpose of determining this appeal (and it is not for the reasons which appear later in this judgment), this court ought not to determine the first issue, that is which of the three possibilities set out in para 29 above is correct. The issue is one of wide ranging importance, and we would be

D uncomfortable about determining it in circumstances where it was common ground that the first possibility could be ruled out. However, given that the point has been raised and argued, and as it may well arise in another case (whether under the 2006 Act or otherwise), we considered that it would be worthwhile identifying the issue as well as referring to the arguments and problems as they appear to us at this stage. Since writing this, we have had the opportunity of reading in draft the judgment of Lord Carnwath JSC,

E which gives further food for thought on this interesting issue.

**51** Accordingly, we proceed on the assumption that the majority of the Court of Appeal and Ouseley J were correct, and that, at least so far as the general common law is concerned, and subject to the other two more specific issues to which we now turn, members of the public, and therefore inhabitants of the locality, used the Beach for bathing "as of right" and not

F "by right".

*The Byelaws: introductory*

**52** NPP's argument is that the effect of the Byelaws was to amount to a licence or permission to members of the public to use the Beach for leisure activities. If that argument is correct, then NPP's appeal must succeed, as the

G use of the Beach by inhabitants of the neighbourhood, as members of the public, would not have been "as of right".

**53** NPP's argument on this issue raises two points. The first is whether the Byelaws, if they had been, or should be treated as having been, properly communicated, would have amounted to a licence or permission sufficient to defeat the public use of the Beach as having been "as of right". The second

H point is whether the Byelaws were, or should be treated as having been, sufficiently communicated to members of the public during the 20 years preceding 2006 when the Beach was used for bathing by members of the public. NPP contends that the answer to both points is in the affirmative, the County Council contends that both points should be answered no, and the Town Council agrees with NPP on the first point and with the Council on

the second. While the Court of Appeal were unanimously in agreement with NPP on the first point, only Lewison LJ agreed with them on the second point. We will consider each of the two points in turn.

*The byelaws: did they give rise to a licence as a matter of interpretation?*

**54** It appears to be common ground that a byelaw can, as a matter of principle permit an activity which would otherwise be unlawful, and we think that this is right. As suggested in *Halsbury's Laws of England*, 5th ed, vol 69 (2009), para 553, the classic definition of a byelaw was given by Lord Russell of Killowen CJ in *Kruse v Johnson* [1898] 2 QB 91, 96:

> "A bylaw, of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the bylaw, they would be free to do or not do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation . . ."

**55** The reference to "ordering something to be done or not to be done" carries with it an ability permitting something to be done: if an entity has the power to forbid or require, it must also have the power to permit that which it can forbid. However, in agreement with Richards LJ [2014] QB 186, 263, para 72 in the Court of Appeal, we would accept that mere silence or inaction on the part of the entity cannot amount to permitting. In the same way as silence and inactivity on the part of a private landowner cannot, without more, amount to consent (save, arguably, as discussed in cases such as those mentioned in paras 44–45 above), so would the absence of any express or implied prohibition in the Byelaws, without more, not amount to an implied licence.

**56** Of course, it may be that the statutory powers pursuant to which particular byelaws are made are expressed in terms which lead to the conclusion that the Byelaws made thereunder cannot or are not intended to extend to permitting activities or certain activities, in which event the Byelaws would either have to be construed so that they did not have that effect or they would be ultra vires. However, there is no question of such an argument being applicable in this case, in the light of the wide words of section 83 of the 1847 Clauses Act (quoted in para 12 above). Indeed, it is worth bearing in mind that the 1847 Clauses Act stipulates that it is to be the relevant "undertaking" which makes the Byelaws, and the undertaking is the entity which owns the harbour. In other words, the Byelaws are made and enforced by the owner of the land concerned, which plainly supports the notion that they can properly involve the grant of rights over the land.

**57** Accordingly, the question which arises is whether, on their true construction, the Byelaws permitted members of the public to use the Beach for leisure activities. NPP cannot point to a byelaw which expressly permits such activities in terms and therefore one is in the realm of implied permission. It is not part of the County Council's case, as we understand it, that byelaws could not grant a licence by implication. This is unsurprising:

A once it is accepted that byelaws can grant a licence, it is hard to justify the argument that they can only grant a licence expressly. Of course, the usual principles apply to implications: they are only justified when they are necessary or obvious.

58 A prohibition can be expressed in such a way as to imply a permission. For instance, it is hard to argue against the proposition that a B byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead. It is at least as a matter of pure linguistic logic, possible to interpret the byelaw as solely meaning that, if (and only if ) specific permission is obtained from the park authority by a person to bring a dog into the park, then the byelaw will apply. However, any reasonable reader of the byelaw would not C consider that it had such a limited meaning. In other words, as with any question of interpretation, a strictly logical linguistic analysis of the words concerned cannot prevail over a contextual assessment of what they would naturally convey to an ordinary and reasonable speaker of English.

59 Thus, byelaw 71, which forbids the bringing of a dog into the Harbour "unless it is securely fastened by a suitable chain or cord, or is otherwise under proper and sufficient control", would appear to a normal D person speaking ordinary English to imply that dogs could be brought into the area of Newhaven Harbour, provided that they are appropriately "fastened" or under control, and are not precluded by any other byelaw. We do not consider that this point is undermined if the harbour master had forbidden dogs to be brought into certain parts of the Harbour area, or even the Harbour generally. The fact that a property owner voluntarily gives a E general permission to the public (or to an individual or group of individuals) to do an act does not prevent him from subsequently revoking or cutting down that permission.

60 The central question for present purposes is whether the Byelaws, and in particular byelaws 68 and 70, imply that members of the public have the right to use the Beach for recreational activities associated with beaches. F The argument advanced by NPP, and accepted by the Court of Appeal, is that (i) the prohibition of bathing in the area identified in the second part of byelaw 68 and (ii) the prohibition on sports and games which impede the use of the harbour in byelaw 70, imply that bathing can take place elsewhere in the Harbour and that associated recreational activities can also take place provided that they do not impede the use of the Harbour.

G 61 In our view, particularly when one remembers that the Byelaws are made and enforced by and on behalf of the owner and operator of the Harbour, this argument is correct. A normal speaker of English reading the Byelaws would assume that he or she was permitted to bathe or play provided the activity did not fall foul of the restrictions in the two byelaws (and in any other byelaws). This conclusion is also supported by the reference to the consent of the harbour master in the first part of byelaw 68 H and the second half of byelaw 70: if the activities referred to in the latter byelaw (i e including an activity which endangers others) are permitted if the harbour master's consent is obtained, that reinforces the view that generally harmless activities such as bathing and playing are permitted, at least in principle. The conclusion is further reinforced by the fact that, at the time

the Byelaws were made, members of the public had been and were using the Beach freely for the purpose of bathing and recreation.

**62** As Lord Sumption pointed out in argument, this conclusion is also supported by byelaws 51 and 52. Those byelaws would serve to cut down the areas within the Harbour in which bathing and recreations could take place (without the harbour master's permission), as they exclude people who simply want to bathe or play from the quays or from the piers in so far as they are enclosed by chains—i e from the operational parts of the Harbour. In the first place, those two byelaws suggest that any other person who does not have "lawful business" in the Harbour would be entitled to go onto other parts of the Harbour area unless precluded by another byelaw (or any other law). Secondly, they undermine any argument which might otherwise be raised that the implied licence raised by NPP would go too far. In addition, they both contain reference to the harbour master's permission, which, as already mentioned, provides some further support for NPP's case.

**63** In these circumstances, the only factor which can stand in the way of NPP's succeeding in its argument that the use of the beach by members of the public was "by right" as a result of the Byelaws, is the fact that the Byelaws were not brought to the attention of the public, the issue to which we now turn.

*The byelaws: did they have to be brought to the public's attention?*

**64** A preliminary point which is raised in this connection is the argument that the Byelaws were only valid or effective so long as "a copy thereof" was "painted or placed on boards, and put up in some conspicuous part of the office of the undertakers, and also on some conspicuous part of the harbour, dock, or pier", pursuant to section 88 of the 1847 Clauses Act. The Court of Appeal rightly rejected that contention. As Lewison LJ said in para 133 in the Court of Appeal, it seems highly improbable that Parliament can have intended that the byelaws for harbours enabled by the 1847 Clauses Act should not apply if, for instance, the boards displaying them had been destroyed or washed away by a storm, or even pulled down by vandals.

**65** Section 85 of the 1847 Clauses Act also supports this conclusion as, although expressed in the negative, it indicates that the Byelaws become effective once they are confirmed, and publication and display clearly are intended to follow confirmation, as is clear from the opening part of section 88. Further, section 89 of the 1847 Clauses Act, now repealed, at most only imposed the initial display of the Byelaws as a precondition to their efficacy; if it had had that effect, then the strong implication was that the continuing display of the Byelaws was not a prerequisite to their continuing efficacy. In fact, as Baroness Hale of Richmond DPSC pointed out in argument, section 89 very probably took matters no further, given the grounds given for its repeal by the Law Commission pursuant to whose recommendation it was repealed. The commission described it as an "unnecessary [provision] confirming the binding effect of byelaws which reflected 19th century doubts as to the legal effect of subordinate legislation and would never be enacted in modern legislation": see *Statute Law Revision—14th Report* (1993) (Law Com 211), p 175. As Mr Laurence QC, for the Town Council, puts it, "section 89 was repealed because it was and always had been unnecessary".

A **66** Nor is this conclusion called into question by section 90 of the 1847 Clauses Act. In so far as that section implies that it would be necessary to establish that the Byelaws were exhibited on a board, it would only be for the purpose of justifying a prosecution for an infringement of the Byelaws. The fact that it may be necessary to show that the Byelaws were appropriately displayed before a prosecution for their infringement B could proceed does not justify the contention that they are of no effect generally unless they are displayed. Accordingly, we conclude that the Byelaws were effective as byelaws in the sense of representing the local laws applicable to Newhaven Harbour, even though they were not displayed as required by section 88 of the 1847 Clauses Act, although that may well have meant that breach of the Byelaws could not have led to a prosecution (at least of someone who had infringed them without having C seen them).

**67** So we turn to the question whether the failure of NPP (and its predecessor) to ensure that the Byelaws were displayed means that they did not operate as an effective licence rendering the use of the Beach by members of the public "by right", rather than "as of right".

**68** The majority of the Court of Appeal, in agreement with Ouseley J, D considered that it was essential that any licence be communicated to the inhabitants of the locality before it could be said that their usage of land was "by right". That is certainly the normal rule where one is concerned with a private land-owner (subject to the point discussed in paras 41–43 above, namely where it is possible or appropriate to infer a consent or licence from the surrounding circumstances, even though there is no communication of a consent, a point which may well require E reconsideration in the light of the cases referred to in para 45 above). Support for such a proposition can be found in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] AC 221, paras 32, 56, 68, 74 and 81. The basis of this principle is explained in a number of cases including, *Sunningwell* [2000] 1 AC 335, *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, F and, most recently, *Barkas* [2015] AC 195, where, at para 21, Lord Neuberger of Abbotsbury PSC quoted from Lord Hoffmann's opinion in *Sunningwell* that "whether user was 'as of right' should be judged by 'how the matter would have appeared to the owner of the land' ", adding that that question should be assessed objectively.

**69** However, as the decision in *Barkas* demonstrates, it is not always G necessary for the landowner to show that members of the public have to have had it drawn to their attention that their use of the land concerned was permitted in order for their use to be treated as being "by right" rather than "as of right". In *Barkas*, land had been acquired and in part developed by a local authority for housing purposes under a statute which permitted any undeveloped part of the land so acquired to be used as "recreation grounds" if appropriate ministerial consent was obtained, which it was. The H undeveloped part of the land was then used for recreation by members of the public, to whom the statutory purpose was not communicated. Despite the absence of any communication of a licence, it was held that local inhabitants were using that undeveloped part of the land "by right", and not "as of right".

70 In *Barkas*, para 23, Lord Neuberger PSC said:

> "Where land is held [by a local authority] for [the statutory] purpose [of recreation], and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct."

To much the same effect, at para 65, after referring to "the 'general proposition' [that] if a right is to be obtained by prescription, the persons claiming that right 'must by their conduct bring home to the landowner that a right is being asserted against him'", Lord Carnwath JSC said:

> "It follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that 'a right' is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights."

71 In our judgment, the position in the present case is indistinguishable from that in *Barkas* for the purpose of deciding whether the use of the land in question by members of the public was "as of right". In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was "by right" and not "as of right". The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case). We agree with Lewison LJ, who reached the same conclusion in the Court of Appeal, and said at para 138 that given that the inspector rightly found that byelaw 68 was an effective prohibition on swimming in the part of the harbour there referred to, it would be inconsistent then to reject the contention that the byelaw's implied permission for swimming elsewhere in the harbour did not operate as a valid licence.

72 By contrast, Richards and McFarlane LJJ considered that the Byelaws had to be communicated to the general public, or at least to the local inhabitants, using the Beach, before they could constitute an effective licence rendering the use "by right". They took this view at least partly because of the decision and reasoning of the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889: see paras 82–87 in the judgment of Richards LJ and para 100 in the judgment of McFarlane LJ. After the decision of the Court of Appeal in the present case, this court in *Barkas* [2015] AC 195 disapproved the decision and much of the reasoning

in *Beresford* [2004 1 AC 889. The disapproval extended to passages quoted by Richards LJ in paras 83 and 84 of his judgment from the opinions of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe.

73 Thus, Richards LJ said at para 86, that, if (as he had concluded) "on their proper construction the byelaws impliedly permitted the public to access the harbour and engage in various sports and activities", it did not follow that "they had the effect of conferring any *right* on the public to do those things". He went on to explain that, on this basis the Byelaws "went no further than to give an implied revocable permission by the harbour authority, as landowner, for such access and activities", and if the authority "had fenced off some part of the harbour, thereby preventing access to it", he did "not think that a claim could have been maintained against the authority by a member of the public on the basis that the fencing off was in breach of rights conferred on him by the byelaws". However, that analysis cannot stand: once one concludes that there is "an implied revocable permission" for an activity, it follows that there is a licence, which renders the activity in question being carried on "by right" not "as of right". The fact that permission can be subsequently withdrawn by an action on the part of the authority, such as fencing off, merely means that, when and if that occurs, the permission is withdrawn, so that any subsequent continuation of the activity concerned becomes a trespass and would therefore normally be "as of right".

*The byelaws: conclusion*

74 It follows therefore that we would allow NPP's appeal on the second issue, which renders it strictly unnecessary to consider its appeal on the third issue. However, as the third issue is an important issue which was fully argued, and we have reached a clear conclusion on it, we consider that it is appropriate to allow the appeal on that ground as well, for reasons to which we now turn.

*Statutory incompatibility: introduction*

75 NPP's argument is that section 15 of the 2006 Act should not be interpreted as extending to the Harbour because it was reasonably foreseeable that registration of the Beach as a town or village green would conflict with the port authority's future exercise of its statutory powers. This argument, which Ouseley J upheld, was, as we have said, unanimously rejected by the Court of Appeal.

76 Section 15 is in Part 1 of the 2006 Act, which extends to all land in England and Wales, with the exception of the New Forest, Epping Forest and the Forest of Dean (section 5), and land includes "land covered by water": section 61(1). There is no express exclusion of land held by statutory undertakers for statutory purposes. Therefore any restriction on the scope of section 15 would have to be implicit. NPP argues that statutory incompatibility provides that restriction. In support of its assertion NPP relies on case law in relation to public rights of way and private easements in English law and public rights of way and servitudes in Scots law.

77 When considering some of that case law it is important to recall that, in the context of the legislation relating to town and village greens, reference to case law on public rights of way, easements and servitudes is only by way

of analogy. In *Beresford* [2004] 1 AC 889, Lord Scott of Foscote stated at para 34: A

> "It is a natural inclination to assume that these expressions, 'claiming right thereto' (the [Prescription Act 1832]), 'as of right' (the [Rights of Way Act 1932] and the [Highways Act 1980]) and 'as of right' in the [Commons Registration Act 1965], all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same B meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their C differences is dangerous."

*Statutory incompatibility: the English law of dedication and prescription*

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 D Lord Hoffmann; *Megarry & Wade, The Law of Real Property*, 8th ed (2012), para 27-035. 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 E 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 F 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 G 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.

79 Similarly, in the English law of private easements (other than access of light) the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition. As prescription is based H on the fiction of a grant, a landowner who could not have granted the claimed easement cannot suffer prescription: see *Sunningwell*, per Lord Hoffmann at pp 349G–351C in relation to the common law; *Housden v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172, paras 43 and 76, per Mummery and Carnwath LJJ respectively, in relation

A to the 1832 Act; *Megarry & Wade op cit* at para 28-065; *Gale on Easements*, 19th ed (2012), paras 4.88–4.91. The Law Commission in its 2011 report, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327) (HC 1067) while advocating the removal of the fiction of grant, recommended (at para 3.168) that the use of land cannot be qualifying use, for the purposes of prescription, at any time when the land is in the freehold ownership of a person or body who is not competent to grant B an easement over it.

80 By contrast, the owner of land which others wish to register as a town or village green does not need to have capacity to create such a green. All that is required is that people from the relevant locality have used the land "as of right" for lawful sports and pastimes: *Barkas* [2015] AC 195 paras 14–19, per Lord Neuberger PSC. Indeed, it was only on the enactment C of the 2006 Act that an owner obtained power to register land as a town or village green: section 15(8). Until then an owner could not do so: *Barkas* at para 68, per Lord Carnwath JSC. The landowner could only create the equivalent of a village green by settlement on trust for local inhabitants or the public at large: *R v Doncaster Metropolitan Borough Council, Ex p Braim* (1986) 57 P & C R 1, 8, per McCullough J.

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*Statutory incompatibility: the Scots law of positive and negative prescription*

81 Faced with this problem NPP turns to the law of Scotland for support for its proposition. Again, those authorities which deal with the creation of public rights of way and servitude rights of way have to be handled with care, not least because they come from a separate legal system E whose property law is much more closely related to the civil law than the common law of England and Wales. None the less, in the field of acquisitive prescription there is a clear analogy with English law as, drawing on the rules of Roman law, the user or possession which grounds prescription must be nec vi, nec clam, nec precario: see *McGregor v Crieff Co-operative Society Ltd* 1915 SC (HL) 93, per Earl Loreburn, at p 98, and Lord Dunedin, at pp 103–104. Before the Prescription and Limitation (Scotland) Act 1973 F ("the 1973 Act") created the modern rules for positive (including acquisitive) prescription and also negative prescription, such prescription was governed by early Scottish statutes of the 16th and 17th centuries, although the period for positive prescription was reduced in the 19th and early 20th centuries. At the heart of positive prescription was uninterrupted possession of property. But some of the institutional writers of Scots law advanced G rationalisations of the law of acquisitive prescription. Thus Stair (*Institutions of the Law of Scotland* II 7.1 and 2) and Erskine (*Institutions of the Law of Scotland* II 9.3 and III 7.2) spoke of the acquisition of a servitude by prescription as giving rise to a presumption of the owner's grant of a title or consent. There are also judicial dicta which supported implied grant, presumed grant or presumed consent but, as we shall show, it has long been accepted that the basis of acquisitive prescription of a positive servitude or a H public right of way is uninterrupted user as of right for the prescriptive period. We deal first with public rights of way and then private servitudes.

82 In Scots law a public right of way can be constituted without any actual or fictional dedication by the owner of the land. Before the period of positive prescription was reduced, user by the public as a matter of right,

continuously and without interruption for 40 years was sufficient to create such a right of way: *Mann v Brodie* (1885) 10 App Cas 378, per Lord Blackburn, at pp 387–388, and Lord Watson, at pp 390–391; 12 R (HL) 52, 54–55, 57. Lord Watson explained it thus, at pp 390–391:

> "According to the law of Scotland, the constitution of such a right does not depend on any legal fiction, but on the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription . . . I am aware that there are dicta to be found, in which the prescriptive acquisition of a right of way by the public is attributed to implied grant, acquiescence by the owner of the soil, and so forth; but these appear to me to be mere speculations as to the origin of the rule, and their tendency is to obscure rather than to elucidate its due application to a case like the present."

Lord Watson's clarification led to the leading case in Scotland on statutory incompatibility, to which we turn.

**83** In *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620 the First Division of the Court of Session dealt with a claim that a railway company, which was a statutory undertaker, was obliged to maintain a railway bridge over which a public right of way was asserted. The court held that there was insufficient evidence of public user for 40 years. But it also held that the public could not acquire a public right of way over the railway by user because it was incompatible with the statutory purposes of the railway company. Lord Kinnear, with whom the Lord President (Lord Kinross), Lord Adam and Lord McLaren concurred, gave the opinion of the court. He accepted Lord Watson's explanation of the basis of acquisitive prescription when he stated, at pp 636–637:

> "I am of opinion, in the first place, that no right of way can be acquired by user over the line of the defenders' railway, and especially at a point where the railway traffic is so great as on the main line close to Portobello station. It must always be presumed that if people having no statutory right of any kind have been allowed to cross the line, their passage is permitted only so long as it does not interfere with the purposes of the railway traffic . . . I am of opinion that no such right can be maintained, and that on the same principle on which it has been repeatedly held that a railway company cannot voluntarily grant a right inconsistent with the performance of the purposes for which it acquired its land. I assent entirely to the doctrine laid down by Lord Watson that the reference to the prescriptive right of way to an implied grant is a juridical speculation to account for an established rule, and not itself a rule of law. But at the same time I do not think it possible that a right of way which it would be ultra vires to grant can be lawfully acquired by user."

**84** In so holding, the First Division upheld the decision of the Lord Ordinary, Lord Kincairney, in that case, who in *Kinross County Council v Archibald* (1899) 7 SLT 305 had relied on Lord Watson's approach in *Mann v Brodie* to reject any idea of an implied grant as the legal basis of the assertion of a right of way through user.

**85** Shortly before the First Division handed down their opinion in *Magistrates of Edinburgh* the same Division of the Inner House (comprising

A the same judges) reached a similar conclusion in relation to an assertion of a private servitude right of way by apparently different but not inconsistent reasoning. In *Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325, the First Division considered an assertion by the owners of a landed estate through which the Caledonian Canal passed that they had obtained by user during the prescriptive period of 40 years a servitude right of way over
B the towpath of the canal. The commissioners, in the exercise of statutory powers to construct and maintain the canal, had constructed a weir, which intersected the towpath, to allow floodwater to escape. The owners sought declarations that they were entitled to use the towpath for access and that the commissioners were obliged to maintain that access road and construct a bridge or other passage over the weir. The court rejected their
C claim, holding that the slight use made of the towpath, which did not inconvenience the commissioners, was not sufficient to create a servitude right of way. The Lord President (with whom the other judges concurred) also held that the commissioners did not have the power to grant a right of way which was not compatible with the exercise of their statutory duties. He stated, at p 335:

D "I think, however, that even if the character of the use of the towing path of the canal had been such as might otherwise have constituted a public or servitude right of passage, the admitted circumstances of the case are such as to exclude any such a result. The commissioners of the canal, as already stated, hold, and always have held, the canal banks for the purposes of the canal, and they have not now, and never had, any right either to alienate them or to agree that they should be subjected to any
E uses which were or might become inconsistent with or adverse to the use of the banks for their proper purpose—videlicet, the containing and working of the canal."

He continued, at p 336:

"And if it would be ultra vires of them to make such an express grant,
F an effective grant could not be inferred from any such user by the pursuers and their authors as is alleged to have been permitted or tolerated in the present case."

**86** In *Ellice's Trustees* the court followed a line of authority, which included *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623 that a statutory body had no power to alienate lands which it had acquired for a
G statutory purpose or to grant any right over such land which was inconsistent with its use for statutory purposes. The court's reliance on that case might suggest that it considered that the acquisition of a servitude right of way by prescription was based on implied grant. But the reclaimers' counsel cited both *Mann v Brodie* and *Kinross County Council* in their submissions, and the Lord President stated, again at p 336:

H "I further agree with the Lord Ordinary in thinking that even if a limited and qualified right of user of the canal banks had been acquired by prescription, that right could not be allowed to come into competition with, or to prevail against, the rights possessed by the [commissioners] and the statutory duties which are imposed on them . . ."

The case is thus consistent with the approach the court went on to take in *Magistrates of Edinburgh* that statutory incompatibility could bar acquisitive prescription.

**87** In *British Transport Commission* [1958] AC 126, 164–165 Lord Keith of Avonholm commented on Lord Kinnear's opinion in *Magistrates of Edinburgh*, suggesting that it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined, at p 166, that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility.

**88** Since those cases, the Scots law of prescription has been reformed by statutory provision. The 1973 Act sets out the modern Scots law of positive prescription. Section 3(2) provides:

> "If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge."

Section 3(3) provides essentially the same basis for the creation of a public right of way by prescription. In contrast with the provisions for the short negative prescription of five years which in section 6(4)(b) excludes from the prescriptive period any period in which the original creditor is under a legal disability, by reason of non-age or disability of mind, such disability on the part of a landowner does not prevent the operation of positive prescription against him. This approach to positive prescription by possession following on a recorded title was expressly stated in earlier statutes, including section 16 of the Conveyancing (Scotland) Act 1924 which provided that periods of legal disability were not to be deducted from the prescriptive period. It applies ex silentio to such prescription in sections 1, 2 and 3(1) of the 1973 Act and extends to prescription by possession without title under section 3(2)(3). Thus in the Scottish statutory scheme, the lack of legal capacity to grant a public right of way or a servitude of way is of itself not relevant.

**89** In this respect the Scottish statute differs from the English law of prescription as section 7 of the 1832 Act excludes from the computation of the period of, among others, the 20 year prescription under section 2 any time during which a person was incapable of resisting a claim because he was an infant or otherwise disabled as specified. But we note that neither the 1832 Act nor the Scottish 1973 Act addresses the issue of statutory incompatibility.

**90** It is not necessary in this appeal, which concerns English law, to express any view on whether in Scots law the doctrine of statutory incompatibility has survived the enactment of the 1973 Act. It suffices to note that it is a matter of controversy. Professor David Johnston in his scholarly *Prescription and Limitation of Actions*, 2nd ed (2012) questions the continued relevance of the Scottish case law to which we have referred (para 19.27) while Professor Cusine and Professor Paisley, *Servitudes and Rights of Way* (1998) support the case law on the ground of inconsistency with the statutory purpose for which the servient owner holds the land:

A para 4.02. Professor Gordon, *Scottish Land Law*, 2nd ed (1999) (paras 24.54 and 24.130) also sees statutory incompatibility or incapacity to grant as a bar to acquisitive prescription. Professor Reid, *The Law of Property in Scotland*, (1996), at para 449, states: "When land has been acquired compulsorily for certain purposes, this precludes the creation of any servitude rights the exercise of which could be prejudicial to these purposes." But he does not repeat this assertion in his discussion of acquisition of such rights by prescription under the 1973 Act: paras 458–461.

B

*Statutory incompatibility: statutory construction*

**91** As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging "as of right" in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, *M'Evoy v Great Northern Railway Co* [1900] 2 IR 325 (Palles CB at pp 334–336), which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.

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**92** In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based on incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

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**93** The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:

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> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in

an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act.

**94** There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates: section 33 of the 1847 Clauses Act. NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order.

**95** The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation—section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31)—or to encroach on or interfere with the green—section 29 of the Commons Act 1876 (39 & 40 Vict c 56). See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann, at para 56.

**96** In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence.

**97** NPP has also suggested that vessels en route to and from other parts of the port might have to reduce speed in circumstances where such reduction would not be desirable to maintain the stability of the vessels. It also led evidence of proposals to unload materials for an offshore windfarm on the Beach. But we do not need to consider such matters in order to determine that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green.

**98** The County Council referred to several cases which supported the view that land held by public bodies could be registered as town or village greens. In our view they can readily be distinguished from this case. In *New Windsor Corpn v Mellor* [1976] Ch 380 the Court of Appeal was concerned with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the Commons Registration Act 1965. The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, it was not acquired and

held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

**99** The *Oxfordshire* case concerned the trap grounds, which were nine acres of undeveloped land in north Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) "not idyllic". More significantly, while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility.

**100** Thirdly, the County Council referred to *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, which concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green.

**101** In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.

**102** In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the Byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility.

*Conclusion*

**103** The poet Ovid spoke of time as "the devourer of things" ("tempus edax rerum": *Metamorphoses*, 15.234). In the English law of prescription, user as of right can over time eat into a landowner's freedom to use land. So too can the 2006 Act. In this case, however, we conclude that, assuming that there is no general common law right for the public to use the foreshore for bathing and associated recreational activities, the user was by permission in the light of the Byelaws, and that in any event the 2006 Act cannot operate by reason of incompatibility with the statutory basis on which NPP's

predecessors acquired the land, and the statutory purposes for which they held, and now NPP holds, that land.

104 We therefore would allow the appeal and set aside the order of the Court of Appeal dated 27 March 2013.

**LORD CARNWATH JSC**

105 As will become apparent, I agree that the appeal should be allowed under ground (ii) for the reasons given by Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC. While I agree that we need not reach a conclusion on ground (i), I think it useful also to comment on some of the more general issues discussed in argument, which have not previously been considered at this level and which may become relevant in other cases.

*Bathing rights on the foreshore*

106 At least since *Brinckman v Matley* [1904] 2 Ch 313, the decision of the Court of King's Bench in *Blundell v Catterall* (1821) 5 B & Ald 268 has been taken as establishing at Court of Appeal level that under English law the public has no general right to go onto the foreshore for the purpose of bathing or other recreation. In the words of the 1904 headnote

> "The public have no common law right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner."

Not even the strong dissenting judgment of Best J in the earlier case, the advocacy of a future Lord Chancellor (Buckmaster KC), nor the criticism of three textbook writers cited by him (p 320), were sufficient to persuade the court to revisit the issue, or even to call on opposing counsel. The members of the court were unanimous in their praise for the model judgment of Holroyd J, regarded it seems as "one of the finest examples" of how a judgment should be expressed: p 323. Only Cozens-Hardy LJ, while observing that the principles laid down in that case "have never since been questioned by any authority to which our attention has been called", was prepared to concede that the point might be open for reconsideration by the House of Lords: p 327.

107 No doubt because judicial fashions have changed, I confess that I do not find the enthusiasm of the Court of Appeal for the judgment of Holroyd J altogether easy to share. Its erudite analysis of extracts from Justinian, Bracton, and Hale, and of obscure exchanges between the court and counsel in some early English cases, makes rather heavy reading to modern eyes.

108 It is also difficult to find the basis of the assertion by Vaughan Williams LJ that the majority judgments in the earlier case had been "recognised ever since by the whole of the profession as an accurate and binding statement of the law": p 322. In the intervening century, recreational use of the foreshore and the associated beaches had become an even more wide-spread and popular activity. As far as one knows, the public had continued to enjoy the pleasures of the beach without interference, and without anyone suggesting that they were mere trespassers. There is no record of anyone relying on the judgment in *Blundell v Catterall* to restrict such use. Nor were we referred to any evidence of support from legal

commentators to set against the three sources relied on by the appellants: *Hall on the Seashore, Phear's Rights of Water,* and *Stuart Moore on the Foreshore*.

**109** Furthermore, as Vaughan Williams LJ acknowledged (p 322) the actual issue in the earlier case had been narrower than that facing his court. It had been, not the general right of the public to bathe on the foreshore, but their right to bring on to the beach bathing machines for that purpose, and to do so in an area where it conflicted with private rights of fishing with stake nets. On the same page, Vaughan Williams LJ also cited the short statement by Abbott CJ of "what the decision of the court was": that is, "where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so" he has no reason to complain if the owner of the soil "shall insist on participating in the profit . . ." On that footing the case was about commercial exploitation of the beach, rather than the public's right to its recreational use.

**110** As appears from the dissenting judgment of Best J in the earlier case 5 B & Ald 268, 279, it had been found as a fact that there was a "custom for the public to cross the spot in question on foot for the purpose of bathing". That usage as such was not apparently in issue. The problem arose because of the associated need for bathing machines, use of which at that time was seen as "essential" to the practice of bathing ("Decency must prevent all females, and infirmity many men, from bathing, except from a machine"). Even the judgment of the majority was not seen by them as restricting the established right of access to bathing on foot, p 289, per Holroyd J:

> "The right is claimed on the pleadings, as founded not on usage or custom, but on the supposed general law only; and the usage, as stated in the special case, is found to have been for the public to cross the seashore on foot only, for the purpose of bathing, no bathing machines having ever been used in Great Crosby, where the locus in quo is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals or by either the permanent or temporary inhabitants of any village, parish, or district."

It is unfortunate that neither in that case, nor in any of the later cases relying on it, was there any discussion of the legal basis of such a hypothetical right gained by prescription or custom.

**111** This was a point touched on by the first of the textbook writers, Robert Hall, a barrister of Lincoln's Inn. In his 1830 treatise, *The Rights of Crown and Subject in Sea and Seashore*, he devoted some 40 pages of a supplemental chapter to a detailed criticism of the majority judgments. He was troubled (p 219) by the implications of Holroyd J's acceptance that there might be a "local usage or custom of bathing", and the difficulty of distinguishing such a custom from one available to the public generally. It would be "singular to denominate this a collection of local customs". He compared fishing on the seashore which, though likely to be practised by local inhabitants, was accepted as a general rather than a purely local right. It would be strange, he said, to treat the right to bathe any differently.

**112** More generally, he noted that much of Holroyd J's discussion was devoted to criticisms of Bracton's exposition of the law relating to

riverbanks, rather than the passages directly concerned with the public right over the seashore. He commented, at pp 191–192:

> "The reasoning, therefore, seems to have been this, Bracton is wrong in his law that 'Riparum usus communis est etc' therefore, 'littorum usus non est communis'. But this is certainly a 'non sequitur'; and although the court, from the authorities, proved Bracton wrong, to a certain extent in his law respecting particular uses made of banks of rivers (as for towage), yet no authorities were adduced shewing that 'communis usus' of the seashore for bathing, is not a good custom."

Best J, by contrast, had preferred to see Bracton's writings on this issue as derived not so much from the civil or common law, as from "the law of all civilised nations": p 281.

**113** As to judicial authorities, the only judgment cited to the court in which *Blundell v Catterall* had been followed without question was *Llandudno Urban Council v Woods* [1899] 2 Ch 705, but that was at first instance, and it was concerned, not with bathing or general recreation, but with the holding of religious services on the beach.

**114** More significant in the present context is *Mace v Philcox* (1864) 15 CBNS 600, which was cited to the Court of Appeal but not mentioned in their judgments. As appeared from the case stated, it was accepted that the "sea-beach or foreshore throughout the whole length of the borough of Hastings, including the locus in quo" had been used "from time immemorial" by the public "as a place of public resort" (p 603), subject only to the corporation's statutory powers to regulate the use by byelaws. The issue was simply as to the right of the defendant to place bathing machines on a part of the foreshore in private ownership, it being accepted that such a right existed on adjoining land owned by the corporation. Although *Blundell v Catterall* was cited on that point, the court did not evidently read it as settling any wider issue; rather Erle CJ, at p 614, was "desirous of guarding [his] judgment so as not to restrict the valuable usage or right of Her Majesty's subjects to resort to the seashore for bathing purposes".

**115** Against this background the unwillingness of the Court of Appeal in 1904 to reopen the issue seems both surprising and disappointing.

*Scotland*

**116** The hearing in *Brinckman v Matley* took place on 13 July 1904. The judgments appear to have been given on the same day. By a curious coincidence, three days later a similar issue (relating to shooting wildfowl on the foreshore) was considered by the Court of Session in Scotland: *Hope v Bennewith* (1904) 6 F 1004. Although *Brinckman v Matley* is noted in a footnote to the report (p 1008), it seems highly improbable that the detail of those judgments would have been available at the hearing. In any event, counsel was able to submit, apparently without contradiction, that *Blundell v Catterall* had been "much criticised and followed with reluctance": p 1010. He relied (inter alia) on *Mace v Philcox* and various textbook writers, including those cited to the English Court of Appeal. The court did not comment on the authorities, but proceeded on the basis of an admitted "public right to use the foreshore" (p 1010) without considering its precise scope.

A 117 It seems that from the middle of the previous century, Scottish law had begun to recognise a public right to use the foreshore for recreation, without feeling inhibited by authorities from the other side of the border. In 2001, the Scottish Law Commission reviewed the cases, beginning with *Officers of State v Smith* (1846) 8 D 711), and concluded that such a right was "well supported by authority". The precise scope of the right was not
B clear:

> "It appears to include walking and running, having a picnic or barbecue, sunbathing and swimming. While it does not include the right to put up a hut on the shore, it does include the right to shoot wild fowl. The sale of refreshments on the beach is outwith the scope of the right." (Discussion Paper No 113 *Law of the Foreshore and Seabed*, para 4(25).)

C 118 By the time of the commission's final report (report 190 (2003)) its recommendations had to some extent been overtaken by the enactment of the Land Reform (Scotland) Act 2003 which conferred general rights of access to land for recreational purposes, "land" for this purpose being defined as including the foreshore: section 32. None the less it was recommended that the common law rights, which were regarded as more
D extensive than the new access rights, should themselves be put on a separate statutory footing: paras 3.1–3.17.

*Comparative jurisprudence*

119 At the end of the hearing in the present case, the court offered Mr George QC the opportunity to provide information about the practice in other common law jurisdictions. He did not take up that invitation, perhaps
E in the understandable fear of opening up a Pandora's box. Some comparative material can, however, be found in the appendix to the Scottish Law Commission's 2001 Discussion Paper. That has been supplemented since the hearing in this case by some further work by our own judicial assistants, particularly relating to the United States of America. This research is far from exhaustive, and, since it is not material to our conclusion
F in the present case, it has not been thought necessary to invite comments from the parties. However, as it may be of relevance to future cases, it seems desirable to make a brief reference to some of the main points.

120 Appendix 2 to the Scottish Law Commission's Discussion Paper contained a short review of the law relating to the foreshore, including rights of recreation, in various jurisdictions. This shows little consistency of
G approach. In the European countries mentioned (France, Germany, Norway, Spain) recreation on the seashore seems generally to be regulated by statute. Of the common law countries referred to (Canada, England & Wales, New Zealand), the English position unsurprisingly is defined by reference to *Blundell v Catterall*; and the position in Canada is said to be unclear: para 31.

H 121 Of more interest is New Zealand, where reference (para 156) is made to a case from the 19th century, *Crawford v Lecren* (1868) 1 NZCAR 117. In that case the Court of Appeal held, in reliance on *Blundell v Catterall*, that there was no right for the public to load and unload goods on the foreshore. The court seems to have attached particular weight to the support for this proposition of Best J, as well as of the majority: pp 128–129.

The commission also notes (paras 159–162) that in New Zealand public access to the foreshore is preserved through the concept of the "Queen's Chain", a strip of land up to 20 metres wide, measured from the high water mark of spring tide. The concept, which has had varying acceptance, and is now implemented by statute, is said to find its origins in an instruction of Queen Victoria given in 1840.

*United States*

**122** The commission did not look at the position in the United States. It says something for the degree of interchange in the early 19th century between the legal communities on either side of the Atlantic, that Hall's criticisms of *Blundell v Catterall* 5 B & Ald 268 were being cited with approval in the following year in an academic article: (1831) United States Law Intelligencer and Review, vol 3, p 114. (The US Law Intelligencer and Review was a periodical edited by one Joseph K Angell, who was born in the United States but lived in England from 1819 to 1824. He founded the periodical in 1829, which ran monthly for three years.) The article quoted extensively from the treatise, and praised its author for his "zeal and ability" in combatting a judicial decision which would abridge the public's "undoubted right of indulging in the favourite and healthful practice of bathing in the sea".

**123** Somewhat paradoxically, although the subsequent development of the law has varied between the states, it was to the English common law that the judges in later cases looked for the foundation for recognition of public rights of recreation over the foreshore. Thus in Florida, in *White v Hughes* (1939) 139 Fla 54, 59; (190 So 446) Brown J observed:

> "There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight . . ."

After quoting Byron on the primeval quality of the "wild waves' play" (*Childe Harold's Pilgrimage*, canto IV, stanza 182) he continued, 190 So 446, 449:

> "The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us *as a part of the English common law, which it undoubtedly has*" (emphasis added).

**124** A more sophisticated (if less poetic) discussion of the development of the law up to 1969 can be found in the comments of the Yale Law Journal ("The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine" (1970) 79 YLJ 762). The author traced the history of the law from its Roman roots, through Magna Carta, to the more modern law in England and America. Of *Blundell v Catterall* he said: "This exclusion from common law protection of an ancient and customary right is a prime example of the needless exclusion of an activity." He noted that the state of Oregon in particular had "seized the customary usage opening and widened

A it" (citing inter alia *State ex rel Thornton v Hay* (1969) 89 Or 887): pp 784–785. He ended by suggesting that the common law of the foreshore seemed to be entering "a major period of reformulation", which he described as "a sharp acceleration of the process begun by Magna Carta". He looked forward to the day when "common law citizens will have as many rights in the foreshore as Roman citizens once did": p 789.

B **125** The decision of the Oregon Supreme Court in *Thornton*, which may have provided a stimulus for that article, concerned the public's right to recreational use of what was described as the "dry-sand area", that is the privately owned area of beach between the vegetation line, and the state-owed foreshore (or "wet-sand area") in which the "public's paramount right" was not in dispute. The court accepted that the dry-sand area had been enjoyed by the general public "as a recreational adjunct" of the C foreshore area since "the beginning of the state's political history", and before that by aboriginal inhabitants "using the foreshore for clam-digging and the dry-sand area for their cooking fires". The majority upheld the public right over that area, by reference to "the English doctrine of custom" (as enunciated in *Blackstone's Commentaries*), preferring that basis of decision to one based on prescription. The minority (Denecke J) arrived at D the same result, relying simply on long usage by the public of such dry beaches, combined with long and universal belief by the public in their right to that use, and long and universal acquiescence in it by the owners. The narrower English law on customary rights was distinguished as appropriate for "a small island nation" at a time when most inhabitants lived and died within a day's walk from their birthplace, as compared to "the vast geography of this continent and the freshness of its civilisation".

E **126** New Jersey is perhaps of greater interest because of the development of the law by the courts relying on the so-called "public trust doctrine", using language not dissimilar to that of Best J in the English case. He had spoken of the "public trust" in such property, at 5 B & Ald 268, 287:

> "From the general nature of this property, it could never be used for F exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil."

The Court of Appeal in *Brinckman v Matley* [1904] 2 Ch 313, 325, accepted that the Crown holds the foreshore on the terms that it must recognise "the G jus publicum, whatever it may be" but saw that as limited by authority to rights of navigation and fishing.

**127** A recent review of the New Jersey authorities comes in the judgment of the New Jersey Supreme Court, in *Raleigh Avenue Beach Association v Atlantis Beach Club Inc* (2005) 185 NJ 40 (879 A 2d 112). The court, at pp 51–52, traced the history of the public trust doctrine to their decision in *Arnold v Mundy* (1821) 6 NJL 1. That case, decided as it H happens in the same year as *Blundell v Catterall*, concerned a claim to rights in an oyster bed. The court had explained that following independence the English sovereign's rights to the tidal waters had become vested in "the people of New Jersey as the sovereign of the country", and that "the land on which water ebbs and flows", including the land between the high and low

water, belonged to the state, "to be held, protected, and regulated for the common use and benefit". A

**128** More recently, in *Borough of Neptune City v Borough of Avon-by-the-Sea* (1972) 61 NJ 296, 303; (294 A 2d 47), the same court had referred to the roots of that principle in Roman jurisprudence, which held that "by the law of nature . . . the air, running water, the sea, and consequently the shores of the sea," were "common to mankind", and had extended the public rights in tidal lands to "recreational uses, including bathing, swimming and other shore activities". That extension had been approved in *Matthews v Bay Head Improvement Association* (1984) 95 NJ 306, 323 in which the court had gone on to consider the extent of the public's interest in privately-owned dry sand beaches, in particular its right to cross such beaches in order to gain access to the foreshore. The court had also affirmed "the concept already implicit in our case law that reasonable access to the sea is integral to the public trust doctrine". There was reference to the dissenting judgment of Best J in *Blundell v Catterall* (without reference to the majority judgments) for the proposition that—"the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved": p 324. B C

**129** In *Raleigh* itself, following *Matthews*, the court applied the principle that "the public use of the upland sands is subject to an accommodation of the interests of the owner", to be determined by "case-to-case consideration": pp 120–121. It repeated the following statement from *Matthews* 95 NJ 306, 326: D

> "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static', but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit' . . . Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand. Today, recognizing the increasing demand for our state's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." E F G

*Comparative material—summary* H

**130** This review of the comparative jurisprudence is of interest, on the one hand for the apparently universal recognition of the recreational use of the foreshore in practice, but on the other for the continuing uncertainty in many jurisdictions as to the legal basis for that use and the wide variety of legal methods (statutory or judicial) used to resolve it. This divergence

A seems surprising, given the universality of the practice, and the common roots of most of the systems of law considered, either in Roman law, or in the rights and obligations of the Crown under the English common law. In the common law jurisdictions this confusion seems in part to be the legacy of *Blundell v Catterall*. Although the authority of that decision has been acknowledged in some common law jurisdictions, there is little evidence of it being given practical application so as to restrict use on the ground. The B development of the law in New Jersey is of particular interest as an illustration of how the law in this country might have developed (and might yet develop) if the view of Best J had prevailed over that of the majority.

*Usage, custom or implied licence*

C **131** It remains to consider what lessons can be drawn for the present case. In the absence of argument to the contrary we must proceed on the basis that *Blundell v Catterall* and *Brinckman v Matley* were rightly decided. It follows that public use of the West Beach during the relevant period cannot be attributed to a general public right to use the foreshore for recreational purposes. Leaving aside the arguments relating to the byelaws under the second issue, there are three possibilities: (a) some form of D prescriptive or customary right (b) implied licence (as found by Lewison LJ) (c) trespass tolerated or acquiesced in by the owners (as found by the majority of the Court of Appeal).

**132** I mention (a), which is not supported by any of the parties, because it is a possibility left open by the majority in *Blundell v Catterall*. While it may not be appropriate to the relatively recent use found in this case, it might be relevant as an alternative explanation of long-standing recreational E uses of beaches more generally. However, as I have said, the legal basis for such a right is unclear. A right gained by prescription, as generally understood, would have had to be related to a particular property, which would not have explained the more general usage found in the case. The alternative, a custom claimed by the inhabitants of "any village, parish or district", would accord with the principle that a custom should be linked to a F particular locality, rather than for the benefit of the public in general. That was a familiar feature of the law of village greens, which in due course was repeated in the definition of customary village greens in the Commons Registration Act 1965. However, quite apart from the criticisms made by Robert Hall in 1830, there seems to have been nothing in the actual findings before the court to support such a limitation.

G **133** Explanation (c)—that those who use public beaches for recreation without specific authorisation do so as mere trespassers—defies common sense. It flies in the face of public understanding, and the reality of their use of the beaches of this country for the last three hundred years or more.

**134** Explanation (b) accords with the view of Lewison LJ in the present case [2014] QB 186, 278. He said he thought that the foreshore should be treated as "a special case", for a number of reasons:

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> "128. . . . (i) The nature of the land is such that it cannot readily be enclosed. It would be wholly impractical to attempt to enclose it on the seaward side; and even on the landward side any attempt would be fraught with difficulty. (ii) Historically the foreshore has been Crown property (although there are private persons who derive title from the

Crown) and the Crown would not, in practice, prevent citizens from resorting to the foreshore for recreational purposes. This has been the case since time immemorial, and in those circumstances it is not unreasonable to presume that the Crown has implicitly licensed such activities. (iii) Even where the owner of the foreshore does attempt to enforce his strict legal rights, there are serious impediments in obtaining an injunction. (iv) Although in theory it is possible to prescribe for rights over the foreshore or to establish a customary right, there is no case in the books where a recreational right over the foreshore has been established. (v) It would take very little, having regard to the nature of foreshore and the manner in which it is generally enjoyed, to draw the inference that use is permissive by virtue of an implied licence.

"129. Even if this is not, on its own, an independent reason for concluding that the use of the foreshore in this case is precario, it does in my judgment provide the context in which the byelaws are to be interpreted."

135 I agree, but I would put the emphasis on the point (v). It is the character of the foreshore and the use which is traditionally made of it, without question or interference, which leads to the natural inference that it is permitted by the owners in accordance with that tradition. As I said in *Barkas* [2015] AC 195, para 61 (referring to comments of Lord Scott of Foscote in *Beresford* [2004] 1 AC 889, para 34):

"Lord Scott's analysis shows that the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole."

Applying that approach to public use of beaches generally, I see no difficulty in drawing the obvious inference, in the absence of evidence to the contrary, that their use, if not in exercise of a public right, is at least impliedly permitted by the owners, rather than a tolerated trespass.

136 That general approach cannot necessarily be applied without question to the present case. This is not an historic beach, but one created artificially in relatively recent times, as a consequence of the statutory harbour works. Nor was public use accepted without question. As appears from the application for registration, the public were barred for some time after the end of the First World War, and their use only resumed in response to a public protest. There might well be a case for treating what followed as tolerated trespass, or use "as of right", had not the whole area been brought under formal regulation by the making of the byelaws. For the reasons given by Lord Neuberger PSC, I agree that thereafter the only possible inference is that the use was permitted by the harbour authorities and was therefore "by right".

*Ground (iii)—statutory incompatibility*

137 In view of our unanimous conclusion on ground (ii), I would have preferred not to have to reach a decision on ground (iii), which I find much more difficult. I see considerable force, with respect, in the detailed reasoning of Richards LJ in the Court of Appeal, and in particular his

A reasons [2014] QB 186, paras 10–28 for not finding assistance in the Scottish cases.

**138** I see a further problem which may have been touched on before Ouseley J (see his judgment at paras 133, 141–142), but has not been raised by the parties or explored in any depth before us. This concerns the consequences of registration under the 2006 Act. Lord Neuberger PSC and Lord Hodge JSC (para 95), citing Lord Hoffmann in the *Oxfordshire* case
B [2006] 2 AC 674, proceed on the basis that registration of the Beach as a town or village green would make it subject to the restrictions (subject to criminal sanctions) imposed by the 19th century village green statutes. It is easy to see why such restrictions are likely to be incompatible with future use for harbour purposes, even if that has not proved a problem hitherto.

**139** However, it is to be noted that the supposed incompatibility does
C not arise from anything in the 2006 Act itself, but rather from inferences drawn by the courts as to Parliament's intentions. In the relevant passage (para 56), Lord Hoffmann expressed agreement with the courts below on this issue, including by implication my own rather fuller reasoning in the Court of Appeal [2006] Ch 43, paras 82–90. However, he did not see this issue as impinging directly on the question whether the land should be
D registered. Having noted and disposed of some of the arguments on the effect of the 19th century statutes, he added, at para 57:

> "Nor do I follow how the fact that, on registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application."

E It was not necessary in that case to consider the issue which arises here: that is, the potential conflict between the general village green statutes and a more specific statutory regime, such as under the Harbours Acts. It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers
F governing the operation of the harbour.

**140** In conclusion, for the reasons already given, I agree that the appeal should be allowed.

*Appeal allowed.*

DIANA PROCTER, Barrister

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# Appendix 10.16

# *Ramblers Association v SoSEFRA* [2017] EWHC 716

# Ramblers Association v Secretary of State for Environment Food and Rural Affairs [2017] EWHC 716 (Admin)

Queen's Bench Division, Planning Court

Dove J

7 April 2017

## Judgment

**George Laurence QC & Luke Wilcox** (instructed by **Bates Wells Braithwaite LLP**) for the **Claimant**

**Tim Buley** (instructed by **Government Legal Department**) for the **Defendant**

**Juan Lopez & Charles Forrest** (instructed by **Network Rail Infrastructure LTD**) for the **Second Interested Party**

**The first and third interested parties were not represented and did not appear**

Hearing dates: 14th & 15th February 2017

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

**Mr Justice Dove :**

Introduction

1. This is an application for judicial review in relation to the decision of an Inspector appointed by the defendant dated 26th October 2015, whereby he refused to confirm the Nottinghamshire County Council (Burton Joyce Footpath No.17 and Stoke Bardolph footpath No.6) Modification Order 2013 (“the Order”). On 1st May 2006 the claimant made an application to the first interested party (“NCC”), who are the highway authority, to add the footpath to the Definitive Map and Statement for which they have

responsibility. The application was made under section 53(5) of the Wildlife and Countryside Act 1981. On 5th October 2011 the application was refused and the claimant appealed to the defendant. That appeal was allowed on 21st February 2012 by the defendant's duly appointed Inspector, and NCC were directed to modify the Definitive Map and Statement to include the footpath, leading to NCC (having concluded that they would accept the decision and not seek to challenge it by way of judicial review) to make the Order on 1st February 2013. The second interested party ("NR") objected to the making of the Order for reasons which are set out below, leading to the convening of a public inquiry in relation to whether or not the Order should be confirmed and the decision under challenge.

The facts

2. The claimant's application related to a claimed footpath passing from Nottingham Road, Burton Joyce in the north-west, passing in a south-easterly direction across country and over a level crossing of the railway line running from Nottingham to Lincoln, until it intersected with the Stoke Bardolph Footpath No.1. The proposed footpath passed over land belonging to the third interested party ("STW"), and also, obviously, railway land operated by NR. The footpath was claimed on the basis of 20 years' usage, and evidence of user forms were submitted from people who had used the route to establish that the requirements of section 31 of the Highways Act 1980 (as set out below) were met. In all, 33 evidence forms were ultimately provided to NCC describing use of the way. In the analysis of the forms provided by the Inspector who considered the appeal against the refusal of NCC to grant the application for modification she describes the evidence as follows:

"14. A total of 33 user evidence forms…provide evidence of claimed use, the earliest use dating from 1956. Fifteen forms indicate for the full 20 year period 1986-2006, with 13 people claiming use weekly and 15 people claiming use monthly, mostly for recreational purposes. Of the 19 forms relating to the 20 year period 1970 to 1990, 3 people claim use for the full 20 year period with a further 16 claiming use for periods of 5 to 15 years. Frequency of use during this earlier period varies from 2 or 3 times a year to daily, with 6 claiming monthly use, 3 claiming use twice a month, and 4 claiming use more than twice a week. None of the users refer to notices or challenges to their use prior to 2006, suggesting that the use was as of right…Some mention warning signs carrying instructions, but these were directed at those crossing the railway with vehicles or animals."

3. The objections raised by NR were both legal and factual. Dealing firstly with the factual points, an analysis was presented of the private Act of Parliament, the Midland Railway (Nottingham and Lincoln) Act 1845 and its accompanying material in the form of the Deposited Plan and Book of Reference detailing the survey of affected land interests at the time of the Act receiving assent. This material did not show the existence of any public right of way at that time. It showed that the land either side of the present level crossing was in the same ownership and at the point of the level crossing there was in existence at that time an "occupation road". It was therefore concluded that the level crossing was created to enable continued access along this private road for the benefit of the landowner. This reflected the position of STW, who owned the land either side of the railway lines at the point of the level crossing and who had the benefit of a right of way across it over the level crossing. In addition to this point, NR's witness gave evidence of a photograph from 1993 showing that the gates at the level crossing were chained and locked at that time. NR also relied upon the evidence of STW, and in particular Mr Jackson (one of their estate managers for the land either side of the level crossing over which the proposed footpath ran) that the gates at the level crossing were chained and padlocked, cross-referencing this to evidence from the claimant's user forms which alluded to gates at the level crossing being padlocked.

4. In relation to their legal objections, NR contended that there were three separate reasons in law why the Order should not be confirmed. These arguments are more fully developed below, as they form a significant part of the subject matter of this case. The first reason was that it was contended that NR had no capacity to dedicate a new public right of way on the basis that dedication would be inconsistent with its obligations to operate a safe and efficient railway network.

5. The second reason relied upon was the contention that the Licence under which NR operate the rail network would not permit the creation of new rights over railway land without the consent of the Office of Rail and Road ("ORR"). The terms of the licence which were in issue were contained in the version of the Licence dated 1 April 2014 as follows:

"7 Land Disposal

7.1 The licence holder shall not dispose of any land otherwise than in accordance with this condition.

7.2 The licence holder may dispose of any land where:

(a) ORR consents to such disposal; or

(b) The disposal is required by or under any enactment…

"disposal" includes any sale, assignment, gift, lease, licence, the grant of any right of possession, loan, security, mortgage, charge or the grant of any other encumbrance to subsist (other than an encumbrance subsisting on the date when the land was acquired by the licence holder or on 15th November 2001) or any other disposition to a third party, and "dispose" shall be construed accordingly;"

6. The third legal issue raised by NR was the contention that since trespass on the railway was rendered a criminal offence by section 55 of the British Transport Commission Act 1949 the footpath could not be the subject of dedication. The claimant sought to refute this argument through reliance upon the case of Bakewell Management Ltd v Brandwood and others [2004] UKHL 14. The claimant submitted that the principle should not be given effect in the present case so as to deprive the public of the benefit of the right of way which would otherwise be established.

7. Having heard the evidence and the arguments at the inquiry, and having conducted a site visit, the Inspector reached conclusions in relation to the merits of confirming the Order. It is necessary in order to understand the arguments raised in this judicial review to set out the Inspector's findings and conclusions at some length. He dealt first with the issues that arose in respect of whether or not the Order should be confirmed in so far as it affected NR's land and the level crossing. At the outset he addressed the arguments about incompatibility with NR's statutory objects and the point about the ORR Licence as follows:

"8. The RA submit that for the purposes of the statutory scheme there is no requirement for the applicants to demonstrate that there was anyone with the legal capacity to dedicate. The RA says that the purpose of section 1(2) of the Rights of Way Act 1932 was to eradicate the need for capacity to be demonstrated once use had been established for a period of 40 years. That specific section was repealed under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) so that since the coming into operation of the 1949 Act a way can be deemed to have been dedicated irrespective of whether there was a person or body with the capacity to dedicate.

9. However, for the statutory scheme to be engaged in the first place, the clause 'whether the way is of such a character that use of it could not give rise at common law to a presumption of dedication' must be addressed. At common law, there remains a requirement for the person or body against whom dedication is inferred to have the capacity to dedicate. Whilst section 1 of the Rights of Way Act 1932 established a statutory framework whereby the capacity to dedicate requirements could be dispensed with following a

necessary period of use, the common law principle involving the capacity to dedicate remains relevant in certain circumstances. If Network Rail does not have the capacity to dedicate a public right of way over its operational land either because such a dedication would be inconsistent with its statutory duties or because it could not authorise use which would otherwise be criminal, a public right of way could not come into being at common law or under the statutory scheme.

10. Network Rail drew support from the case of British Transport Commission v Westmoreland County Council [1958] (the Westmoreland case). As contested by Network Rail, this case established a number of principles:

(i) A statutory undertaker (such as Network Rail) cannot voluntarily release or otherwise abandon a statutory power that has been conferred upon it by special Act of Parliament and that concerns the manner in which that statutory undertaker may permissibly deal with land acquired for the purposes of that Act;

(ii) A statutory undertaker cannot, in the absence of an express statutory power, grant any easement over land acquired for the purposes of its special Act if the existence of such an easement – in any possible circumstances and at any future time – would undermine the statutory undertaker's satisfaction of the purposes of the special Act;

(iii) a statutory company has no power to grant a public right of way where the enjoyment thereof by the public *is incompatible* with the statutory objects of the company; and

(iv) for the purposes of adjudging *incompatibility*, it is a question of fact whether, at the date when the question is considered by a tribunal of fact, that there is any likelihood that the existence of an alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duty.

11. In the Westmoreland case, the route at issue ran over a bridge spanning the railway; the court found that the existence of the bridge did not endanger the running of trains upon the lines. In that case, statutory incompatibility did not arise, nor did the issue of criminal trespass under section 55 of the British Transport Commission Act 1949 (BTCA). The question of incompatibility is therefore a question of fact in each case. The circumstances in the Westmoreland case are different from that at Zulus Crossing where it is claimed a public right of way has come into existence crossing the live rails of the railway on the level.

12. Mr Jones's evidence was that an assessment had been made of the risk to users of the crossing using Networks Rail's ALCRM model. The assessment gave the crossing a score of C6, which reflected the number of vehicular traverses by the private rights holder against the number and speed of the trains passing over the crossing. The risk assessment did not take into account public use of the crossing as there was no empirical data for public use of the crossing to insert into the model.

13. A covert camera installed at Zulus Crossing for a period of 9 days in August 2015 had revealed around 60 crossings of the tracks by members of the public. The photographs showed single pedestrians crossing the railway, cyclists, dog walkers and families with small children and / or pushchairs. In Mr Jones' view, those members of the public encumbered with children, dogs or other accompaniments placed themselves at greater risk in crossing the railway as their primary attention may not be upon looking and listening for approaching trains. Factoring in 20 pedestrian crossings per day into the ALCRM model raised the crossing risk assessment to C5. Based on the ALCRM model, it was Mr Jones' view that public use of Zulus Crossing increased the level of risk to crossing users and train passengers with a corresponding reduction in safety at the crossing.

14. Mr Greenwood's evidence was that Network Rail's licence included conditions under which the railway must operate and is the primary tool which the Office of Rail and Road (ORR) has for holding Network Rail to account in respect of safety and operational efficiency. The Licence contained conditions which govern Network Rail's competence to grant new rights which affect operational land; the grant of any such rights would require the consent of the ORR. Mr Greenwood said that Network Rail would not receive such consent from ORR to grant a new public right of way over the railway as the grant would undermine the business of operating and improving the network. Condition 7 of the licence prevented the disposal of railway land without ORR consent and 'disposal' for the purposes of condition 7 included the 'grant of any other encumbrance or knowingly permitting any encumbrance to subsist". It was submitted that a change of the status of the crossing from a private vehicular crossing to one which also carried public rights was a 'disposal' of the land which given the implications regarding safety and risk would not be consented to by ORR.

15. Although there had been no fatalities at Zulus Crossing, an increase in pedestrian use of the crossing as a result of the existence of a public right of way is likely to increase the risk of an accident or fatality occurring. Such increase in risk and danger to both crossing users and passengers on the railway is reflected in the revised ALCRM risk assessment. In my view, use by the public of Zulus Crossing would be incompatible with Network Rail's ability to undertake and execute its statutory objectives as set out by the legislation governing the operation of the railway network."

16. Section 55 (1) of the BTCA provides that 'Any person who shall trespass any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty…'.

17. The claimed footpath crosses the Nottingham – Newark railway on the level and it is clear that the land is part of the operational railway. The crossing therefore satisfies the description of land found in section 55 as being 'the lines of the railway'. Use of Zulus Crossing by the public therefore constitutes an offence under section 55 of the 1949 Act.

18. It was argued by the RA that the principles established in Bakewell Management Ltd v Brandwood [2004] (Bakewell) could be applied to pedestrian use of Zulus Crossing. In Bakewell the House of Lords found that rights could be acquired over land through unlawful long use if that unlawful use could have had been authorised. The RA contended that although section 55 of the 1949 Act makes trespass over '*the lines of the railway*' a criminal offence, it must be within Network Rail's power to authorise what would otherwise be a trespass since customers have to go '*in dangerous proximity to lines of railway*' in the ordinary course of using the railway.

19. At issue in Bakewell was whether the use prohibited by statute could have been authorised and therefore not be a criminal act. In that case the offence of driving across a common was committed when done '*without lawful authority*'. The House of Lards found that authority to drive over the common could have been given and therefore no offence would have been committed. The Road Traffic Act 1988 and the Law of Property Act 1925 both prohibit the driving on a common '*without lawful authority*'. The RA contends that although section 55 of the BTCA does not include the term '*without lawful authority'*, the concept of trespass is such that it implies that authority could be given by the landowner. The RA notes that rail passengers are regularly in '*close proximity to lines of railway'* when they stand on platforms waiting for their train; these people must be trespassers under the provisions of section 55 but are permitted to remain by Network Rail.

20. I am not persuaded by the RA's line of argument on this point for a number of reasons. First, Bakewell concerned criminality because the landowner could give, but had not given lawful authority to drive over the common. This is in direct contrast to section 55 of the BTCA which makes trespass on the railway a criminal act and where there is no provision for the network operator to give 'lawful authority' for such acts. Secondly, Network Rail cannot grant such authority as it would be contrary to the terms of the license under which it operates. Finally, the analogy drawn by the RA regarding passengers standing on a platform as engaging in 'authorised trespass' when they are in 'close proximity of the rails' is incorrect; any passenger present on a platform is an invitee or client of the railway company and is therefore not a trespasser.

21. Furthermore, passengers standing on platforms are presented with a number of safety related messages regarding where not to stand so that they are not placed at risk; notices such as 'keep away from the platform edge' and the line painted on the platform edge to mark out where it is safe to stand prevent passengers from being in 'close proximity of the rails'. Trespass on the railway at railway stations is committed when and if passengers contravene those notices which warn against trespass which are usually located at the ends of the platform.

22. In any event, in Bakewell the House of Lords drew a distinction between those cases where it was possible to authorise use and remove the element of criminality and those in which it was not; "*It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant of the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the owner to grant*." Zulus Crossing falls into this latter category as it is not possible for Network Rail to authorise the use which the public have made of the crossing.

23. There can be no doubt that the action of members of the public walking over Zulus Crossing is a trespass 'over the lines of railway' in contravention of section 55 of the BTCA. The only persons authorised to use Zulus Crossing are Severn Trent Water as successors in title to the owner whose land were bisected by the construction of the railway and for whom the crossing was constructed.

24. For a penalty of trespass to be applicable under section 55 of the 1949 Act it is necessary that notice to not trespass on the railway has been given at the railway station nearest to the point where the trespass is alleged to have taken place and that such notices have been renewed when defaced or destroyed.

25. Network Rail submitted copies of photographs of signs at Burton Joyce and Carlton stations taken in June 2015 and September 2015 respectively. I viewed the signs at Burton Joyce station myself as part of my unaccompanied site visit. The photographs show signs located at the ends of the platform which give warning to pedestrians not to cross the line or pass beyond the sign. It was Miss Bedford's evidence that the signs at Burton Joyce and Carlton stations had always been in place and that although the current signs did not mention the word 'trespass', their meaning was clear and unambiguous. It was Miss Bedford's understanding that the required signs had always been in place and although there was no photographic evidence to that effect from the 1950's to the 1990's, Miss Bedford considered it to be more likely than not that the required signs had been maintained in place at all material times.

26. There is no direct evidence that the relevant signs have been in place at Burton Joyce or Carlton stations since 1949 but equally no evidence has been submitted to demonstrate that such notices had not been present. In the absence of any contrary evidence I attach some weight to Miss Bedford's evidence which was subject to cross-examination and was not demonstrated to be incorrect. Given that the network

operator has a statutory duty to prevent trespass on the railway, I consider it more likely than not that the required prohibitory notices have been present at Burton Joyce and Carlton stations to give effect to section 55 of the 1949 Act in respect of pedestrian use of Zulus Crossing.

27. Notices and signage has also been present at Zulus Crossing to advise authorised users on the safe use of a 'user-worked' crossing. A photograph of the site taken in 1993 shows a sign which is headed 'Stop Look Listen'; other words are also present on the sign but the quality of the photograph and the graffiti on the sign makes the remaining wording illegible. The Council stated in its report to the Rights of Way Committee that the additional wording was 'Notify local British Rail Manager before crossing with a vehicle which is unusually long, wide, low, heavy or slow moving. 1. Open both gates quickly and look in both directions before crossing. 2 Cross quickly. 3. Close and secure gates after use. Penalty for not doing so £100'. This same signage appears to have remained in place until at least 2006 and is shown in a photograph taken in July of that year.

28. Currently present at Zulus Crossing is a large sign on each gate which reads 'Private level crossing authorised users only'; further signs on the gates warn of a 'penalty for not closing gates £1000'. There are other signs which give advice on the safe use of the crossing with vehicles and animals and a sign with the legend 'warning do not trespass on the railway penalty £1000'. I accept that the signs currently in place were not present in 2006 when the RA's application was made and that the signs which were present during that period were not as comprehensive as they are today.

29. The witnesses I heard from at the inquiry confirmed that there had been signs present on site although recollections about the precise wording of those signs was mixed. Mrs Wollacott recalled a sign saying '*please close the gate*' but no other signs; Mrs Gretton recalled a sign on the gate which read '*failure to close gate penalty'*; Mr Wright had seen a sign near the gate but he could not recall the wording. Mr Bethell had used the crossing as part of his duties for Severn Trent Water and recalled cast iron signs being present at the crossing prior to the printed steel signs which had been present since at least 1993; he recalled signs along the lines of *'keep gate closed*' or '*close gate after use*'. Mr Parkes recalled the existence of signs but not the wording.

30. The RA submit that to all intents and purposes the signage present during the 20-year period did not convey to the user that the crossing was a private accommodation crossing; the absence of appropriate signage meant that the user had deduce from the physical characteristics of the crossing as to whether it could be used. It was submitted that at many crossings there are signs which say 'do not trespass on the railway' which is likely to be understood by users not to turn left or right to walk along the tracks. In the RAs view, Zulus Crossing was not dissimilar to the other crossings of the Nottingham – Newark line that the public were used to using.

31. It was Network Rail's case that appropriate signage had been erected and maintained at all times at Zulus Crossing and that the signage was directed at the authorised users of the crossing; that is, those who held a private vehicular right of way - the signage which had been present prior to 2006 could not be construed as implying a licence to the public to use the crossing.

32. The photographic evidence demonstrates that signage was present at Zulus Crossing. I agree with Network Rail that the wording of the signs present from at least 1993 until at least 2006 was directed at the private user of the crossing; the public having no rights over the crossing, let alone rights with large, wide, low, heavy or slow vehicles. These signs clearly offer advice to the private rights holder on how to safely cross the railway. There does not appear to have been any signs which specifically warned against trespass on the railway at Zulus Crossing until after 2006. However, the absence of such signage is immaterial given that I have concluded that signs which complied with section 55 (3) of the BTCA were

present at Burton Joyce and Carlton stations during the relevant period; in such circumstances any use by the public of Zulus Crossing would have amounted to criminal trespass."

8. The Inspector then went on to consider the factual questions which had been raised as to whether the requirements as to user had been met. His factual findings in relation to the evidence before him were expressed in the following terms:

"33. It is apparent from the images recorded by the covert camera during August 2015 that public use of Zulus Crossing is continuing despite the existence of signs warning against trespass and despite both gates being locked to prevent unauthorised use. Although the RA submits that there are good sight lines at Zulus Crossing which allows pedestrians to cross in safety, the ALCRM methodology employed by Network Rail suggests that there is a high risk of accidents occurring at this crossing; just because there has been no fatality at the crossing does not mean it is safe to use.

34. I only heard from 5 user witnesses as the inquiry and a total of 33 user evidence forms were submitted in support of the application. The user evidence collectively demonstrates that the public has habitually crossed the rails at Zulus Crossing throughout the 20 years prior to 2006, with some users claiming to have walked over the rails on a weekly basis and others on a monthly basis.

35. Some of this use must have involved climbing over a locked gate at the Stoke Bardolph side of the railway prior to 2002 when Mr Jackson replaced the padlock with a hook and eye fastening. The locking of the gate to prevent unauthorised use of the crossing would effectively interrupt the public's enjoyment of the way and the action of climbing over a gate which has been specifically locked to prevent access can be regarded as use with force. In such circumstances, at least some of the claimed use during the 20 years prior to 2006 would have been interrupted and some would have been use which was not '*as of right*' if the provisions of section 31 (1) were applicable to this case. However, any of the use by the public after 1949 is negated by the continuing effect of section 55 of the BTCA."

9. The Inspector drew together all of his conclusions in relation to these issues and whether or not the Order should be confirmed, in so far as it affected the railway land and the level crossing, as follows:

"36. The claimed footpath crosses an operational railway on level and the dedication of a public right of way in such a location would be incompatible with the statutory objectives of Network Rail with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. Under the provisions of previous and current legislation governing the operation of the railway network, Network Rail and its predecessors lacked the capacity to dedicate new public rights of way over the live rails at Zulus Crossing. As Network Rail lacks the capacity to dedicate a public right of way, the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.

37. As dedication of a public right of way at common law cannot have occurred at Zulus Crossing, it follows that the provisions of section 31 of the 1980 Act are not engaged. Furthermore, at all material times during the relevant 20-year period Zulus Crossing has been subject to the provisions of section 55 of the 1949 Act. Any use of the crossing by the public has been unlawful and it is not possible for Network Rail to grant lawful authority for such use. I conclude that as it is not possible for dedication of a public right of way to have occurred at common law the Order should not be confirmed with regard to Zulus Crossing."

10. The Inspector then turned to consider the question of whether the Order should be confirmed in relation to the STW land. This aspect of the case involved consideration both of the question of the evidence in relation to use of the parts of the footpath in question on the STW land, and also the question

of whether those parts of the footpath should be confirmed when they had the effect of forming two culs-de-sac. The Inspector's conclusions were as follows:

“38. The remainder of the Order route crosses land owned by Severn Trent Water and that land is not subject to the same statutory restrictions as the land owned by Network Rail. The available user evidence is of use of the path throughout the 20 years prior to 2006 and other than the challenges to use said to have been made by Mr Jackson in around 2007, there is little evidence to suggest that use was interrupted or was by stealth, force or with the permission of the owner. In addition, no evidence was presented to demonstrate that Severn Trent Water took active steps to inform the public that there was no intention to dedicate a right of way over what is an internal access road. Mr Jackson spoke of signs being present around the estate at the time when waste treatment took place in large open lagoons, but modern methods meant that the estate now had the appearance of a normal farm estate.

39. Whilst there is nothing to prevent a public right of way being a cul-de-sac at one end, the result of the section over Zulus Crossing not being recorded as a public right of way would be the recording of two culs-de-sac each one ending at the railway. These footpaths would not connect with any other path in the network in the vicinity of the railway and would only lead to the railway at Zulus Crossing. To use the 'missing link' between these two paths would constitute a criminal trespass, and the 'missing link' cannot therefore be regarded as a legitimate point of termination sufficient to justify public rights leading directly to either side of the railway.

40. I consider that as there is no legitimate place of public resort at either cul-de-sac, the remainder of the Order route could not be lawfully established as a public highway at common law. It follows that the Order should not be confirmed to show the residual part of the Order route as two cul-de-sac paths.”

11. In the light of the conclusions that the Inspector had reached his decision was that the Order should not be confirmed.

The issues in the case

12. As originally formulated the judicial review proceeded on 13 Grounds ranged across several forms of allegation that there were errors in the Inspector's decision. As the arguments (both written and oral) emerged, the positions on both sides of the case were clarified and refined. Some issues fell away. In short, in the final analysis the claimant relies upon three reasons why the Inspector erred in law in concluding that the Order should not be confirmed.

13. Firstly, the Inspector was wrong to conclude that the confirmation of the Order would conflict with NR's statutory duties, and therefore that they did not have capacity to give rise to the right of way. In essence, the claimant's arguments are that firstly, the Inspector assessed the issue at the wrong date, secondly, that he assessed it as part of the assessment of the “character” exception under section 31(1) of the Highways Act 1980 and should have assessed it under the “incompatibility” exception in section 31(8) of that Act, and thirdly, that the conclusions which he reached in relation to the assessment of risk were irrational. This latter point, is in my view, not at all evident from the claimant's Statement of Facts and Grounds, and objection was taken to it being raised for the first time at the hearing by both the defendant and NR. The claimant applied for permission to raise this argument at the hearing and I heard submissions from all sides about it. I shall assess those submissions below and in that context conclude whether permission to amend should be granted and express my conclusions on the points raised.

14. The second reason why it is said that the Inspector erred in law relates to his consideration of the issues raised under section 55 of the 1949 Act. The claimant contends that the Inspector was wrong to conclude that the signs which were relied upon in this case could properly give rise to criminal trespass.

Furthermore, the claimant submits that in any event the illegality principle was not available in this case and that the Inspector was wrong to dismiss the argument which was raised under Bakewell Management, in particular in the light of the further guidance provided by the Court of Appeal in R(Best) v Chief Land Registrar [2015] EWCA Civ 17. The claimant accepts that it is necessary for them to succeed in relation to both the first and second reason for the Inspector's decision to be quashed. Either one of the Inspector's conclusions in relation to these issues would be sufficient to lead to the Order not being confirmed, and his decision upheld.

15. The third reason relied upon by the claimant relates to the treatment by the Inspector of the STW land and in particular the conclusion that he could not confirm the footpath in the form of the two culs-de-sac which would remain if he were correct about the inability to confirm the Order over NR's land and the level crossing.

16. It is right that I should record that there are some matters which were originally raised in the case, but which as the matter was finally argued did not need to be pursued, and which it is not necessary for me to form conclusions about. Whilst written submissions were made in detail about the ORR Licence, and whether or not it had the effect of preventing NR through statutory incompatibility from dedicating a footpath, the parties accepted that it is clear from the Inspector's decision that he did not found his conclusions in relation to statutory incompatibility on the terms of the Licence, and therefore this point was not pursued at the hearing. All parties reserved their position in relation to it. Further, the defendant accepted that in so far as the Inspector had only considered the 20-year period from 1986 to 2006, and not other potential alternative periods for which the claimant could have contended, the conclusions reached by the Inspector in paragraphs 35 and 36 were not a complete answer to the claimant's case in the form of an alternative basis upon which the decision not to confirm the Order could be upheld. The claimant's criticisms of that part of the decision related to the reasons given by the Inspector for concluding that on the facts the user was not sufficient were, therefore, not pursued.

17. I propose to examine each of the three reasons, and the arguments advanced on either side of the case, separately before reaching my overall conclusions as to whether or not relief should be granted.

Reason 1: errors of law in relation to the “incompatibility” exception

18. Before examining the arguments in detail it is necessary to set out a little of the statutory history which provides the background to the argument. At common law it was possible to defeat dedication of a public right of way through proof that the landowner was under an incapacity. Such an incapacity could arise from legal obligations such as a mortgage over the land, or that the land was the subject of a settlement, or that the landowner was a public body and dedication would be incompatible with its statutory powers and duties.

19. As the Inspector observed, this position in relation to capacity was revised by statute. The Rights of Way Act 1932 as originally enacted provided as follows at section 1.

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

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

…

(7) Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate such way where such way would be incompatible with such public or statutory purposes."(emphasis added)

20. As can be seen, the statute amended the position at common law in relation to the relevance of capacity as a means of defeating the allegation that there had been dedication of a right of way. The words underlined in the section above were deleted by section 58 of the National Parks and Access to Countryside Act 1949, thereby further amending the position in relation to the role of capacity in the consideration of whether there could be held to have been a dedication of a way. The position at common law in relation to incapacity as a consequence of statutory incompatibility was retained and restated in section 1(7) of the 1932 Act. In due course this section was replaced by section 31 of the Highways Act 1980 as follows:

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

(2)The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3)Where the owner of the land over which any such way as aforesaid passes—

(a)has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b)has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

…

(8)Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes."

21. The question which arises in the present case is the time at which the issue in relation to section 31(8) is to be determined. That section reiterated the restatement of the common law set out in s1(7) of the 1932 Act. The first case in time to which I was referred was the decision of Farwell J in A-G ex rel Barnes Urban District Council and London and South Western Railway (1905) 69 JP 110. The facts of that case were that

in March 1847 an agreement had been made between Mortlake Vestry and the predecessors in title of the plaintiff council and the defendant railway company whereby a path, which had been closed, was to be replaced with a path across the railway with a level crossing with gates and a watchman. In October 1903 the defendant railway company prevented the use of the footpath over the railway line and provided a footbridge which they compelled the public to use to cross the line. The defendant contended that the agreement was ultra vires and void. The report records Farwell J's judgement in the following terms:

"The defendant company has closed the gates and abolished the level crossing, thereby compelling the users of the footway to cross by the bridge, and by that alone. In my opinion the bridge is not convenient for such foot traffic as takes place, with handcarts and perambulators, etc. The defendants contend that the dedication of a footpath under the agreement of March 1847 was ultra vires ab initio, for the reason that it was not compatible with the statutory objects of the company. This contention is not in its entirety supported by authority. In R v Leake (1833) 5 B & Ad 469, cited by Esher MR in Grand Junction Canal v Petty (1888) 21 QBD 273,275, 52 JP 692 it was said by Parke B at p478: "If the land was vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public is not incompatible with the objects prescribed by the Act, then it is clear that the commissioners have that power"…In a case like the present a limited dedication is taken by the public, a responsibility being cast of the users of the path to look out for themselves, and this apart from the common law liability of the railway company for negligence. A statutory company can dedicate a footway so long as its user is not inconsistent with the objects and obligations of the company. This being so, the question is really reduced to one of fact. The evidence has been adduced to two points-the public safety and that of the traffic on the line. I find that no danger has been proved either to the user of the line or to the safety of the public who use the trains; if there is danger to any one, it is to the public who come and take what the company has given them. I think that the public use their rights by virtue of the dedication and subsequent user, subject to any inconvenience and risk arising from the use of the railway; they cannot claim that the railway shall not be used at all. It might, of course, be possible to show such a user by the public-as if streams of people were continually passing over a crossing-as would seriously hamper the railway service, and in such case it might be held that the dedication was of a very limited character; but in the present case the principal user of the level crossing was by the passage of children to and from school, and I cannot say that the possible risk is sufficient ground for allowing the company to avoid the duty that it undertook by the agreement arrived at in 1847. In my opinion no case has been made out by the company…"

22. The next case where the question of statutory incompatibility arose for consideration was South East Railway Company Limited v Warr (1923) 21 LGR 669. This was an action for trespass for climbing over a wicket gate at a level crossing, to which the defence was that a public right of way ran through the crossing. It is a curious case on the facts, since it appears from the judgment that the right of way did not in fact cross the lines of the railway. However, notwithstanding this, the railway company argued that as a railway company it was not possible for a footpath to be dedicated across their land as any such dedication would be ultra vires. The Court of Appeal did not agree. Lord Sterndale MR observed:

But, at the expiration of a very long argument, another point was raised, which is the only point that has given me any difficulty at all, and that is this : There is a decision in Great Central Railway Co. v. Balby with Hexthorpe Urban District Council (1912), 2 Ch. 112; 10 L. G. R. 687 ; 81 L. J. Ch. 596, and I think it must be taken to be the opinion of the learned Judge who gave that decision, that a railway company has not got the power to dedicate a public highway across its lines. I doubt if the learned Judge meant more than this: that if all you know is that the railway company is proposing to dedicate, or is said to have dedicated, a public highway across its lines of metals, and the conclusion is obvious that it must interfere with the working of the railway, then it is beyond the powers of the company to make such a dedication, because, as I have said, nobody disputes that a railway company cannot grant a public or private right in such a way as to interfere with the carrying out of its statutory powers. That being so, it is said that the company here

> have no power to dedicate this strip, or whatever you call it, this infinitesimal piece of ground, to dedicate that as a public highway, because it would be dedicating a highway across its metals. In the first place, it is not anything of the sort; it does not dedicate anything across the line at all, the highway is there before, and what is more, it is not necessary that the person who comes over this gate, or through this gate at A, should go across the line at all. He is upon another highway, another public footpath going to the westwards, and, therefore, the dedication of a highway over or through that gate is not a dedication of a highway across the lines at all.

A person coming that way need not cross the lines, he may go to the westwards, and not cross the lines at all, but undoubtedly the effect of the dedication is to give access to the public highway which does go across the lines from a direction in which there was not access before that dedication, that is to say, from the eastwards and north wards. The argument before us was this: the result of that is exactly the same as a dedication in the first instance of a footpath or public highway across the line. It does not seem to me that it is anything of the sort. If it could be shown that the result of the dedication which gives access to the footpath across the line by a large number of persons would be such as to interfere with the statutory powers of the company, then the company could not gate that access. That does not seem to me to be doubted. It seems to me that must be shown in some way. I do not care to discuss now• of Way stile bad no{ice to ed Judge and r t lie was bis con- feat care elusions.oint was culty at Railway , a Ch. be taken thatthan 'oposieg sross its nterfere 5 of the said, iblic or ' out of ny here it, this ghway, In the te any- I what s gate, He is west- trough atpsel. upon whom the onus is, because when you have got evidence on both sides the matter of the question of onus does not become as a rule very important. There must be disclosed by the evidence, such as it is, something which shows that the company cannot dedicate because to do so would be to interfere with its statutory powers. There is here no such evidence given on either side, and I decline entirely to say that, apart from evidence, the giving of access to an unknown number of persons, who may be few or may be many, to cross an existing highway is prima facie doing something that will interfere with the statutory working of the railway. The evidence discloses nothing of the kind."

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23. Warrington LJ delivered a concurring judgment.

> "So far as the actual findings of the learned Judge are concerned, I see no reason whatever for disagreeing with the conclusions at which he arrived that a public way had, prior to some year in the nineties which is immaterial, been acquired by the public as far as the northern boundary of the railway company's land. Further than that, I think, so far as the facts are concerned, that the learned Judge was justified in coming to the conclusion that, treating the company for the moment as an individual, under no statutory restrictions, the public way extended over the two or three inches in question. But now it is said that the plaintiffs are not an ordinary individual, but that they are a statutory company, subject to the restrictions which are applicable to any person of that nature, and that that person is incompetent to create a public right of footway, I say nothing about a cart or carriage way, over land which is traversed by its rails, and that this is a case in which it is sought to establish against the railway company such a right of way.
>
> Now this, I think, is really indisputable and established by a long line of authorities, that in the case of a statutory body such as a railway company which has acquired land for the purposes of its undertaking, it is not competent for a company to deal with its land by way of partial alienation in such a way that the result may be in compatible with the use by the company of the land which was so acquired for the purposes for which it was acquired. But the appellants here go further, and they say that in the case of a right of way over the metals it is enough to prove that what is claimed is a public right of way in that place to establish that such a dedication would be ultra vires the railway company and that, therefore, such a public way

cannot exist: in the first place, even if that proposition were made out, it would not, in my opinion, apply to the facts of the present case, because at the point of the railway company's property immediately south of the strip of land of two or three inches wide there were, and always have been, two public ways, one running east and west along the northern boundary of the company's property and not crossing the lines, and one running south and crossing the lines. There is, therefore, no question of a fresh dedication of a public way across the line or on any part of the line of the railway company which could, or is even intended to be, used for lines; therefore, strictly, the proposition I have referred to, if it could be supported, would not be applicable to the present case, but, in my opinion, that proposition in its wide terms is not capable of being supported if it be alleged that it is a presumption of law, quite irrespective of the facts of the present case, that a railway company cannot create a public footpath across its rails. If that is put forward as a proposition of law, I venture, with all respect, to disagree with it."

24. These two cases, decided at common law, were the backdrop to the centrepiece of the authorities in this part of the case: British Transport Commission v Westmorland County Council 1958 AC 126. The facts of that case were that the County Council had prepared a provisional map under the 1949 Act which marked a footpath across a bridge spanning a railway which had been constructed under statutory powers conferred by a private Act of Parliament in 1845. The railway owners applied to the Quarter Sessions under section 31 of the 1949 Act for a declaration that no right of way existed over the bridge. The Quarter Sessions held that although the bridge had not been expressly dedicated to the public as a right of way, its use by the public for a period of over more than 20 years had been such as to raise a presumption that it had been dedicated. They went on to find that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway and that, thus, a footpath had been dedicated and was properly marked on the provisional map.

25. During the course of argument counsel representing the railway owner submitted that the test of incompatibility with statutory powers was not to be examined solely at the time of the alleged dedication. He submitted that "one must ask whether it is remotely possible that in the future the dedication might interfere with the purposes of the railway, and, if it is even remotely possible there can be no dedication". By contrast counsel on behalf of the County Council submitted that the correct approach to the question of incompatibility, having accepted that the duty of a railway operator to the public was to run its train safely and efficiently, was "whether, at the date when the question is considered by the tribunal of fact, there was any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties".

26. All five members of the Committee provided opinions which concurred in the result that the decision of the Quarter Sessions should be upheld. In order to provide the context for the submissions made by all parties it is necessary to set out relevant extracts from each of the speeches given. The first speech was given by Viscount Simonds and the relevant passages are as follows:

"Any examination of this question must begin with the case of *Rex v. Inhabitants of Leake,*http://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=i0ad6ada60000015accf4a935c0e1b125&docguid=I7B9794C0E42711DA8FC2A0F0355337E9&hitguid=I7B976DB0E42711DA8FC2A0F0355337E9&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=4&resolvein=true - targetfn83 which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J. in that case. "If," he said, "the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

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

If I am right in saying that the principle of *Leake's* case must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be incompatibility, or, perhaps I should here say, compatibility, if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

My Lords, I am satisfied that this argument is misconceived. In the first place, in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. Parke J.'s use of the word "never" in *Leake's* case was clearly not intended to have so dramatic an effect. But in the second place, to give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. and it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired…

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

27. The next speech came from Lord Morton and he observed as follows

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

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

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

Having accepted the formulation of the test put forward by the County Council Lord Morton then went on to apply that test to the facts and was satisfied that the conclusions which had been reached by the Quarter Sessions were appropriate.

28. Lord Radcliffe was in particular troubled by how subsequent authorities had treated the decision of Sir George Jessel MR's judgment in Mulliner v Midland Railway Company [1879] 11 Ch.D 611. The effect of the proposition laid down by Sir George Jessel is described by Lord Radcliffe as being "to the effect that a railway company, which operates under statutory powers of managing its railway conferred upon it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do". He reviewed the authorities in which the decision in Mulliner was considered. In the course of doing so he observed that "few authorities can have been explained so often with such little fidelity to the original source". This concern about the treatment of Sir George Jessel's proposition in subsequent authorities led him to express his opinion in the following terms:

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

Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance upon what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works - railway lines, reservoirs, canals, towpaths, drains and bridges. It has led to much confusion between the voluntary grant or

dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and therefore necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, although the test derived from *Rex v. Inhabitants of Leake* has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is the case of *South Eastern Railway Co. v. Cooper*: but the judgments delivered by the Court of Appeal in that case are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that Mulliner cannot stand today as a binding decision in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way."

29. In his speech Lord Cohen observed that counsel on behalf of the railway owners had submitted reasons to distinguish the case of Leake on the basis that it did not lay down as the test of incompatibility whether there was any likelihood of dedication of a right of way materially hindering the statutory undertaker from an appropriate and efficient discharge of its duties. Addressing that second reason Lord Cohen stated as follows:

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

30. Lastly, Lord Keith agreed that the appeal by the railway owners should be dismissed and expressed his opinions briefly in the following terms:

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

31. Against the background of these authorities Mr Laurence forged the following submissions. Firstly, he submitted that the question of the date at which statutory incompatibility under section 31(8) of the 1980 Act was not settled by the British Transport Commission case. Viscount Simonds expressly left open the date at which the tribunal of fact should make the assessment as to whether or not there was incompatibility. The decision was confined to the evaluation of the competing submissions in relation to the standard of proof of incompatibility with statutory purposes, whether merely a likelihood of interference, or whether a remote possibility of interference would be sufficient. Mr Laurence submitted, therefore, that this was the first occasion at which the question of the date at which the assessment should occur was in point. He submitted that at common law the presumed dedication was at the start of the period. In Turner v Walsh (1881) 6 App Cas 636(which was applied in the context of section 31 of the 1980 Act by Lightman J in Oxfordshire County Council v Oxfordshire City Council [2004] Ch 253at paragraph 98) the following was observed by the court as to the approach to the evidence of dedication:

"Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this Act? This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses."

Thus Mr Laurence submitted that the appropriate time for the assessment under section 31(8) to be undertaken is the point at which dedication is deemed to have occurred, namely the start of the 20 year period under section 31(1). He submitted that there is no reason for adopting a different timescale for the assessment of deemed dedication to the assessment of incompatibility. Indeed, he submitted that there is very good reason based upon the deeming of the dedication to take the same date for the assessment of both. As a fall-back, he submitted that at the very least the assessment should be undertaken at the end of the 20-year period, were he wrong in his submissions that the start of the 20-year period is the appropriate point in time to make the appraisal.

32. Bringing these submissions back to the circumstances of the present case, he therefore submitted that the Inspector erred in law when at paragraph 10(4) and paragraph 15 and 36 of the decision the Inspector adopted the date of his decision as being the time at which he undertook the assessment. Mr Laurence's submission was that the assessment should have been made as at the start of the 20-year period. For the purposes of these submissions he contended that the way had been called into question at a time in or around 1990 when there was evidence that a gate had been locked. That would lead to the assessment being made as at 1970. Alternatively, on the facts before the Inspector the relevant date for assessment applying Mr Laurence's contention could not in any event be later than 1986.

33. Mr Laurence made further submissions in relation to the Inspector's treatment of this issue. He submitted that when the Inspector addresses this question in paragraph 9 of his decision he treats the incompatibility point as being an aspect of the "character" exception, namely the exception that "the ways of such a character that use of it could not give rise in common law to a presumption of dedication" which is included within section 31(1). Mr Laurence observed that nowhere does the Inspector allude to section 31(8), which was in truth the exception which he was being encouraged to apply by the objector. Thus Mr Laurence submitted that the Inspector erred in law as he treated the question of incompatibility as being a feature of the "character" exception rather than under the correct limb of section 31, namely the "incompatibility" exception provided by section 31(8).

34. Mr Laurence also submitted that the Inspector erred in that he failed to examine the question of whether or not there was any limitation which could be imposed upon the Order which would respect the statutory duties of the objector, to the extent that it was proper for the Inspector to have held that the objector's statutory duties were incompatible with the Order. During the course of the hearing, and in order to illustrate this limb of his argument, Mr Lawrence produced a draft limitation which provided that the exercise of the right of way should only be limited to occasions when no train was approaching or on the level crossing. He submitted that it was open to the Inspector to address the concerns of the objector under section 31(8) and resolve them by the creation of such a limitation, which would operate so as to ensure that the right of way could exist alongside the satisfactory discharge of NR's statutory duties. The draft limitation which he proffered was in the following terms:

"The lawful exercise of the right of way over land belonging to Network Rail and lying between the gates which bound Network Rail's operational land on either side of the railway ("the crossing") is limited to occasions when no train is approaching or on the crossing."

35. Finally, and in what was as set out above effectively a fresh Ground, Mr Laurence submitted that it was irrational for the Inspector to have concluded that the existence of the right of way on the level crossing would be incompatible with NR's statutory duties. It was common ground that those statutory duties, as in the British Transport Commission case, were related to the need for NR to ensure public safety whilst operating the railway and also to ensure that the railway operated efficiently. Mr Laurence submitted that the evidence which was before the Inspector could not sustain any conclusion that those objects would be imperilled by the making of the Order.

36. Firstly, he noted that there are a significant number of level crossings which accommodate rights of way across NR's railway network, including in particular a number of crossings of the railway lines in question (of the order of 12 or so) between the level crossing concerned in the present case and Newark. In relation to the evidence which was before the Inspector Mr Laurence noted that the increased volume of pedestrians using the right of way, namely 20 crossings per day, which led to the increase in the crossing risk assessment from C5 to C6 (see paragraph 13 of the decision) was not demonstrated by any of the empirical evidence as to the number of people who were crossing at the height of summer in August 2015 (an average of 6-7 per day). Thus, the conclusion that there would be an increase in the risk assessment score was not founded on the evidence. In any event, he submitted that a mere increase in risk does not equate to statutory incompatibility. Mr Laurence submitted that there had to be a real and material increase in risk for statutory incompatibility to be made out and thus he contended that on the basis of the material before the Inspector it was not open to the Inspector to find that there was statutory incompatibility.

37. In response to these submissions Mr Buley, on behalf of the defendant, contended that the question of the date at which the assessment under section 31(8) of the 1980 Act fell to be determined had been settled in the British Transport Commission case and that whilst Viscount Simonds had left the point open, a proper analysis of the other speeches in the House of Lords demonstrated that Lords Morton, Radcliffe and Cohen all formulated the test as one which had to be assessed at the date at which the question of fact as to whether or not there was incompatibility fell to be determined. He therefore submitted that this question as to the proper date for the appraisal had been settled in the British Transport Commission case. He submitted it formed part of the ratio of that case. In any event, he submitted that the adoption of the date of the fact-finding exercise in three of the five judgments in the House of Lords provided compelling obiter dicta, even if he was wrong as to the ratio of that case, indicating that the right answer was that the date was as at the date of the factual findings. Thus, he submitted that Mr Laurence's concerns about the potential mismatch between the date at which dedication of the way was assumed under section 31(1) and the date at which incompatibility was considered did not arise, in the sense that it was already settled law that the date was the date of the factual assessment. In any event, he submitted that use of the date of the fact-finding exercise for the purpose of assessing the question under section 31(8) was not a strange

mismatch on the basis that the question under section 31(8) was a forward looking exercise, and thus it was not appropriate or proper to confine that enquiry to the claim period.

38. As a fall back, he submitted that the proper construction of section 31(1) meant that the date at which dedication should be presumed was at the end of the 20-year period, rather than its beginning. He submitted that Lightman J was wrong in the Oxfordshire County Council case to adopt the common law position from Turner v Walsh. He submitted that the deemed dedication should be at the end of the 20-year period on the basis of the statutory language of section 31(1) ("has been enjoyed") which made clear that the deeming of the existence of the way was at the end of the 20 year period. Thus it was his fall back submission that in any event the assessment should not occur at the start of the 20 year period which is the basis of the dedication but rather at its conclusion.

39. Dealing with the submissions made in relation to paragraph 9 of the decision letter and the suggestion that the Inspector had erroneously applied the "character" exception, Mr Buley submitted that there was no error at all in anything that the Inspector had stated in paragraph 9. The Inspector's text sets out the requirement at common law to have capacity to dedicate, and then goes on to explain the basis upon which statutory incapacity or incompatibility arose to be considered in the case before him. The absence of mention of section 31(8) was wholly inconsequential when the Inspector accurately set out the relevant principles, observing that section 1 of the 1932 Act preserved "the common law principle involving the capacity to dedicate" with it remaining "relevant in certain circumstances". Thus Mr Buley's submission was firstly there was no error of law in the Inspector's paragraph 9. Even if the Inspector had treated the "incompatibility" exception incorrectly as being part of the "character" exception there was no respect in which it could be said that he had misapplied the appropriate legal test or applied a legal test which was in error. In substance he had applied the test under section 31(8) and therefore there was no reason to consider that the decision would be other than highly likely to be the same and the principles in section 31(2)(a) of the Senior Courts Act 1981 should apply so as to deprive the claimant of relief.

40. Turning to the question of the suggested limitation Mr Buley contended that the limitation could not in truth address the problem raised in relation to incompatibility. The question is not related to the extent of the care used by the public, but rather that the answer should be not to have the right of way at all.

41. In respect of the rationality argument, Mr Buley complained that there was no pleaded Ground on this basis and therefore permission had not been granted to raise the point. In any event, he submitted that the reality was that the only evidence before the Inspector, certainly of any technical character, was that produced by NR. The evidence from August 2015 was of the number of users when there was a locked gate in place, and the existence of a right of access was not advertised on the definitive map and statement. The predicate of NR's case, namely that the existence of the path made it clearly foreseeable that there would be greater public use and therefore greater potential conflict between pedestrian and rail movements, was self-evident and thus the decision which the Inspector reached was entirely rational and based on the evidence before him.

42. The defendant was supported in these submissions by Mr Lopes on behalf of NR. He submitted that there were insurmountable difficulties in drafting a limitation on the Order of the kind posited by Mr Laurence. Quite apart from the fact that there appeared to be no positive invitation to the Inspector to seek to identify any limitation, the drafting proposed by Mr Laurence to illustrate his submission was said by Mr Lopes to effectively make NR's case. It did not deal, for instance, with vulnerable users who would be slower to cross the level crossing. Further, it failed to engage with what might be meant by a train approaching and thus when the limitation might or might not apply. In reality, Mr Lopes submitted, any material increase in the use of the level crossing created a lack of safety which led to the overarching statutory powers being brought into play and the question of incompatibility arising.

43. My conclusions in relation to these competing submissions are as follows. Firstly, I am entirely satisfied that the question of when the assessment of statutory incompatibility under section 31(8) of the 1980 Act falls for determination was settled in the British Transport Commission case. It is clear to me from an analysis of the speeches which I have set out above that whilst Viscount Simonds expressly reserved his position, firstly, there was argument on the point in the case as he observed and secondly, that at least three of the members of the Committee accepted the formulation which was provided by counsel on behalf of the County Council, namely that the assessment was to be made at the date when the fact finding tribunal was considering the question. Thus, the British Transport Commission case is in my view binding authority at the highest level to the effect that the Inspector in the present case was correct to undertake his determination in relation to section 31(8) at the time when he was reaching his decision on the Order. Even were I wrong in concluding that the British Transport Commission case was binding in relation to this point, nonetheless I would accept and endorse Mr Buley's submission that the adoption of counsel for the County Council's formulation of the test by three of the members of the Committee in that case is very persuasive authority in support of that proposition. I have no difficulty in accepting that persuasive authority and concluding that the correct date for the examination of the issues in respect of section 31(8) is the date on which the fact finding exercise is occurring and the order is being examined.

44. At first sight there is some force in Mr Laurence's submission that this conclusion creates something of a mismatch between the assessment of whether or not dedication is possible under section 31(8), and the assessment of the evidence in relation to the 20-year period relied upon under section 31(1). However, further reflection in my view underlines the good sense and practicality of adopting the date of decision-making in relation to the order as the date when the assessment of statutory incompatibility should occur. As Lord Radcliffe observed, the test itself from the case of Leake is essentially a pragmatic one. There are in my view sound practical reasons why the facts should be assessed at the point in time when the question arises. Firstly, the consideration of whether or not the recognition of the right of way would be incompatible with the statutory undertaker's statutory duties is in large part going to be a forward-looking exercise. It is an examination of the position at the time when the order is being considered, but against facts and forecasts which consider the question not simply at that moment, but also looking forward to consider whether on the balance of probabilities it is likely that in future the statutory undertaker's statutory duties would be compromised and there would be incompatibility between the operator's statutory objects and the existence of the way. The fact that it is a forward-looking exercise would render it peculiar for that test to be applied at some point in the past.

45. Secondly, it would be a curious factual enquiry for an examination to be made as to the safe and efficient operation of the railway, for instance, in the present case either at 1970 or 1986. Such an enquiry would have to be taken on the basis of technical standards and engineering knowledge at that point in time in the past (assuming that could be reliably ascertained). Evidence of accidents or near misses or other difficulties in operating the railway after the date in 1970 or 1986 would be inadmissible or at least arguably irrelevant. The artificiality of such an enquiry is in my judgment a strong pointer towards it being inappropriate to examine the question under section 31(8) at some earlier date than the date of determination. Mr Laurence recognised the force of the difficulties created by the exclusion of supervening events bearing directly upon the safe and efficient operation of the railway, and in his reply he sought to develop a hybrid approach whereby it would be possible for the Inspector to take account of such evidence, albeit still reaching a conclusion based upon a date at the start of the relevant 20 year period. In my view, whilst respecting Mr Laurence's endeavour to try to find a solution to the problem created by adopting an earlier date for examination of the question, this hybrid approach throws into sharper focus the practical problems created by taking the earlier date as the date for assessment. How such a hybrid approach could operate in practice is, in my view, very unclear and uncertain. Whilst there may be a mismatch between the timescales for the questions posed under section 31(1) and 31(8) when considering whether an order should be made or confirmed, the nature of those enquiries (retrospective under section 31(1), and both retrospective and importantly prospective under section 31(8)) and the practical issues with which they are engaged justify the difference in the times at which those questions are to assessed.

46. It follows that not only am I satisfied that the British Transport Commission case settled that the question of fact under section 31(8) is to be examined at the point in time when the order is being examined, I am also satisfied that there is very good reason for taking that as the appropriate date for consideration of that particular forward-looking question.

47. The conclusions which I have reached effectively dispose of the subsidiary issue (which was in any event academic, on the basis that if I found that the date was not the date when the order was being examined the decision would be unlawful in any event) as to whether the presumed date of dedication is at the start of the period in accordance with the common law rule established by Turner v Walsh or, alternatively, as Mr Buley submitted at the end of the 20-year period in accordance with his construction of section 31(1). On the findings which I have made there was no error of law in the Inspector's decision and therefore this point does not arise for my determination. With due deference to the arguments which I heard, I prefer to leave the resolution of this issue to another case in which it is material and in point.

48. The next question is whether the Inspector fell into error in paragraph 9 of the decision by thinking that he was applying the “character” exception, when he should properly have been applying the “incompatibility” exception. I am not persuaded that there is any error of the kind claimed by the claimant in the Inspector's decision. In paragraph 9 the Inspector accurately sets out the law, starting by introducing the statutory scheme in the first sentence, then setting out the common law requirement for capacity to dedicate in the second sentence, before in the remainder of the paragraph explaining that whilst there had been adjustments to that requirement by the 1932 Act “in certain circumstances”, the requirement that dedication should not be inconsistent with NR's statutory duties both at common law and under the statutory scheme remained a basis on which the Order could not be confirmed derived from capacity. This was an accurate statement of the law. As set out above section 1(7) of the 1932 Act and section 31(8) of the 1980 Act make clear that the common law in relation to statutory incompatibility have been preserved as part of the statutory scheme. Thus, whilst it is true that the Inspector did not specifically reference section 31(8) he did not need to do so. He had carefully set out the relevant law and no cross-reference was necessary to show that he was correctly directing himself to the issue which he had to decide. I do not accept, therefore, that the Inspector misdirected himself as the claimant alleges. Whilst Mr Buley and Mr Lopez raised the question as to whether in the event that I concluded there had been a misdirection of law, the provisions of section 31(2A) of the Senior Courts Act 1981 would operate so as to deprive the claimant of the benefit of relief, in the light of the conclusions which I have reached this point does not arise.

49. I turn then to the question of whether or not the Inspector ought, notwithstanding his conclusions, to have contemplated the imposition of a limitation on the order so as to enable it to be made and the statutory duties of the railway operator to be accommodated. I share the view given in his submissions by Mr Lopez that there are formidable difficulties in drafting any such limitation. Whilst respecting the spirit in which Mr Laurence's draft limitation was offered, the debate around it demonstrated how difficult it would be to identify when, in particular, a train on the railway lines was to have precedence such that the right of way over the level crossing was effectively suspended.

50. In my view there is a further, more significant, objection to this approach. In reality any person using the level crossing as a pedestrian as a trespasser at present will no doubt exercise circumspection and not wish to find themselves on the railway lines at any point when a train is on its approach or actually crossing. The existence of that natural desire for self-preservation, which is in truth no more or less than what is reflected in the limitation, is not a complete answer to resolving the safety issues which arise or the instances which may occur affecting the efficiency of the railway. With the best will in the world human error occurs. It is the existence of conflict, and the increased extent of such conflict, between pedestrian movements and train movements that increases the chance of human error and the number of times when there is a danger to public safety. Thus, the limitation is not an answer to the conclusions reached by the

Inspector under section 31(8) because the limitation cannot itself avoid the impact on public safety and the efficiency of the railway which would arise with an increase in use of the level crossing caused by its recognition as a public right of way. There is force in the submission made by Mr Lopez that in fact the Inspector could not properly be criticised in this respect since the possibility of such a limitation was never raised with him. However, notwithstanding that point, even had it been raised I am satisfied that it would not have provided a conclusive answer to the findings which he made in respect of the impact of making the Order upon the statutory duties of the second interested party.

51. I turn then to the rationality Ground which was raised by Mr Laurence. Whilst I recognise that the matters raised were essentially matters of argument based on material which was already before the court, nevertheless in my view seeking to amend pleadings and argue new points at the hearing of a judicial review is in principle inappropriate. I allowed the argument to be heard and will offer my conclusions upon it, simply because I have been able to form conclusions upon the point with relative ease and for the assistance of the parties who engaged with the point. I am not, however, minded to allow the claimant to amend at the very late stage which it sought to since, as Mr Buley rightly points out, to do so would enable the claimant to avoid all of the disciplines and strictures of formal responses by the defendant and NR, and the necessary examination of arguability at the permission stage. Without prejudice to that position my conclusions are as follows.

52. I am satisfied that the Inspector's conclusions on the question of whether or not the safe and efficient operation of the railway would be affected so as to interfere with NR's statutory duties were entirely rational and open to him. As was observed in the course of argument, the reality in this case was that the Inspector only had technical evidence from NR on this point. That evidence addressed in detail objective engineering modelling of the risk presented by an increase in the number of persons using the way in the event that the order was confirmed. Paragraphs 12 and 13 of the Inspector's decision record that evidence, which forecast that were pedestrian movements across the railway line to increase to 20 crossings per day there would be an identifiable increase in the risk which use of the level crossing presented to the public and therefore, as the Inspector noted, a corresponding reduction in the safety of the crossing.

53. In my view Mr Laurence's point in relation to the CCTV survey recorded in paragraph 13 of the decision does not provide any argument that this analysis was fundamentally flawed or irrational. The CCTV survey provided some indication of the present level of usage. It was not presented on the basis that that would be the level of usage after the Order had been made and the right of way recognised. The CCTV survey enabled two conclusions to be reached. Firstly, the level of pedestrian usage was such at present that it would be likely to increase (and the forecast was to 20 pedestrians per day) if the Order was made. That led to the conclusion that safety at the crossing would be materially reduced. Secondly, it demonstrated that there were vulnerable users using the crossing who, if the right of way were recognised and the use persisted, would be at particular risk in using the level crossing as a right of way. It follows that the conclusions which the Inspector reached in paragraph 15 of his decision were securely founded upon the evidence before him, and conclusions that were clearly open to him on the evidence which he received at the inquiry. Thus, even had I permitted an amendment to allow this argument to be presented I would have concluded that the point was not arguable and refused permission for it to be raised as part of this judicial review.

Reason 2: the issues in respect of section 55 of the British Transport Commission Act 1949

54. Whilst the relevant text of section 55 of the British Transport Commission Act 1949 was set out by the Inspector in his decision, it is worthwhile for reference purposes to set out the full text relevant to these arguments which (as originally enacted) is as follows:

“55.— For better prevention of trespass on railways &c.

(1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings…

(3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed."

55. All parties accept that the doctrine of illegality operates as a free-standing principle upon which the Order could be defeated, as opposed to being a factor which is part and parcel of the considerations under section 31(1) of the 1980 Act. In essence, as set out above, the Inspector concluded that on the basis that the use of the level crossing by pedestrians amounted to a trespass which was rendered criminal by section 55 of the 1949 Act, the Order should not be confirmed. This contention is the subject of challenge in these proceedings, as it was at the inquiry before the Inspector.

56. On behalf of the claimant Mr Luke Wilcox, who advanced this part of the claimant's case, made his submissions on essentially two bases. Firstly, he submitted that on the facts of this particular case the offence under section 55 of the 1949 Act did not in fact arise. Secondly, he submitted that even if it did, the principle of illegality was not engaged in the context of this particular offence, and therefore any crime which might have been committed under section 55 of the 1949 Act could not operate so as to defeat the Order. This latter submission was based upon an examination of two authorities which were key to the claimant's case: firstly, Bakewell Management Limited v Brandwood [2004] UKHL 14; [2004] 2 AC 519and secondly R (Best) v Chief Land Registrar [2015] 3 WLR 1505.

57. Under section 55(3) of the 1949 Act it is in effect a defence to a charge under section 55 that no "public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such an offence is alleged to have been committed". It will be recalled that in paragraphs 25 and 26 of the decision the Inspector found that there had been signs in place at the nearest stations, namely Burton Joyce and Carlton, since 1949 and that such notices as were found by the Inspector "give warning to pedestrians not to cross the line or pass beyond the sign". In fact the full text of those signs as exhibited in the trial bundle are as follows:

"Passengers must not pass this point or cross the line"

It appears from the photographs that the signs are situated at the end of the platforms at the stations.

58. Mr Wilcox submitted that the signs are not adequate to give rise to criminal liability under section 55. He submitted that where criminal liability was to be imposed it was essential that such was made clear in any relevant notice. He further submitted that since the 1949 Act was a private Act of Parliament there was a particular need for clarity in relation to the creation of the offence. He contended that it was particularly pertinent that the sign was directed only towards passengers at the station, and further did not clearly identify that failure to comply with the sign would amount to a criminal offence. In all of these circumstances he submitted that the requirement that a notice should be provided had not been met, in

particular in terms of the contents of these signs, and therefore they were incapable of satisfying the requirements necessary in order to give rise to criminal liability under section 55.

59. To understand Mr Wilcox's submissions in relation to his second point as to the application of the principle of illegality it is necessary to set out the substance of the authorities upon which he relied as set out above, starting with the Bakewell Management case. That case concerned the owners of property who accessed their homes by driving vehicles from the public highway along tracks or roads over common land. A deed had been deposited on 31st December 1927 pursuant to section 193(2) of the Law of Property Act 1925 by the owner of the common land declaring it to be common land to which section 193 of the 1925 Act applied. As a consequence of that declaration section 193(4) created a statutory prohibition upon vehicular use of the common in the following terms:

"(4) any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence."

60. No lawful authority was granted by the owner of the common land, but the occupiers of the homes who were accessing them upon the common land claimed entitlement to an easement by virtue of evidence of protracted use and the effluxion of time under section 2 of the Prescription Act 1832 or, alternatively, under the doctrine of lost modern grant. The claims were resisted by the land owner on the basis that since the use of the accesses over the common land was a criminal offence the doctrine of illegality applied so as to prevent the establishment of the easements claimed. In advancing the case on behalf of the owner of the common land reliance was placed on the case of Hanning v Top Deck Travel Group Limited 68 P&CR 14. In his speech Lord Scott identified that in the leading judgment of the case of Hanning Dillon LJ, having analysed the relevant authorities, concluded that they established the rule that:

"an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute."

Lord Scott concluded that the cases did not establish that rule. He stated that instead:

"what they establish is a rather different rule, namely, that an easement cannot be acquired to do something the doing of which is prohibited by a public statute. "

The distinction between those two propositions is made clear in paragraph 39 of his speech in the following terms:

"The feature of Hanning's case, and the present case, that distinguishes them from such cases as Legge's case and *Cargill v Gotts* is that the servient owner was able, notwithstanding the statutory prohibition, indeed by the very terms of section 193(4) , to make a lawful grant of the easement. A statutory prohibition forbidding some particular use of land that is expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority is an unusual type of prohibition. It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant by the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the landowner to grant. It is difficult to

see why, in the former class of case, the long and uninterrupted user should not be capable of supporting the presumed grant by the landowner of an easement that if granted would have been lawful and effective notwithstanding that the user was contrary to a statutory prohibition. I can see no requirement of public policy that would prevent the presumption of a grant that it would have been lawful to grant. On the contrary, the remarks of Lord Denning MR and Stamp LJ in *Davis v Whitby [1974] Ch 186* , 192 and of Lord Hoffmann in R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335, 349 to which I have referred provide sound public policy reasons why, if a grant of the right could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed."

61. This analysis led Lord Scott to his conclusions at paragraph 46 in the following terms:

"My Lords, in my opinion, the decision in Hanning's case and the subsequent justifications of that decision are wrong and ought not to be followed. I accept that, at the end of the day, the issue is one of public policy. It is accepted, however, that a prescriptive right, or a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of being tortious. That is how prescription operates. Public policy does not prevent conduct illegal in that sense from leading to the acquisition of property rights. The decision in Hanning's case can only be justified on the footing that conduct illegal in a criminal sense is, for public policy purposes, different in kind from conduct illegal in a tortious sense. Why should that necessarily be so? Why, in particular, should it be so where the conduct in question is use of land that is not a criminal use of land against which the public law sets its face in all cases? It is criminal only because it is a user of land for which the landowner has given no "lawful authority". In that respect, the use of land made criminal by section 193(4) of the 1925 Act, or by section 34(1) of the 1988 Act , has much more in common with use of land that is illegal because it is tortious than with use of land that is illegal because it is criminal."

62. Lord Walker also emphasised the dispensing power of the land owner in the case of a criminal offence under section 193(4) of the 1925 Act in his speech. Like Lord Scott, he made reference to the public policy dimension of the illegality principle. His conclusions were expressed as follows:

"56. The present case is exceptional because of the unusual nature of the offence created by section 193(4) of the Law of Property Act 1925. It creates a criminal offence but it is, most unusually, an offence in respect of which the owner of the soil of the common has a dispensing power. It is common ground that that is the effect of the words "without lawful authority" in subsection (4). Moreover the landowner does not hold his dispensing power in any sort of fiduciary capacity. He is not bound to exercise it in the public interest. He can if he thinks fit exercise his dispensing power in his own private interest, by levying a charge for the grant of his authority. Miss Williamson (for the claimants) candidly agreed that from her clients' point of view the appeal is ultimately about money…

59. My Lords, in my view this House should not readily conclude that the decision of the Court of Appeal in Hanning's case was mistaken, especially as it has been followed, not only by the Court of Appeal in this case, but also on other occasions. Nevertheless I am satisfied that the wide formulations of the principle by Templeman LJ in *Cargill v Gotts [1981] 1 WLR 441* and by the Court of Appeal in Hanning's case, although producing the right result in the generality of cases, are too wide in a case like the present. That is not to say that the residents of houses near Newtown Common did not commit a criminal offence (of a fairly venial nature) when they drove across the common to and from their houses. The principle of legal certainty requires the criminality or lawfulness of an act to be determined at the time when it takes place, and not with the advantage (or disadvantage) of hindsight. Nevertheless the prior authority of the owner of the common would have provided a complete defence to any criminal charge. In the ordinary case of prescription of a private right of way, the prior authority of the landowner (in the solemn form of a grant by deed) is presumed or inferred from long user, even though every act of user during the prescription period takes place without his actual prior authority and is a tortious (though not a criminal) act. I cannot see that

any public interest would be served by holding that the absence of the landowner's actual prior authority should produce a completely different result in cases where section 193(4) is in play.

60. I do not see this as reintroducing the "public conscience" test which this House disapproved in *Tinsley v Milligan [1994] 1 AC 340* . It is merely a recognition that the maxim ex turpi causa must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest: see for instance *National Coal Board v England [1954] AC 403*. In my opinion it is the landowner's unfettered power of dispensing from criminal liability, exercisable at his own discretion and if he thinks fit for his own private profit, which is the key to the disposal of this appeal. Since a dispensing power of that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality."

63. Against the backdrop of these conclusions Mr Wilcox submitted that in the present case the second interested party had a dispensing power in respect of any offence under section 55. It was perfectly possible for NR to authorise the use of the level crossing without being in breach of their statutory powers, and by doing so they would have obviated any offence under section 55 since they had authorised the pedestrian use of the level crossing. In those circumstances there would be no trespass upon which section 55(1) of the 1949 Act could bite. He submitted that the Inspector was therefore in error in paragraph 37 of his decision when he concluded that "it is not possible for network rail to grant lawful authority for such use". NR could have granted permission for the level crossing to be used. The offence under section 55 is analogous to that under section 193(4) of the 1925 Act and thus the principle of illegality should not have been deployed so as to defeat the Order.

64. Turning to the second authority upon which the claimant relies, it is important to note that this decision was not made available to the Inspector. The case of Best concerned the claimant's application to the Land Registry to have himself entered on the Register as the registered proprietor of a property which he had entered as a vacant residential building without the registered proprietor's consent, and to which he had carried out building and other works of repair so as to make it his permanent residence. His evidence was that he had treated it as his own property since 2001. The Chief Land Registrar rejected the application on the basis that his occupation from 1st September 2012 (when section 144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force) had been a criminal trespass and could not therefore give rise to a claim for adverse possession. The Court of Appeal concluded that section 144 of the 2012 Act did not affect the settled law of adverse possession in relation to registered or unregistered land, and therefore the existence of section 144 did not prevent the claimant from having acquired a possessory title which should be registered.

65. The relevant offence under section 144 is established as follows:

"144(1) a person commits an offence if:

(a) the person is in a residential building as a trespasser having entered as a trespasser

(b) the person knows or ought to know that he or she is a trespasser, and

(c) the person is living in the building or intends to live there for any period"

66. In giving the leading judgment in the Court of Appeal Sales LJ identified in paragraph 51 of his judgment that the best guidance on the question of the operation of illegality is to be found in the speech of Lord Wilson JSC in Hounga v Allen (Anti-Slavery International intervening) [2014] 1 WLR 2889. Sales LJ set out his analysis of the decision in Hounga in the following terms:

"52. In doing so, the Supreme Court confirmed the position arrived at in *Tinsley v Milligan* [1994] 1 AC 340: the law of illegality does not operate to confer a broad discretion on a court to take any illegal actions on the part of a claimant into account when deciding the extent to which such illegality has an impact upon the relief sought by the claimant. Rather, the task for the court is to identify in the specific context in question a particular rule which reflects in an appropriate way the relevant underlying policy in that area: see *Hounga*, paras. [42] et seq.; also *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339, paras. [30]-[31] per Lord Hoffmann; *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391, paras. [20]-[25] per Lord Phillips of Worth Matravers; and now *Les Laboratoires Servier v Apotex Inc.*, supra, paras. [13]-[22] per Lord Sumption JSC. Although in each case a rule is to be identified, rather than just taking a discretionary approach of a kind disapproved in *Tinsley v Milligan*, *Hounga* and *Les Laboratoires Servier*, there is not one single rule with blanket effect across all areas of the law. Instead, there are a number of rules which may be identified, each tailored to the particular context in which the illegality principle is said to apply: see *Gray v Thames Trains Ltd* (para. [30]: the *ex turpi causa* policy is based "on a group of reasons, which vary in different situations"; and para. [32]: as between rules applicable in different contexts, "the questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation") and *Les Laboratoires Servier*, paras. [19] and [22].

53. The issue in *Hounga* was, "In what circumstances should the defence of illegality defeat a complaint by an employee that an employer has discriminated against him by dismissing him contrary to section 4(2)(c) of the Race Relations Act 1976?" (para. [1]). In a significant respect, therefore, the question was similar to that before us, depending as it did on the extent to which the Supreme Court considered that the rights conferred by the 1976 Act should be treated as impliedly qualified so as to be subject to a defence of illegality. At paras. [42]-[44] of his judgment in *Hounga*, Lord Wilson said this:

"42. The defence of illegality rests on the foundation of public policy. "The principle of public policy is this …" said Lord Mansfield by way of preface to his classic exposition of the defence in *Holman v Johnson* (1775) 1 Cowp 341, 343. "Rules which rest on the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification": *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask "What is the aspect of public policy which founds the defence?" and, second, to ask "But is there another aspect of public policy to which application of the defence would run counter?"

43. An answer to the first question is provided in the decision of the Canadian Supreme Court in *Hall v Hebert* [1993] 2 SCR 159. After they had been drinking heavily together, Mr Hebert, who owned a car, allowed Mr Hall to drive it, including initially to give it a rolling start down a road on one side of which there was a steep slope. The car careered down the slope and Mr Hall was seriously injured. The Supreme Court held that the illegality of his driving did not bar his claim against Mr Hebert but that he was contributorily negligent as to 50%. At the outset of her judgment on behalf of the majority, McLachlin J, at p 169, announced her conclusion about the basis of the power to bar recovery in tort on the ground of illegality, which later she substantiated in convincing terms by reference to authority. Her conclusion was as follows:

'The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage[s] award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.'

44. Concern to preserve the integrity of the legal system is a helpful rationale of the aspect of policy which founds the defence even if the instance given by McLachlin J of where that concern is in issue may best be

taken as an example of it rather than as the only conceivable instance of it. I therefore pose and answer the following questions: (a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent on her dismissal, in particular the abusive nature of it. (b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed on her, it would not represent evasion of it. (c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Hounga to enter into illegal contracts of employment? No, the idea is fanciful. (d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity."

54. Lord Wilson's assessment was that the considerations of public policy militating in favour of applying the *ex turpi causa* defence to defeat the claim were very slight: para. [45]. He then went on to consider the countervailing public policy considerations which were in play, in favour of allowing the claimant to rely on the Race Relations Act and to bring her claim. He concluded that these outweighed the public policy considerations in favour of allowing an illegality defence to the claim and that therefore the claim should proceed: paras. [46]-[52]. Lord Hughes JSC (with whom Lord Carnwath JSC agreed) agreed "that the claim of statutory tort in the present case was set in the context of the claimant's unlawful immigration, but that there was not a sufficiently close connection between the illegality and the tort to bar her claim": para. [59]."

67. Sales LJ applied the guidance given in Hounga to the particular circumstances of Best as follows:

"69. Following this approach, I accept Mr Rainey's submission that the relevant balance of public policy considerations shows clearly that the fact that a relevant period of adverse possession for the purposes of the LRA included times during which the possessor's actions constituted a criminal offence under section 144 of LASPOA does not prevent his conduct throughout from qualifying as relevant adverse possession for the purposes of the LRA.

70. For these purposes, what is required, following the guidance given by Lord Wilson in *Hounga* at para. [42], is an amalgamated approach, balancing the public policy considerations which underlie and find expression in the provisions of the LRA governing acquisition of title by adverse possession against the public policy considerations which underlie and find expression in section 144 of LASPOA. Addressing that focused issue, I consider that it is clear that in enacting section 144 of LASPOA, Parliament did not intend that it should have any impact on the law of adverse possession set out in the LRA. The mischief which section 144 was intended to address and the objective it was intended to achieve had nothing to do with the operation of the law of adverse possession. (I would add that, in my opinion, each of the authorities relied upon by Mr Rainey for his wide submission is capable of being explained by application of the same approach).

71. The object of section 144 appears both from its own terms and from the Government's stated reasons for seeking its enactment by Parliament, as set out in the Response to Consultation. Although that response was not in formal terms a White Paper, in substance it fulfilled the same role of explaining the background to a legislative proposal introduced by the Government. In my view, therefore, the consultation paper has similar status to a White Paper as a legitimate aid to interpretation of section 144, and in particular as a legitimate source for guidance as to the policy objective which was sought to be achieved by section 144 (cf *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591). The stated objective of section 144 was to provide deterrence and practical, on the ground assistance for home-owners in removing squatters from their property. Disruption of the law of adverse possession was not mentioned as an intended effect of the provision, nor was it suggested that it was being introduced to

try to re-balance the rights of property owners as against those of adverse possessors with respect to the entitlement to be treated as title-holder in relation to property."

68. In his submissions Mr Wilcox drew parallels with the case of Best and sought to apply the balancing of public policy interests required by paragraph 42 of Lord Wilson's judgment in the following way. He submitted that like Best the provisions of section 31 of the 1980 Act are grounded in principles akin to adverse possession in terms of the requirement for long usage, and he drew attention to the public benefit to be derived from certainty as to the existence of rights of way, both in terms of the interests of land owners in knowing whether or not rights of way existed across their land, and also in terms of the public who might wish to use the right of way and the public benefits which were thereby provided. He submitted that the strong public interest in the secure and certain identification of rights of way provided by section 31 had to be balanced with the public policy interest of keeping trespassers off the railway, but contended that much more limited weight had to be given to that latter public policy consideration in the light of the fact that the sentence which the offence under section 55 attracts is very light, and far lighter than the sentence under section 144 of the 2012 Act. For these reasons he submitted that the doctrine of illegality ought not to apply in relation to section 31, which is premised on the tort of trespass in just the same way as were the easements in Bakewell Management and the adverse possession in Best. The acquisition of those rights should not, as a matter of public policy, be precluded by the section 55 offence.

69. In response to these submissions Mr Buley on behalf of the defendant submitted in response to the claimant's first point that in relation to the notices containing the prohibition upon entering onto the railway lines all that was required was the necessity of making clear that there was no lawful authority for persons to enter upon operational railway land and in particular to walk upon the railway lines. It was not necessary for the notice either to cite the word "trespass", or to identify that going on to the railway land would give rise to a criminal liability. He contended that the use of the word "passengers" was a perfectly sensible use of language bearing in mind the context that the notice appeared in a station. It was, he submitted, quite unrealistic to suggest that such a notice could not apply to any person who happened to be on the station who was not catching a train. In particular, he drew attention to the fact that section 55(3) is simply a defence to the crime created under section 55(1). In particular that defence does not require the offender to have seen the notice or even to have had access to the notice. All that is required is for notices to be exhibited at the station and that was what had occurred in the present case.

70. Turning to the submissions made by the claimant in relation to Bakewell Management, Mr Buley submitted that the factual circumstances of the present case were very different from that which pertained in that case. As Lord Walker had emphasised in paragraph 60 of his speech, the doctrine of illegality "must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest". In the present case Network Rail were serving the public interest by excluding trespassers from their land in the interests both of public safety and also the efficient operation of the railway. Thus, the present case engaged a wider and more important public interest, and the illegality doctrine was undoubtedly engaged. The public interest could not sensibly be measured in the present case simply by reference to the extent of the sentence which might be imposed for the crime concerned. Turning to the exercise of the principles set out in Best, Mr Buley accepted that the policy of section 31(1) was broadly similar to those legal principles associated with rights of prescription or adverse possession and that, as in Best, those principles are underpinned by a public interest which has to be afforded some weight in the overall balance. However, he submitted that on the other side of the balance was to be set the critically important public interest in the safe operation of the railway and the safety of the public, as well as the efficient operation of the railway as a piece of public transport infrastructure. He contended that the public interest in the safe and efficient operation of the railway will clearly outweigh any interest in the public policy lying behind section 31(1).

71. Mr Buley emphasised, further, that which had been observed by Lord Scott in paragraph 24 in his speech about the limitations upon what “lawful authority” could be granted by the owner of the common. In paragraph 24 Lord Scott observed as follows:

“24 The words in subsection (4) "without lawful authority" deserve careful attention. They have been taken, in cases like the present and like *Hanning v Top Deck Travel Group Ltd 68 P & CR 14* , to refer to an authority given by the owner of the common. They might also, if proviso (a) is applicable, refer to an authority given by some public official or public body pursuant to the Act, scheme, byelaw or regulation in question. But the ability of the owner of the common in question to give someone a "lawful authority" to do one or other of the things prohibited by subsection (4), or, indeed, to do one or other of those things himself, is subject, in my opinion, to an important qualification. The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners: see section 30 of the Commons Act 1876 (39 & 40 Vict c 56). To do so would be a nuisance: see Clerk & Lindsell on Torts, 18th ed (2000) para 31-27. Nor could the owner of a common lawfully authorise things to be done by others on the common that, if done, would constitute a nuisance. The reference to "lawful authority" in subsection (4) does not, therefore, mean that the owner of a common can authorise to be done whatever he pleases. Authority given to too many people to camp on the common and light too many fires could damage the sufficiency of grass on the common for the commoners' grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend on the facts. But, subject to that qualification, subsection (4) allows the owner of a common to which section 193 applies to authorise the doing of an act that if done without that authority would be an offence under the subsection.”

Mr Buley submitted that this passage in the Bakewell Management case recognised that there was a limitation on the dispensing power of the land owner, namely that the land owner could not grant authority to a person to do whatever they pleased, and in particular could not grant authority to undertake acts which would harm the interests of the commoners. Thus, in the present case he submitted there were necessary limitations on the dispensing power of the second interested party founded upon the need for the second interested party to comply with its statutory duties in terms of operating the railway safely and efficiently. Mr Lopez supported Mr Buley's submissions on behalf of NR.

72. Having considered Mr Wilcox's submissions in relation to the form of the notice which was exhibited at the relevant stations from 1949 I am unable to accept his contention that, in substance, the notices were of no effect such that any person using the level crossing could have relied upon the defence under section 55(3) of the 1949 Act. In my view they provide a public warning to persons not to go onto the land occupied by the operational railway, and in particular the railway lines. I do not consider that it was necessary for the notice to specifically use the words “trespass”, in circumstances where the obvious substance of the notice was to make clear that being present on the railway lines was prohibited (or not authorised) which is clearly the meaning of trespass as it is applied in section 55. The notice made clear that passing onto the railway lines was prohibited. Had it used the word “trespass” it would not have in any way changed the substance of the contents of the notice. As such it satisfied the requirements of section 55(3).

73. The notice is not required by section 55(3) to specify that going onto the railway lines when prohibited from doing so would amount to a criminal offence. I therefore do not accept that the failure of the notices in the present case to do so rendered them incompetent to preclude the defence under section 55(3). Thus I am satisfied that the Inspector was correct as a matter of law to conclude that the notices were adequate, and therefore on the factual findings which he made he was entitled to conclude that the use of the level crossing during the relevant period gave rise to a criminal offence.

74. Moving to consideration of the issues raised under the Bakewell Management and Best cases I accept the submission of Mr Buley that there is not, in substance, equivalence between the offence created by section 193(4) of the 1925 Act and that created by section 55(1) of the 1949 Act. When consideration is given to Mr Wilcox's suggestion that there is under section 55(1) a dispensing power whereby NR might grant an exemption by permitted pedestrian use of the level crossing, it has to be recognised immediately that such could only occur to the extent that it was consistent with the statutory duties of NR to preserve the safety and safeguard the efficiency of the operation of the railway. As is clear from NR's case and the findings of the Inspector in the present case, permitting public use of the level crossing as a right of way would both give rise to increased risk to public safety and also be inconsistent with the efficient operation of the railway. Thus any suggested power to grant exemption from the offence under section 55(1) immediately runs across the same issues which are raised in relation to statutory incompatibility. Unlike Lord Walker's conclusions in paragraph 56 as to the dispensing power under section 193(4) of the 1925 Act, in the present case the public interest would be directly engaged in any exercise of any apparent dispensing power on behalf of NR. Thus Mr Wilcox's submission as to dispensing powers is not an answer to the issue in the present case.

75. It is necessary to undertake the exercise contemplated by Lord Wilson in paragraph 42 of Hounga and Sales LJ in paragraph 52 of Best. Firstly, it is necessary to ask what is the aspect of public policy which underpins section 31 of the 1980 Act. In that respect I accept that, akin to cases of adverse possession or prescription, section 31 is designed to provide clarity in respect of the rules relating to recognition of public rights of way where they have been the subject of long usage, and also to provide certainty and clarity for land owners and the public in respect of any public rights existing over land. As in the cases of Bakewell Management and Best the public interest in those factors is clear and obvious. Set against that must be such public interest as underlies the creation of the offence under section 55 of the 1949 Act. I have no doubt that the creation of an offence of preventing trespass on the railways had the objective of promoting and securing the safe and efficient operation of the railways. There is a clear public interest in excluding trespassers from the railway lines who may not only come to harm not only themselves, but also may give rise to health and safety risks for those working on the railway. Furthermore, the presence of trespassers on the railway line gives rise to obvious risks to the efficient operation of the railway and the provision of timely rail services.

76. Balancing those respective public interests I am in no doubt that the weightier public interests at stake in this case are those which are represented by section 55 of the 1949 Act and the safe and efficient operation of the railway. In my view the public safety objective of preventing people from trespassing on the railway by means of a criminal sanction is of particular weight in striking the balance. It follows that I am satisfied that it was appropriate for the Inspector to conclude that the principle of illegality did apply to the consideration of whether or not the Order should be made in this case, and his conclusion that the use of the level crossing had amounted to an offence under section 55(1) of the 1949 Act justified a finding that the Order should not be made.

Reason 3: The cul-de-sac

77. It will be apparent from paragraph 38 of the Inspector's decision set out above that he declined to make the Order on the basis of the objection of the NR. On behalf of the claimant it is submitted that even were the Inspector correct about that, and the inappropriateness of confirming the order in so far as it affected the level crossing, there was no reason why he could not have confirmed the order as, in effect, two cul-de-sacs, each running up to the railway lines and then terminating at the point where the level crossing commenced.

78. Issues of this kind were considered by Farwell J in the case of Attorney General v Antrobus [1905] 2 Ch 188. That case concerned an action brought against the land owner of Stonehenge. The land owner erected fences precluding the public from visiting the monument and an action was brought seeking the removal of the fences which had been erected. Part of the plaintiff's case was that there were public rights

of way running up to and through Stonehenge which had been blocked by the land owner's fencing. Having heard evidence Farwell J found as a fact that there had for many years past been a large amount of traffic to Stonehenge as "the end and object of the journey". He concluded on the facts that there had in truth been no through traffic by any of these visitors but that the object of their journey had been to visit and enjoy the monument. He further concluded that on this basis permission must have been granted by the land owner for that activity and therefore no public right had in fact been created.

79. Part of the reasons for him concluding that the case should be dismissed related to the fact that the tracks relied upon as public rights of way simply led to the monument but did not pass through it. His conclusions were expressed in the following terms:

"Further, the tracks which lead into the circle cease there and do not cross, and the public have no jus spatiandi or manendi within the circle. The claim, therefore, is to use tracks which in fact lead nowhere. Now, the cases establish that a public road is primâ facie a road that leads from one public place to another public place (see per Lord Cranworth in Campbell v. Lang and Young v. Cuthbertson), or as Holmes L.J. suggests in the Giants' Causeway case, there cannot primâ facie be a right for the public to go to a place where the public have no right to be. But the want of a terminus ad quem is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient… In Bourke v. Davis Kay J. says: "But it is argued that a cul-de-sac may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. …. But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended." Eady J.'s decision in Attorney-General v. Richmond Corporation accords with this. I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road; but the mere transit of passengers to see a view or a house at the end will create no right, as Lord Cranworth says. But the landowner may by express words, or by conduct inducing the expenditure of money on the track in question, be shewn to have dedicated even a cul-de-sac to the public. There are doubtless drives in many seaside places and elsewhere which may have become public ways by this means. This explains the Giants' Causeway Case, for in that case the road in question had been "presented" by the Grand Jury in 1814, and had been repaired by the public authority."

80. In the Oxfordshire County Council case Lightman J observed at paragraph 101 as follows:

"a cul-de-sac may be a public highway if there is some kind of attraction at the far end which might cause the public to wish to use the way."

81. On the basis of these authorities Mr Laurence submits that at common law it was possible for a viewpoint, or point of particular resort as an attraction, to justify a cul-de-sac to being dedicated as a public right of way. At common law the land owner could evidence an intention to dedicate if the requirements under section 31 were satisfied. Furthermore, he submits that the railway line could properly be regarded as a point of resort or viewpoint which could properly lead to the dedication of the two cul-de-sacs running up to each side of the level crossing. As such the Inspector erred in law in failing to modify the order to reflect this submission and make the Order in those terms.

82. Mr Buley submits that the Inspector was perfectly entitled to reach the conclusion which he did in paragraphs 38-40 of the decision, namely that bearing in mind the missing link between the cul-de-sacs would involve a criminal trespass, and there was no "legitimate place of public resort" at the end of either cul-de-sac, the remainder of the route could not be established as a public highway at common law. Thus

the Inspector was entitled to conclude that the Order should not be confirmed. He submitted that it was simply unrealistic to suggest that the railway line in and of itself amounted to a popular place of resort or local viewing attraction so as to amount to evidence of dedication.

83. I am satisfied that the conclusions which the Inspector reached in relation to the question of whether or not it would be lawful to confirm the Order in the form of two disconnected cul-de-sacs was entirely correct. As Farwell J in the Antrobus case observed, there cannot be any prima facie right for the public to pass from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network or over which there is no other public right of use). Furthermore, as Farwell J emphasised, the question is one of evidence in each case. In the absence of any express dedication or public expenditure on the way claimed, mere use by the public without more of a cul-de-sac in the absence of some particular point of attraction could not amount to evidence justifying a finding that dedication had occurred. In the present case there was simply no evidence to suggest that people were using the two cul-de-sacs to gain access to the railway as a point of popular resort. Rather, all of the evidence suggested that the parts of the claimed right of way which formed the two cul-de-sacs were in fact being used as parts of a single journey traversing the whole length of the path identified in the order. There was not therefore in the present case the evidence necessary to demonstrate the dedication of two cul-de-sacs omitting the “missing link” indentified by the Inspector. I am therefore satisfied there is no substance in the claimant's contentions in this respect and that the Inspector's conclusions on this part of the case were legally robust.

Conclusions

84. For all of the reasons which have been set out above, I am satisfied that the decision which was reached by the Inspector in relation to this Order was lawful and that there was no error of law in the decision which he reached in any of the respects which have been presented by the claimant. It follows that this claim must be dismissed.

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