Appendix 13

Fortune v.Wiltshire Council [2012] EWCA Civ 334

Court of Appeal

*Fortune and others *v* Wiltshire Council and another

[2012] EWCA Civ 334

2012 March 5, 6, 7, 8; 20 Arden, Longmore, Lewison LJJ

Highway — Right of way — Mechanically propelled vehicles — Highway authority required to maintain list of highways maintainable at public expense — Statute extinguishing public rights of way for mechanically propelled vehicles not shown as such on definitive map and statement subject to exceptions — Extinguishment not to apply where right of way shown in highway authority's list of highways maintainable at public expense — Local authority maintaining inaccurate list of such highways on electronic database only — Whether "in writing" and "deposited" at authority's offices — Whether amounting to list for purposes of exception — Disputed highway shown on database — Whether public's right to use highway with mechanically propelled vehicles extinguished — Interpretation Act 1978 (c 30), s 5, Sch 1 — Highways Act 1980 (c 66) (as amended by Local Government Act 1985 (c 51), s 8, Sch 4, para 7 and Local Government (Wales) Act 1994 (c 19), s 22(1), Sch 7, para 4), ss 36(6)(7), 320 — Natural Environment and Rural Communities Act 2006 (c 16), s 67(1)(2)(b)

Against the objection of local residents, planning permission was granted for the building of a large number of houses on land adjoining a lane which was highway. The relevant sections of the lane were not shown in the definitive map and statement of "roads used as public paths", which Part IV of the National Parks and Access to the Countryside Act 1949 required county councils to maintain, but they were shown as a road maintainable by the local authority in a record on the authority's electronic database. The claimants, who owned properties fronting the lane, brought proceedings against the local authority and one of the developers, alleging that the lane was not a public vehicular highway and that the public were restricted to using it on foot and on horseback and were not entitled to use it with mechanically propelled vehicles on the basis that, even if the lane had been a public vehicular highway before 2006, the public's right to use it with mechanically propelled vehicles had been extinguished by section 67 of the Natural Environment and Rural Communities Act 2006[1]. Section 67(1) provided for the extinguishment of existing public rights of way for mechanically propelled vehicles over ways which were either not shown in the definitive map and statement, or which were shown there only as footpaths, bridleways or restricted byways but, by subsection (2)(b), subsection (1) did not apply to an existing public right of way if immediately before commencement of the Act it was not shown in the definitive map and statement but was shown in a list of highways maintainable at public expense required to be kept under section 36(6) of the Highways Act 1980[2]. A list made in accordance with section 36(6) was required by section 36(7) to be "kept deposited" at the authority's offices. The judge held that (i) the list of streets kept by the local authority in electronic form satisfied the requirement in section 320 of the 1980 Act that documents required to be kept under that Act be "in writing", construed accordingly with Schedule 1 to the Interpretation Act 1978[3], and (ii) the public's right to use the relevant sections of the lane with mechanically propelled vehicles had not been extinguished by section 67(1) of the

[1] Natural Environment and Rural Communities Act 2006, s 67: see post, paras 136, 137.
[2] Highways Act 1980, s 36(6)(7), as amended: see post, paras 139, 140.
S 320: see post, para 164.
[3] Interpretation Act 1978, s 5: "In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 . . . are to be construed according to that Schedule."
Sch 1: see post, para 165.

A 2006 Act because the records in the electronic database of streets maintained by the authority constituted a list of highways maintainable at public expense for the purposes of section 36(6) of the 1980 Act and so the specific exception provided by section 67(2)(b) applied.

On the first claimant's appeal—

Held, (1) that, having regard to the definition of "writing" in Schedule 1 to the Interpretation Act 1978, records in an electronic database were "in writing" for
B the purposes of section 320 of the Highways Act 1980; that, therefore, the list of streets which were highways maintainable at public expense kept on the local authority's database was a list which section 36(6) of the 1980 Act required it to make, notwithstanding that it was not kept in physical form; and that, construing the word "deposited" in section 36(7) accordingly, the list was "kept deposited" at the authority's offices as required by section 36(7) (post, paras 163, 164, 165–167).

(2) Dismissing the appeal, that the judge had been justified in concluding that,
C prior to the coming into force of the Natural Environment and Rural Communities Act 2006, the lane had been a vehicular highway, dedicated at common law, across its full width; that section 67(2)(b) of the 2006 Act required merely that a list made and kept under section 36(6) of the Highways Act 1980 should exist and that the right of way was shown in it, not that the list be fully compliant with section 36(6); that, since the purpose of section 67(2)(b) of the 2006 Act was not to protect vehicular rights of way from being extinguished only where there was an accurate list under section 36(6) of the 1980 Act but to give effect under section 67(1) to the
D concern about mechanically propelled vehicles misusing green lanes, the fact that the list might be defective, need correcting, omit necessary information or contain an erroneous entry did not prevent it retaining its character as a list of streets made and kept under section 36(6) for the purposes of section 67(2)(b) of the 2006 Act; and that, accordingly, since the lane was shown in the list kept on the authority's electronic database, section 67(1) of the 2006 Act did not apply and the public vehicular rights of passage over the relevant sections of the lane had not been
E extinguished thereby (post, paras 123, 127, 128–129, 159–160, 161, 162, 163, 168, 169).

R (Warden and Fellows of Winchester College) v Hampshire County Council [2009] 1 WLR 138, CA distinguished.

Decision of Judge McCahill QC sitting as a judge of the Chancery Division affirmed.

F The following cases are referred to in the judgment of the court:

Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA

Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 WLR 1325; [2007] Bus LR 129; [2007] 4 All ER 765 HL(E)

Fairey v Southampton County Council [1956] 2 QB 439; [1956] 3 WLR 354; [1956] 2 All ER 843, CA

G *Folkestone Corpn v Brockman* [1914] AC 338, HL(E)

Leigh v Jack (1879) 5 Ex D 264, CA

Maltbridge Island Management Co Ltd v Secretary of State [1998] EGCS 134

Mann v Brodie (1885) 10 App Cas 378, HL(Sc)

Micklethwait v Newlay Bridge Co (1886) 33 Ch D 133, CA

Moser v Ambleside Urban District Council (1925) 23 LGR 533, CA

Oxfordshire County Council v Oxford City Council [2004] EWHC 12 (Ch); [2004]
H Ch 253; [2004] 2 WLR 1291

R v Exall (1866) 4 F & F 922

R v Secretary of State for the Environment, Ex p Hood [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243; 73 LGR 426, CA

R (Maroudas) v Secretary of State for the Environment, Food and Rural Affairs [2010] EWCA 280; [2010] NPC 37, CA

R (Smith) v Land Registry (Peterborough) [2010] EWCA Civ 200; [2011] QB 413; [2010] 3 WLR 1223; [2010] 3 All ER 113, CA
R (Warden and Fellows of Winchester College) v Hampshire County Council [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA
Robinson Webster (Holdings) Ltd v Agombar [2002] 1 P & CR 243
Suffolk County Council v Mason [1979] AC 705; [1979] 2 WLR 571; [1979] 2 All ER 369, HL(E)
Todd v Adams and Chope (trading as Trelawney Fishing Co) [2002] EWCA Civ 509; [2002] 2 All ER (Comm) 97; [2002] 2 Lloyd's Rep 293, CA

The following additional cases were cited in argument:

Commission for New Towns v JJ Gallagher Ltd [2002] EWHC 2668 (Ch); [2003] 2 P & CR 24
Hale v Norfolk County Council [2001] Ch 717; [2001] 2 WLR 1481; [2001] RTR 397, CA
Hollins v Oldham (unreported) October 1995, Judge Howarth
Jennings v Stephens [1936] Ch 469, CA
Marriott v Secretary of State for the Environment, Transport and the Regions [2001] JPL 559
R v Inhabitants of the County of Southampton (1887) 19 QBD 590, DC
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 Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490; 89 LGR 398, CA
R (Ridley) v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 171 (Admin)

No additional cases were referred to in the skeleton arguments.

APPEAL from Judge McCahill QC sitting as a judge of the Chancery Division in the Bristol District Registry

By a claim form the claimants, Vera Mary Ann Fortune, Rosemary Phoebe Ayres and John Stewart Heselden, the owners of property fronting onto Rowden Lane, Chippenham, Wiltshire, brought proceedings against the defendants, Wiltshire Council and Taylor Wimpey UK Ltd, whereby they disputed the nature and extent of the public's right of way over Rowden Lane, following the grant of planning permission for a residential development comprising 138 houses adjacent to the lane, which was to be implemented by, inter alios, the second defendant. The second defendant played no active role in the action and agreed to be bound by the judgment. On 12 October 2010 Judge McCahill QC dismissed the claim.

By an appellant's notice dated 24 February 2011 and pursuant to permission granted by the Court of Appeal (Lloyd LJ), the first claimant appealed on the grounds, inter alia, that (1) the judge's reasoning and conclusions in his treatment of the evidence generally were flawed in numerous respects; (2) the judge had wrongly rejected the claimants' case that public rights of way for mechanically propelled vehicles over Rowden Lane could be extinguished because they were not immediately before the commencement of the Natural Environment and Rural Communities Act 2006 shown on the relevant definitive map and statement or were only shown as a footpath, bridleway or restricted bridleway; and (3) the judge

A had erred in law in failing to hold that Rowden Lane was not shown on a qualifying list on 1 May 2006.

The facts are stated in the judgment of the court.

George Laurence QC and *Nicholas Caddick QC* (instructed by *Nicholsons Solicitors LLP, Lowestoft*) for the first claimant.

Timothy Mould QC and *Jeremy Burns* (instructed by *Head of Legal*
B *Services, Wiltshire Council, Trowbridge*) for the local authority.

The second defendant did not appear and was not represented.

The court took time for consideration.

20 March 2012. **LEWISON LJ** handed down the following judgment of
C the court.

Introduction

1 This is the judgment of the court.

2 In 2002, against the objection of local residents, planning permission was granted for the erection of 138 houses on land adjoining Rowden Lane in Chippenham. However it will be difficult, if not impossible, to implement
D the permission unless that part of Rowden Lane with which we are concerned is a public vehicular highway. The first claimant, Mrs Fortune, one of the residents, says that although it is a public highway, the public are restricted to use on foot and on horseback, and are not entitled to use it with vehicles (or at least not with mechanically propelled vehicles). Wiltshire Council says that it is a public vehicular highway. The first claimant says
E that even if it was a public vehicular highway before 2006, the public's right to use it with mechanically propelled vehicles has been extinguished by statute. The council says that the right remains in being.

3 The second defendant, Taylor Wimpey, one of the developers, was joined as a party to the action but has played no active role, having agreed to be bound by the decision. The dispute was tried in Bristol by Judge McCahill QC over some 12 days. In a reserved judgment of remarkable
F length and detail he decided all the issues in favour of the council. The full judgment is available on BAILII. With the permission of Lloyd LJ the first claimant appeals.

4 Mr George Laurence QC and Mr Nicholas Caddick QC presented the first claimant's case. Mr Timothy Mould QC and Mr Jeremy Burns presented that of the council.

G **5** Although Mr Laurence made serious criticisms both of the judge's findings of fact and of his legal conclusions, he acknowledged the conspicuous care with which the judge had dealt with the many points, both factual and legal, that were argued before him. We associate ourselves with that generous tribute; although as will be seen we did not find it necessary to deal with all the issues that the judge had to decide.

6 The judge began by considering whether a public vehicular highway
H had arisen by 20 years' use in the period between 1982 and 2002. He found that it had. He next considered whether Rowden Lane had in any event been a public vehicular highway since before 1835 (when the first of the modern Highways Acts came into force). He considered a variety of documentary evidence and concluded that it had been. His next task was to consider the

width of the highway. He held that the "hedge to hedge" presumption applied. Having reached those conclusions he then considered whether the public's right to use the highway with mechanically propelled vehicles had been extinguished by section 67 of the Natural Environment and Rural Communities Act 2006 ("NERCA"), or whether it had been preserved by one of the specific exceptions in the Act. He decided that one of the specific exceptions applied (leaving over the question whether another specific exception might also apply). We heard the issues in a different order. We began by inviting the parties to argue the case for and against dedication at common law. If the appeal failed to dislodge the judge's conclusion on that issue, then the questions of modern use and the width of the highway would not arise. At the conclusion of the argument we indicated that we had not been persuaded that the judge's conclusion was wrong. The only remaining issue was the point arising under NERCA, and we heard argument on that.

Topography

7 Mr Laurence produced a helpful annotated plan based on the current Ordnance Survey map which helps to understand the topography, and which is annexed to this judgment. The section of Rowden Lane in dispute runs south eastwards from its junction with the A4, Bath Road at Rowden Hill to a cattle grid. From its junction with the A4, for the first 70 metres, Rowden Lane appears initially as a suburban street, with pavement, kerbs and street lights. The judge referred to this westernmost section of Rowden Lane as "section A". This section of Rowden Lane stops just beyond the car park of a pub called the Rowden Arms. From about 70 metres east of the A4 until it reaches a cattle grid, Rowden Lane has a more rural character. This section of Rowden Lane consists of a metalled road, with grass verges bounded on both sides either by hedges or stone walls, beyond which lie those properties that front or back onto the lane. The judge referred to this section of Rowden Lane as "section B". It runs for about 400 metres. It is from this section of Rowden Lane that there is access to the land over which planning permission has been granted. Continuing in a south-easterly direction across the cattle grid the continuation of Rowden Lane leads towards what is now Rowden Farm. Shortly before it reaches Rowden Farm it is joined by another way coming in from the north. The junction was referred to as "point K" and is so marked on the plan. If the traveller were to turn north up that other way he or she would (nowadays) walk along a former footpath northwards in the direction of the Bath Road, which would in due course become the modern Gipsy Lane (sometimes called Gypsy Lane). Gipsy Lane debouches onto the Bath Road. Thus it would be theoretically possible to travel in a loop from the junction of Rowden Lane and the Bath Road, down to the junction of the two ways at point K, and back up again to rejoin the Bath Road at its junction with Gipsy Lane.

8 The section of the Bath road that leads from its junction with Rowden Lane to its junction with Gipsy Lane rises at a fairly steep gradient. There are also gradients if the traveller were to follow Rowden Lane down from the junction with the Bath Road and then back up Gipsy Lane. Although Mr Caddick made submissions about these gradients they were not explored in detail at trial. The judge had a site view; and the gradients did not seem to him to be an impediment to the council's case.

A 9 If, instead of turning north along the footpath, the traveller were to continue along Rowden Lane he would shortly arrive at Rowden. The current Ordnance Survey map shows a collection of houses, together with Rowden Manor and the site of Rowden. Earlier versions of the Ordnance Survey map also show the remains of intrenchments, a moat, and a fort.

10 The judge recorded that it was common ground that Rowden Lane
B was a public highway. The dispute between the parties was over the nature of the rights which the public could exercise over the lane, and the width of the highway over which those rights could be exercised. Until shortly before trial in November 2008, the first claimant and her fellow claimants admitted that section A was a public vehicular highway. With the judge's permission, they then changed their case to withdraw their admission in respect of section A and instead to contend that the disputed section of Rowden Lane
C (i e both sections A and B) is no more than a bridleway. Thus the first claimant accepts that the disputed section of Rowden Lane is subject to public rights of way, but asserts that those public rights of way are limited to passage on foot and on horseback. She also accepts and asserts that, at least historically, it would have been possible for public rights of passage on foot and on horseback to have been acquired over a thoroughfare (or usable
D through route) starting at the junction between Rowden Lane and the Bath Road, and ending back on the Bath Road via the junction at point K and Gipsy Lane. The concession relating to sections A and B of Rowden Lane is made because of the inclusion of section C of Rowden Lane on the definitive map where it is shown as a road used as a public path and the deeming provisions of the Highways Act 1980 and its predecessors.

E *Legal principles*

11 Lord Diplock introduced the subject in *Suffolk County Council v Mason* [1979] AC 705, 709–710:

> "The law of highways forms one of the most ancient parts of the common law. At common law highways are of three kinds according to
F the degree of restriction of the public rights of passage over them. A full highway or 'cartway' is one over which the public have rights of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles and cattle. A 'bridleway' is a highway over which the rights of passage are cut down by the exclusion of the right of passage with vehicles and sometimes, though not invariably, the exclusion of the right of driftway, i e, driving cattle, while a footpath is one over which the
G only public right of passage is on foot. At common law too a public right of way of any of the three kinds has the characteristic that once it has come into existence it can be neither extinguished nor diminished by disuse, however long the period that has elapsed since it was last used by any member of the public—a rule of law that is the origin of the brocard 'once a highway, always a highway.' "

H 12 The public may acquire a right of way either by dedication and acceptance, or by the operation of some statutory provision. Dedication may be express, or may be inferred from use of the way by the public. In the case of ancient highways dedication by inference from public use is the most common method of establishing the existence of a highway. The classic

description of dedication by inference is that of Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378, 386: A

> "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was." B

13 Use by the inhabitants of a locality counts as public use for this purpose: *Fairey v Southampton County Council* [1956] 2 QB 439, 457; *Oxfordshire County Council v Oxford City Council* [2004] Ch 253, para 100.

14 The presumption of dedication from use by the public is "a probable C inference from facts proved to the fact in issue, and it follows that in a particular case it is for the judges of fact to determine whether, on the evidence adduced, it can reasonably be drawn": *Folkestone Corpn v Brockman* [1914] AC 338, 354. One obvious area for evidence is the nature of the way over which the public right of way is claimed. If the way leads from one recognised highway to another, or from one inhabited settlement to another, the inference may be relatively easy to draw. If, on the other D hand the way leads nowhere, the inference may be more difficult to draw. But there is no rule of law that precludes a factual conclusion that a public highway has been established over a route that ends in a cul de sac. In *Moser v Ambleside Urban District Council* (1925) 23 LGR 533, 540 Atkin LJ said:

> "I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you E wish to see you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise."

15 We doubt whether this is limited to a place of "popular resort" in the recreational sense. A way leading to a seaport or to a settlement at the end of a peninsula might equally be a highway. F

16 Mr Laurence submitted on the authority of *Folkestone Corpn v Brockman* that long use by the public, even if it is use of the quality usually described as use "as of right", does not necessarily result in the conclusion that there has been a common law dedication of a highway; or even that it raises a presumption of such a dedication. It is evidence from which an intention to dedicate may be inferred: no more than that. He commended a G passage from the speech of Lord Dunedin, at p 375:

> "User is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or H presumed from extraneous facts. But that still leaves as matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering

A the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication."

17 Lord Dunedin illustrated his point with two examples, at pp 375–376:

B "If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user, and in such cases it is safe to say, whether strictly accurate or not, that the user raises a legal presumption of dedication. That really means no more than this, that the evidence points all one way. Hundreds of highways are in this position. But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. C But from that house there leads another avenue to the north which connects with a public road different from that from which the south avenue started. This is not a fancy case. The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up the one avenue and down the other—perhaps without actually calling at the house—raise a presumption that the landholder had dedicated his private avenues as highways? The user D would be naturally ascribed to good nature and toleration."

18 These passages concern the question whether an inference of an intention to dedicate should be inferred as a result of long public use. If there was no relevant public use then the question of an intention to dedicate for that use does not arise. It is only if there was long public use of the relevant kind (in this case with vehicles) that the question of an intention to dedicate E is live. It is not entirely easy to see why Mr Laurence placed such heavy reliance on the quoted passages, because it is conceded that the disputed sections of Rowden Lane were part of a highway (albeit limited to use on foot and on horseback). This concession necessarily entails an intention to dedicate. What Mr Laurence has to submit is that although there was an intention to dedicate, and although use by the public included use with F vehicles, the intention was limited to use on foot and on horseback. *Folkestone Corpn v Brockman* [1914] AC 338 says nothing about that situation.

19 However, although he conceded that Rowden Lane was a highway, Mr Laurence made it clear that he was not conceding that anyone ever had any actual intention to dedicate Rowden Lane as a highway. Its status as a highway came about because of the conclusive effect of the definitive map G and the deeming provisions of the 1980 Act (and its predecessors). Under section 31 of the 1980 Act dedication may be presumed from 20 years' use. The relevant parts of that section 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 H 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." A

20 Since section 31(1) refers to a deemed dedication that must, in our judgment, entail (at least) a deemed intention to dedicate; and we consider that this is reinforced by the ability of the owner to prove a lack of intention to dedicate. Thus intention to dedicate is part of the concept of the deemed dedication. Accordingly even though Mr Laurence's concession was partly B based on the deeming provisions, in our judgment that necessarily entails an intention to dedicate. Mr Laurence did, however, accept that (a) if the highway was created by dedication and acceptance at common law and (b) if the use of the way by the public included use with vehicles as well as on foot and on horseback, then it would be unsustainable to conclude that the inferred intention to dedicate was limited to passage on foot and horseback only, to the exclusion of vehicles. C

21 There are two other points to be made about *Folkestone Corpn v Brockman*. First, the origin of the way in question was known in that case. It was laid out by the Earl of Radnor in 1827 in connection with the residential development of land of which he was life tenant. Second, the way in question ran entirely over land in the same ownership: viz that of Lord Radnor (or the trustees of the settlement of which he was life tenant). Lord D Dunedin's observations about two carriageways through a private park must be read in that context. It may be easier to infer an intention to dedicate where a way runs through land owned by several owners all of whom (at least) use it.

22 In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from E circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922, 929:

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, F for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

23 In addition section 32 of the 1980 Act provides:

> "A court or other tribunal, before determining whether a way has G 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 H which it was made or compiled, and the custody in which it has been kept and from which it is produced."

24 At common law the inhabitants of a parish were bound to repair the highways within their area unless it could be shown that responsibility had

A attached to an individual or a corporate body by reason of tenure, inclosure or prescription. The Highway Act 1835 modified the position by providing that no road or occupation way made after 1835 was to be repairable by the inhabitants at large unless it was expressly adopted by the highway authority under the formal procedure laid down in the Act. All footpaths, whether created before or after 1835, remained the responsibility of the inhabitants B at large until December 1949, when the National Parks and Access to the Countryside Act 1949 ("NPACA") applied certain provisions of the Highway Act 1835 to public paths. After 1835 it was possible for roads to be created which did not become the liability of any person or persons to repair. Apart from such roads as these, repair of highways by inhabitants at large remained the underlying principle of the law until the enactment of the Highways Act 1959 which provided that no duty with respect to the C maintenance of highways was to lie on the inhabitants at large of any area.

25 Since the Highways Act 1959, as regards liability to repair, highways fall into three main classes: (1) highways repairable at the public expense; (2) highways repairable by private individuals or corporate bodies; and (3) highways which no one is liable to repair. See *Halsbury's Laws of England,* 4th ed (2004 reissue), vol 21, para 247.

D **26** In view of the first claimant's reliance on the way that Rowden Lane was dealt with in conveyancing documents, it is also necessary to say something about the ownership of highways. Arden LJ traversed this ground in *R (Smith) v Land Registry (Peterborough)* [2011] QB 413.

27 Before the Highway Act 1835 the property in a highway belonged to the frontagers, even though it was repairable by the inhabitants at large. Section 41 of the Highway Act 1835 provided that the "scrapings" of a E highway should vest in the parish surveyor of highways or, where a district surveyor had been appointed, in the district surveyor. By section 149 of the Public Health Act 1875 streets in urban districts which were repairable by the inhabitants at large, were vested in the urban authority for that district. Chippenham was an urban district. Urban district authorities also took on the previous repairing duties of the highway surveyors. Similar provisions F relating to rural districts were made by the Local Government Act 1894. The Local Government Act 1929 made county councils highway authorities for main roads within their areas, and vested the "materials thereof and drains thereto belonging" in them. It was not until the Highways Act 1959 that there was a clear statutory provision that vested highways themselves (as opposed to the scrapings and materials of highways) in the relevant highway authority. That is carried forward into G the current legislation: 1980 Act, section 263(1). The point is that before 1836 it would not be surprising for conveyances to deal with the soil of a highway; and even after 1835 it was only the scrapings or materials of the highway that vested in the surveyor. The modern position under which the "top two spits" of a highway is vested in the highway authority did not come about until much later.

H

Approach to appeals on fact

28 The judge's conclusions which are challenged are essentially questions of fact. His ultimate conclusion came after examining a number of different strands of evidence: what is sometimes called a multi-factorial

evaluation. In *Todd v Adams and Chope (trading as Trelawney Fishing Co)* [2002] 2 All ER (Comm) 97, para 129 Mance LJ said:

> "Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence."

29 In *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 this court approved that approach; and it was again approved by the House of Lords in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325.

30 That said, it is not the function of this court to retry the case. Our function is to decide whether the appeal should be allowed on the ground that the judge was wrong: CPR r 52.11(3)(a). It is for the first claimant to persuade us that he was wrong, either in his findings of fact or in his application of the law.

The case for the council at trial

31 The case for the council was based largely on the expert evidence of Mr Alan Harbour. He considered a variety of materials. They included local histories, old maps, local authority records and so on. He summarised his conclusions at the end of his first report in a section headed "Synopsis". He said:

> "In my opinion Rowden Lane is an ancient vehicular public highway, in existence before its first known map recording in 1669. The vehicles involved in such use could have included carts, wagons, sledges and more latterly carriages. The main purpose of the historical public use would appear to have included access to the open common lands surrounding Rowden Lane prior to the inclosure of these lands. In addition it is also quite probable that Rowden Lane was used as access to the place known as Rowden; and also as an alternative use to the Great (London) Road so as to avoid its poor condition and possibly later to avoid the paying of tolls on the section of the main road it bypasses."

32 There were thus three distinct types of public use on which Mr Harbour relied. The first two did not entail the use of Rowden Lane as part of a vehicular through route which joined the London (or Bath) Road at each end. The third type did. Although Mr Laurence said in the course of his reply in this court that he had not understood what the council's case was, in our judgment this synopsis made it perfectly clear.

A 33 The case for the first claimant was based largely on the expert evidence of Professor Williamson. His conclusion was that the disputed section of Rowden Lane was formally created in about 1669 as a private access road and that it continued to be regarded as such well into the 20th century. Although a public bridleway might have existed along it (or part of it), Rowden Lane was never a full public highway open to vehicles. It was very unlikely that Rowden Lane formed part of a through route enabling a B traveller with a vehicle to bypass the London Road. There would have been no advantage to be gained, and the through route would have required the navigation round a very difficult V shaped junction unsuitable for wheeled traffic where Rowden Lane met Gipsy Lane.

34 The judge began his consideration by discussing modern use of Rowden Lane. However, as mentioned we began by looking at the C historical material on which the judge also relied. The judge preferred the evidence of Mr Harbour to that of Professor Williamson, where they were in conflict. He gave reasons for this conclusion running to some 20 paragraphs of his judgment. Put bluntly, he considered that Professor Williamson was more of an advocate than an independent expert. Mr Laurence criticised the judge for having preferred the evidence of Mr Harbour to that of Professor Williamson. He pointed to a number of errors that he said Mr Harbour D had made. However, in his evaluation of the expert evidence the judge gave weight to these errors, which he acknowledged, but explained why nevertheless he preferred Mr Harbour's evidence. The evaluation of expert evidence subjected to lengthy cross-examination (of which we have only had extracts) is pre-eminently a matter for the trial judge. We decline to interfere with or discount the judge's evaluation of the expert evidence. E Having said that, where the judge's reasoning depended on documents that can be interpreted without the aid of expert evidence we have formed our own view.

Two questions

35 Before delving into this fascinating material, there are two F fundamental questions that in our judgment the first claimant's case does not adequately deal with. She accepts that Rowden Lane is a public highway. It follows therefore that at some time in the past it must have been dedicated as a highway (no doubt inferred by long public use). However, the first claimant says that the public rights of way are limited to use on foot or with animals. The first question is: if it is accepted that the public used the way as of right, where were they going to? The answer must be either that they were G using Rowden Lane as part of a network of highways (i e as a thoroughfare) or they were visiting some particular place simply as members of the public. Indeed the judge recorded that Professor Williamson accepted that there must have been a public attraction or attractions at the end of section B of Rowden Lane to attract the public along it (para 945), and the judge so found. The judge's finding was well supported by the evidence to which we were referred. H

36 Much of the skeleton argument for the first claimant is devoted to attempting to demonstrate that the public had no reason for using Rowden Lane. But that argument is inconsistent with the first claimant's acceptance that Rowden Lane was (and still is) indeed a highway. The concession and assertion that Rowden Lane was and still is a highway also seems to us to

deal with the point that Lord Dunedin made in *Folkestone Corpn v Brockman* [1914] AC 338. If there was public use "as of right" then it is effectively conceded that an intention to dedicate should be inferred. It would make no sense to conclude that while the landowner intended to dedicate the way as a highway for foot traffic and riders, use by carters was use by mere toleration. So the real question is: was there sufficient evidence upon which the judge could conclude that there was public use of the way with vehicles?

37 The second question is: given the width and nature of Rowden Lane from the earliest recorded times, how does it come about that there has been a dedication for use by pedestrians and riders but not for horses and carts? The latter question was posed by the judge (paras 673 and 942); but neither the grounds of appeal nor the skeleton argument really provide an answer.

The early maps and other material

38 The judge began his consideration of this material with a short history of Rowden. Rowden lies on what was formerly a down. Its old name was Rughdon, probably meaning rough down. It was already a place in occupation in 1190. The principal residence of the area was a mansion house or manor, now Rowden Farm, close to the River Avon. Rowden Manor was also the site of an ancient fort.

39 In 1434, it passed to the Hungerford family who, ten years before, had purchased Sheldon and the Manor and Hundred of Chippenham. In 1554, Queen Mary granted a charter to the borough of Chippenham. She also gave it certain lands which she had confiscated from Walter Lord Hungerford, who had called King Henry VIII an heretic. Lord Hungerford was executed at Tower Hill. His manors of Chippenham, Sheldon and Lowden, together with a very considerable number of other Wiltshire manors elsewhere, were forfeited and remained in the Crown until the next heir, then a minor, reached the age of 21.

40 Some 23 days before the heir of Lord Hungerford came of age, Queen Mary gave about 66 acres of Lord Hungerford's land to the borough. These lands included the Great Coppice. The judge said of the Great Coppice that it lay over an area of 17 acres and (para 610) that there was "a general right for the inhabitant householders of Chippenham to coppice wood from it. It was harvested every seven years for quantities of poles needed to make sheep hurdles (fencing)". This finding was based on the work of Mr Baines, a local historian, writing in 1980. It is not now disputed. It was accepted that the inhabitants of Chippenham were not exercising the right to take wood in their capacity as commoners; and that the inhabitants of Chippenham constituted the public for the purposes of the law of highways.

41 In addition to Mr Baines' work the judge also considered Mr Frederick Goldney's Records of Chippenham (1889). That work referred to a record from 1647 by which the coppice was allotted to the inhabitant householders of Chippenham "according to decree". Mr Goldney also recorded complaints in 1649 that the right to take wood from the coppice was being abused by "diverse unrulye and disorderlie people not onelie of this town and pishe but alsoe of other pishes adjoyneing hereunto". The judge drew two important inferences from this material.

A First that access to the Great Coppice was down Rowden Lane (para 611); and second that the removal of wood would have required a horse and cart (i e use by vehicles): para 613.

42 The judge was helped in his reconstruction of the landscape as it was in the 16th century by a plan prepared in 1905. This plan was the work of Mr John Perkins who explained in an accompanying memorandum that it had been prepared from borough records and "other authoritative B local maps and plans". He said that the plan had been "prepared at first hand from the original official records of the borough (which comprise very many deeds, documents, [maps], plans and minute—and other books) and from other local [maps] and plans already mentioned." This plan showed clearly a spur road leading off Rowden Lane to the Great Coppice. It also showed a cart track more or less in the position of Gipsy Lane joining C Rowden Lane at about point K. Mr Laurence said that this plan was obviously inaccurate and that the judge should have ignored it. We reject that submission. The maker of the plan said that it had been compiled from a variety of original sources; and there is no reason to doubt that assertion. It is true that the depiction of the spur road does not appear on some later plans. But that is a question of weighing all the evidence. It is not a question of ignoring some of it. D

43 By the 17th century Rowden Manor was a large property with a quadrangle inside and a moat around it. The Hungerfords were Parliamentarians and the Royalists seized and sacked it.

44 The earliest contemporaneous map that the judge considered was an inclosure map dating from 1669. He set out the rival contentions of Mr Harbour and Professor Williamson: paras 620–632. The 1669 map E depicted Rowden Lane as "Rowden Way". One of the points of disagreement between the experts was whether (as Professor Williamson contended) the 1669 inclosure agreement *created* Rowden Way in substitution for old tracks across the common, or whether (as Mr Harbour contended) it *recognised* a pre-existing way. The judge concluded that Rowden Way existed well before 1669, because it already had its own name, and it led to a named destination. Rowden was a place of interest, F and therefore the public had a reason to, and did, visit it: para 633. The judge also noted that Rowden Lane (and gates across the way) was wide enough to take horses and carts, and that Rowden Lane came off a main road (now the A4).

45 Mr Laurence said that the judge had ignored the evidence of this map in coming to his conclusions that the public had used Rowden Lane to G gain access to the Great Coppice. His point was that the solid lines on the map represented impassable boundary features and no gates were shown in the boundary adjoining the Great Coppice. He pointed to some evidence given by Professor Williamson in which he interpreted solid lines as boundary features. The judge did not refer to this evidence expressly. But he must have rejected it. It is not difficult to see why. If Professor Williamson's interpretation of the solid lines were correct, then no allottee of land (with H the possible exception of one) would have been able to access his land, since all the allotted parts were bounded by solid lines on the map. Second, as Mr Laurence accepted, the only alternative means of access to the Great Coppice would have been along the Lacock road. But in the first place that would have necessitated crossing a stream in order to access the coppice.

So there was a natural physical barrier to that means of access. Mr Laurence suggested that there might have been a bridge over the stream; but there was no evidence at all to support that. In the second place anyone coming from Chippenham to the Great Coppice would have reached the junction of Rowden Lane and the Bath Road well before the Lacock Road; and it would have been natural to have taken the first turning off the main road. In our judgment the judge was fully justified in concluding that Rowden Lane was used as a means of vehicular access to and egress from the Great Coppice, as well as to gain access to the place called Rowden.

46 This was a very important finding. What it meant was that the origin of the way was very old and, moreover, was unknown. To revert to the passage from Lord Dunedin's speech in *Folkestone Corpn v Brockman* [1914] AC 338, 375 that Mr Laurence commended:

> "If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user, and in such cases it is safe to say, whether strictly accurate or not, that the user raises a legal presumption of dedication. That really means no more than this, that the evidence points all one way."

47 The next map that the judge found to be of assistance was Andrews and Dury's Map of Wiltshire, produced in 1773. This was a commercially produced map. The judge said that this map did not show footpaths, but only vehicular routes: para 655. This finding accorded with the evidence of Professor Williamson who accepted that by and large Andrews and Dury basically showed vehicular ways, although there might have been one or two bridleways. The judge found that this map showed Rowden Lane as part of a thoroughfare, which Professor Williamson also accepted in cross-examination; although he did to some extent retract that concession in re-examination. The judge said of this map that "it was the first map of the county to be based on a meticulous original survey, and that it is considered by experts to be of very fine quality. It was described, in a catalogue of Wiltshire maps, as one of "the finest maps of Wiltshire before the Ordnance Survey". The map shows Rowden Lane, Gipsy Lane and the intervening track across the field to be of a fairly uniform width. According to the judge

> "this map demonstrated that it is more likely than not that in 1773 there was a clearly visible and established thoroughfare between the Bath Road, Gipsy Lane, across the fields to connect with Rowden Lane and back onto the Bath Road": para 650.

Although he accepted that the map did not prove the public status of the topography that it recorded, he inferred that the map showed the ways to be "of some local significance, and more than just private tracks": para 651.

48 It is also worth noting that on the Andrews and Dury map the junction between Rowden Lane and Gipsy Lane is shown as a right angle (i e not an acute "V" shape). Other junctions depicted on this map illustrate different angles of junction between roads. Mr Laurence said that this feature should be ignored because Andrews and Dury was only a schematic map. However, both experts praised its quality. The depiction of the junction is a piece of evidence that the judge was entitled to take into account. There is no warrant for ignoring it completely. Even if the Andrews and Dury map did not plot the angle of junction accurately, the

A point remains that it still showed a vehicular through route. Moreover, if the Andrews and Dury map was merely schematic as Mr Laurence suggested, the angle shown on that map may have represented a "swept curve" at point K about which there was so much debate both at trial and before us. In addition the Andrews and Dury map also showed a spur road leaving Rowden Lane shortly before its junction with Gipsy Lane. This feature is inconsistent with the contention that Rowden Lane was no more than a private track serving Rowden Farm.

B

49 The judge then considered a map of 1784 made by Mr Powell, a land surveyor. Again he set out the rival views of Mr Harbour and Professor Williamson. His own impression from the map was that Rowden Lane and Gipsy Lane were roads of some importance. They were hedged on both sides, had worn or used surfaces and seemed to be important parts of the

C local public road network, at para 675. Even if Rowden Lane was not a thoroughfare he would still have regarded Rowden Lane as part of the local public road network. It was shown on the map as wider than footpaths; and pecked lines on the map showed a used or surfaced part of the road with verges on each side. This would have accorded with Professor Williamson's concession that there must have been one or more attractions at the end of Rowden Lane so as to attract the public to go there at all, at para 945, and

D with the judge's previous finding that Rowden Lane was used both as access to the Great Coppice and to the place called Rowden. But in fact the judge said that he was persuaded by Mr Harbour that Rowden Lane was part of a thoroughfare, at para 678.

50 There are number of other features of this map worthy of mention. Footpaths were clearly marked as such on the map, but Rowden Lane

E carried no such notation. The map also distinguished in terms of nomenclature between "Rowden Down Lane" (which corresponds with sections A and B of the modern Rowden Lane) and "Rowden Farm Lane" which runs from a pond adjoining one of the footpaths to Rowden Farm. The very fact that the two parts of the way are given different names (and that only one of them is linguistically tied to Rowden Farm) suggests that Rowden Down Lane was more than a mere private access to Rowden Farm.

F At the eastern end of Rowden Down Lane Rowden Down Lane meets a field called Home Down (at a point which corresponds with the modern cattle grid). A way continues across Home Down represented by pecked lines on the map. But there is also a spur depicted in the same way as Rowden Down Lane itself, which turns at right angles to Rowden Down Lane (i e to the south). This spur does not form part of the access to Rowden Farm: it must

G be going somewhere else. This feature of the map also undermines Mr Laurence's submission that Rowden Down Lane was no more than a private access to Rowden Farm. At the beginning of Rowden Farm Lane (its western end) the way widens out adjacent to the pond. This may well represent a place where animals were allowed to drink.

51 The judge found corroboration for the thoroughfare theory in two

H other maps he examined: Archibald Robertson's map of 1792, and the first Ordnance Survey map of 1828. Both these maps showed a "clearly demonstrated through route from the Bath Road (A4), along Gypsy Lane, across fields and back along Rowden Lane to the A4" of sufficient importance to be shown on the map: paras 681, 689. In the course of his cross-examination Professor Williamson agreed that Robinson's map

showed Rowden Lane as part of a through route for vehicles. Robinson's map also showed the junction between Rowden Lane and Gipsy Lane as a rectangular bulge which might well have accommodated turning vehicles. Professor Williamson had no alternative explanation. Professor Williamson also agreed that the Ordnance Survey map showed a vehicular through route; but added the qualification that he was not accepting that it had any particular legal status.

52 The next plan that the judge examined was a plan of property belonging to a Mr Heath. It dated from 1796. It depicted the main road, described as "the Turnpike Road from London to Bath", and "Rowden Lane". It also shows another spur road coming off Rowden Lane in addition to that shown on Mr Powell's map of 1784. This spur corresponds with the spur shown on the plan prepared by Mr Perkins in 1905. This map also shows gates (including field gates). The spur in question appears from this map to have been fenced or hedged. It was uncoloured on the map. The significance of this plan, in the judge's view lay principally in its colouring. The Bath road was coloured brown on the plan as was Rowden Lane. Not all the roads shown on that plan were coloured; and the judge drew the inference that the brown colouring was intended to say something about the status of the coloured roads: namely, that they were public roads.

53 The first Ordnance Survey map was produced in 1828. It showed the spur road that had been depicted on the 1796 plan, and showed it as fenced or hedged. It also showed the angle between Rowden Lane and Gipsy Lane as a less acute angle than the "V" shape that Professor Williamson spoke to.

54 The judge moved on to consider Greenwood's map of Wiltshire, produced in 1829. Greenwood was a well known commercial map-maker who produced maps of many English counties. The judge considered that this map also showed a thoroughfare which included Rowden Lane. Professor Williamson agreed. It was not coloured in the same way as the Bath road; but nor were a multitude of other roads linking disparate settlements. The legend of the map showed that the colouring of the Bath Road meant that it was a turnpike or toll road, whereas that of Rowden Lane meant that it was a "cross road". As the judge pointed out, in 1829 the expression "cross road" did not have its modern meaning of a point at which two roads cross. Rather in "old maps and documents, a "cross road" included a highway running between, and joining other, regional centres". Indeed that is the first meaning given to the expression in the Oxford English Dictionary ("A road crossing another, or running across between two main roads; a byroad"). Professor Williamson agreed in cross-examination that a "cross road" was a reference to a road forming part of a thoroughfare. The judge gave a further explanation of the significance of the expression later in his judgment, at para 733, by reference to the *Planning Inspectorate, Rights of Way Section, Advice Note No 4, Advice on the Definition of a Cross Road* (July 1999), para 2:

> "In modern usage, the term 'cross road' and 'crossroads' are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term 'cross road'. These include a highway running between, and joining, other highways, a byway and a road that joined other regional centres. Inspectors will,

A therefore, need to take account that the meaning of the term may vary depending on a road pattern/markings in each map."

55 The guidance went on, at para 8, to urge caution as the judge recognised, at para 734:

"In considering evidence it should be borne in mind that the recording of a way as a cross road on a map or other document may not be proof B that the way was a public highway, or enjoyed a particular status at the time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere—as sometimes happened—that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality C of the available evidence in reaching a decision."

56 The judge concluded that Greenwood's map supported "the emerging picture" of an established thoroughfare. In our judgment the label "cross road" added further support. This map also shows the angle between Rowden Lane and Gipsy Lane as a less acute angle than the "V" shape that Professor Williamson spoke to.

D 57 The next map that the judge considered in detail was the first piece of evidence that post-dated the Highway Act 1835 which marked the beginning of the modern law of highways. This was the Chippenham and Allington Tithe Award 1848. On this map Rowden Lane was coloured sienna (as were all public roads). On the other hand Rowden Lane (or at least sections A and B) was given parcel numbers, which other public roads were not. The names of the owners and occupiers of both parcels were E given. The description of these parcels was "Part of the Road to Rowden Farm" and no titheable value was attributed to it. Nevertheless the experts agreed that the tithe award plan could show either that Rowden Lane was considered to be public highway, or that it was a private road with no titheable value. The judge considered the rival arguments. He concluded that the 1848 map provided support for the proposition that sections A and F B of Rowden Lane were public carriageways. He gave weight to the fact that it was common ground that Rowden Lane was a public highway of some sort. He placed most weight on the colouring on the map which was consistent with the treatment of Rowden Lane in other maps. For example a map of 1867 produced for the purpose of a proposed change to the borough boundary showed Rowden Lane coloured in the same way as all public carriageways.

G 58 Mr Laurence's attack on the judge's conclusion is twofold. First he says that the tithe map says nothing about the status of Rowden Lane. It could have been a private road rather than a public one. The first difficulty with this submission is that it overlooks (as do so many of Mr Laurence's submissions) the admitted fact that Rowden Lane *was* a highway. Second, the judge acknowledged that the mere fact that Rowden Lane was not tithed H did not of itself show that it was a public carriageway. He drew the inference from other indications. Third, in drawing his conclusion the judge was entitled to look (as he did) at the totality of the evidence. He was not required to consider the tithe map in isolation.

59 The second main prong of the attack is that on the tithe map section C is shown as titheable, subject to a deduction. It follows from this,

says Mr Laurence, that section C cannot have been subject to public rights of way with vehicles. If section C was not subject to public rights of way with vehicles, then it follows that sections A and B of Rowden Lane must have ended in a cul-de-sac at the cattle grid separating section B from section C. It is obvious, says Mr Laurence, that a public vehicular right of way would not have ended in a cul de sac. We do not accept that this is a valid criticism of the judge. First, in the light of the judge's finding that Rowden Lane had been used by the inhabitants of Chippenham for retrieving wood from the Great Coppice and to have access to the place called Rowden, and Professor Williamson's concession that there was some attraction at the end of Rowden Lane such as to attract public use it is not obvious that Rowden Lane would not have ended in a cul de sac. Second, there is no legal impediment to the presumed dedication of a public vehicular way ending in a cul de sac. Third, the judge had in fact found that Rowden Way was part of a thoroughfare as shown by earlier maps (as Professor Williamson had accepted); and once public vehicular rights had been established over Rowden Lane they would not have ceased to be exercisable merely because part of the thoroughfare fell into disuse or became blocked.

60 The judge considered two further commercial maps: Edward Weller's map of 1862 and Bacon's map of 1876. Both these maps showed Rowden Lane as part of a through route. Bacon's map also showed some farm tracks or accommodation roads; but where these were depicted they did not join with other roads. That said, the judge did not place special reliance on either of these maps, except as part of a general picture.

61 The judge turned to consider the Ordnance Survey map of 1886. This showed Rowden Lane bounded by solid lines (which suggested solid boundary features such as hedges or walls). The width of the road was consistent with other maps. By now the pub had been built to the north of section A of the road, which provided its only access. The judge accepted the significance of the fact that Rowden Lane had its own parcel number and survey area which was one of the conventions used by the Ordnance Survey for public roads. He was satisfied that it was a proper inference that by the time of this map Rowden Lane had been dedicated and accepted as a public highway and that the public rights of passage included passage with vehicles: para 732. The 1900 edition of the Ordnance Survey map showed much the same thing. However on this map section B of Rowden Lane was shown bounded by a thicker line. By contrast section C of Rowden Lane (beyond the cattle grid) was not shown with these lines. The judge set out the rival views of the experts. Mr Harbour said (and the judge accepted) that the thickness of the lines bounding section B were of the same thickness as those bounding the Bath road. Mr Harbour, relying on part of a paper by Dr Yolande Hodson (who is an acknowledged expert on Ordnance Survey maps) said that this denoted that section B of Rowden Lane was a public road. Professor Williamson disagreed; but accepted that the thickness of the lines showed that this section of Rowden Lane (but not section C) was capable of accepting fast wheeled traffic in all seasons. The judge accepted that the condition of the road was not definitive of its legal status (as Dr Hodson had indeed said in her paper), but held that this map showed that section B of Rowden Lane had a status and role higher than a private drive or road: para 744.

A **62** Later in his judgment the judge drew another inference from this map. He said (para 914):

> "The shading on the 1900 OS map is also a reliable indicator that sections A and B were well maintained roads suitable for taking fast wheeled traffic in all seasons. This must be contrasted with the different and inferior way in which section C was depicted. In my judgment, the
B way in which sections A and B had been maintained make it unlikely that they simply formed a private road to Rowden Farm, for, if that were so, one might have expected a similar level of maintenance along section C, and that is not the case. I find that the level of maintenance of sections A and B is higher than one would have expected of mere farm tracks in private ownership, and this is most confidently displayed in the
C 1900 OS map."

63 He concluded that the most likely explanation for the enhanced level of maintenance was that it was maintained at public expense and to a standard consistent with a pubic vehicular highway. He also pointed out that this level of maintenance would have been unjustified if sections A and B of Rowden Lane were simply a bridleway: para 915. This is not
D a conclusion that the judge reached simply relying on the shading: it is a conclusion he reached on a consideration of the shading in its wider context.

64 On 1 September 1896 the Chippenham Borough Council resolved to grant a lease of land adjoining Rowden Lane for use as a hospital. The grant was to include a right of way "thereto from Rowden Lane". The hospital building was very small (only 10 feet long and 15 feet wide). The buildings
E were, however, built, because they show up on later versions of the Ordnance Survey map. It is inconceivable that vehicles were not used in connection with the hospital. It is also probable that the reason why the granted right was to stop at Rowden Lane was that Rowden Lane was (or was reputed to be) a vehicular highway.

65 The next map that the judge considered was the map prepared for
F the purposes of the Finance (1909–10) Act 1910. The judge described the background to this Act by reference to paras 46 and 47 of the judgment of Etherton J in *Robinson Webster (Holdings) Ltd v Agombar* [2002] 1 P & CR 243. As it happens Mr Harbour gave evidence in that case too; and Etherton J accepted his evidence about the background to the Act. In fact Mr Harbour reproduced his description of the background in his report in the present case. There can be no possible criticism of the judge for
G accepting Mr Harbour's evidence.

66 The 1910 Act was part of the embodiment of Lloyd George's "People's Budget" 1909 which followed the resolution of the constitutional crisis of 1909–1910. Among other things it imposed a new tax on land called increment value duty. This was to be levied on the increase in the value of land between its initial valuation and its subsequent sale or transfer,
H or on the death of the owner. It was an early form of capital gains tax. In order to establish baseline valuations, the 1910 Act provided for a valuation to be made of all the land in the United Kingdom as at 30 April 1909; an exercise described as the "New Domesday" survey. The survey was carried out by the Valuation Office of the Board of Inland Revenue. England and Wales were divided into valuation divisions, which were subdivided into

valuation districts. Within each valuation district, a number of income tax parishes were created: these were the basic units for the Valuation Office survey. A land valuation officer was appointed to each income tax parish. They were almost always the existing assessors of income tax and some 7,000 were appointed nationally. This enabled the Inland Revenue to have local people with local knowledge undertaking the crucial task of identifying hereditaments. The Act contained specific provision for reducing the gross value of land to take account of any public rights of way or public rights of use as well as easements. Valuers would have been extremely reluctant to show any land as a public road if it could be assessed for duty, and landowners were subject to criminal penalties if they falsely claimed a way to be public to minimise tax liability.

67 Mr Laurence criticised the judge for having said (in common with Etherton J) that valuers would have been reluctant to show land as a public road if it could be assessed for duty; but that was Mr Harbour's evidence. Professor Williamson did not offer a contrary opinion. Mr Laurence also said that the judge was wrong to rely on what Etherton J had said about the importance of the Finance Act 1910 map. But the judge said that he would carry out his own independent assessment of what the map showed (para 757): and that is precisely what he did. Despite Mr Laurence's submissions we reject the assertion that the judge relied on *Robinson Webster (Holdings) Ltd v Agombar* [2002] 1 P & CR 243 for anything other than the general background.

68 Professor Williamson produced some written material which gave some more details about the background to the 1910 Act and the interpretation of maps and other materials produced in the course of carrying its provisions into effect. Section 11 of the Planning Inspectorate Consistency Guidelines (2nd revision June 2008) says, at para 11.7:

> "The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i e they will be shown uncoloured and unnumbered . . . So if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books; however there may be other reasons to explain its exclusion."

69 Professor Williamson also produced an article in Rights of Way Law Review May 2002 *(Uncoloured Roads on 1910 Finance Act maps*) in which Mr David Braham QC writes, in section 9.3, p 153:

> "In areas where the valuation work was completed, all the omitted roads were either stretches of road which ran between inclosures 'fenced roads', or roads in built-up areas. The valuations and deductions required by the Act were duly made where an unfenced stretch of highway crossed a larger area which had to be valued anyway. In such cases the larger area, such as a field or private park, was valued and a deduction was made in respect of the public right of way: that was so even if other stretches of the same highway were fenced roads which were omitted from the valuation."

A 70 Mr Braham also writes in the same article, on p 157:

> "The fact that the road is uncoloured may point strongly to the conclusion that the road was recognised as a highway at the time but, viewed in isolation, the fact that the road is uncoloured leaves open the question whether it was recognised as a public carriage road or as a lesser highway."

B 71 The consensus of opinion, therefore, is that the fact that a road is uncoloured on a Finance Act map raises a strong possibility or points strongly towards the conclusion that the road in question was viewed as a public highway. The Planning Inspectorate Consistency Guidelines suggest that such a highway was *normally* a vehicular highway, although Mr Braham warns that *if viewed in isolation*, the lack of colouring leaves C open the question whether the highway in question was no more than a bridleway. In addition, different treatment was given to fenced and unfenced highways.

72 The base map used for the Finance Act Map was the 2nd Edition Ordnance Survey Map 1900. The judge said (para 761) that only all purpose (vehicular) highways were excluded from tax assessment. Minor highways, including footpaths and bridleways were declared as part of the D assessment, but the land showed a deduction in taxable value for any incumbrances. The position is a little more nuanced than the judge described, as the quoted documents show.

73 As Mr Mould pointed out the Finance Act Map showed that land on both sides of most of the disputed section of Rowden Lane was owned by Mr Rich. In fact the soil of the lane had been expressly conveyed to him E some years before, so there was no possible doubt about who owned the vast majority of the disputed section of Rowden Lane. The disputed part of Rowden Lane itself (up to what is now the cattle grid) is shown on the Finance Act Map as uncoloured; and it does not form part of any taxable hereditament.

74 One of the pieces of evidence before the judge in relation to the 1910 map was the treatment of Brigadier Palmer who owned land which F included section C of Rowden Lane and much more besides. He claimed (and was given) a deduction of £125 from the assessed value of his land. There was debate at trial about what the deduction represented. The judge was under the impression that the first claimant had accepted that the deduction was claimed in relation to some form of public rights over section C of Rowden Lane. Mr Laurence says that the first claimant G accepted no such thing. However, we come back again to the point that it is accepted that there were in fact public rights over section C of Rowden Lane. So whether or not Brigadier Palmer did *in fact* claim the deduction on account of public rights over section C, even on the first claimant's case he would have been *entitled* to make that claim. That being so, we cannot see how the judge can be said to have been wrong to infer that Brigadier Palmer exercised his entitlement to that extent. It is, however, the case that H Brigadier Palmer did not claim a deduction for a full vehicular highway across his land. The judge commented that vehicular use of Gipsy Lane had probably ceased by 1910 because of improvements to the Bath Road and the absence of tolls. He said that the treatment of Brigadier Palmer's land suggested that section C of Rowden Lane had lost its reputation as a

vehicular highway. In our judgment that was a legitimate inference for him to have drawn. A

75 The judge noted that the Finance Act Map showed not only the pub with its access from Rowden Lane but also a football ground at Home Down. It, too, was accessible from section B of Rowden Lane. The judge drew the inference that the public visiting the football ground or the pub would have come and gone not only on foot or on horseback, but also in vehicles. The voluminous grounds of appeal and skeleton argument do not challenge this inference. In his oral submissions Mr Laurence criticised the judge for having drawn this inference, submitting that the public could as easily have come by vehicle from Gipsy Lane to the north east of the football ground. Maybe they could have: but why could they not have come from both directions? Which route they used might well depend on where they were coming from. This does not seem to us to be a reason that fatally undermines the judge's inference. Moreover the judge found that by 1910 vehicular use of Gipsy Lane had fallen into disuse; and Mr Laurence did not challenge this finding. The judge also noted that sections A and B of Rowden Lane were uncoloured (and untaxed) on the map. Section C of Rowden Lane, by contrast, was taxed but was subject to a deduction. Mr Harbour's view was that this was strong evidence that sections A and B of Rowden Lane were subject to full rights of public passage (i e it was a public carriageway). It may be noted here that section C was unfenced; and hence might have been mapped differently for that reason. B C D

76 Professor Williamson agreed that the map tended to show that sections A and B of Rowden Lane were considered by the valuers to be a public carriageway. However, he put forward three principal reasons why the judge should not draw that conclusion: para 749. The first was predicated on uncertainty of ownership of Rowden Lane. But it is clear that the relevant sections of Rowden Lane were owned by Mr Rich. The second related to the treatment of a different footpath some distance away from Rowden Lane. This was shown on the map as partly uncoloured and partly coloured. The judge observed that the history of that other footpath had not been investigated in the evidence before him; and declined to draw any inference about why it had been treated in that way on the map. In fact it may well be the case that the footpath in question was partly fenced and partly unfenced, which may provide the explanation for its differential treatment on the map. But like the judge we decline to draw any inference from that treatment for essentially the same reason. The third reason was based on the evidence of private conveyancing, to which we will return. E F G

77 The judge considered Professor Williamson's points and concluded, at para 753:

> "I am satisfied that it is more likely than not that, if sections A and B with their wide verges, were merely a bridleway, this would have resulted in a liability to taxation, but a deduction in respect of the minor highway. In my judgment, the probable explanation for sections A and B being untaxed is because they were regarded as a full vehicular highway." H

78 The judge's conclusion echoes what is said in the Planning Inspectorate Consistency Guidelines, in the passage we have quoted. But the judge did not treat the Finance Act Map as definitive. It was simply one

A piece of the jigsaw puzzle. He considered that this conclusion was consistent with all the evidence of earlier maps. As he put it, at para 771:

> "I have elsewhere in this judgment developed the point that the majority of maps show Rowden Lane ungated at its junction with the Bath Road, and that there was no physical obstruction to passage between sections A and B. There were many and varied types of members
B of the public who used Rowden Lane over the centuries. The lane must have led to a place of public interest or purpose, because it is conceded by the claimants to be a public highway albeit only on foot and on horseback. Moreover, there is a clear picture of Gipsy Lane and Rowden Lane forming a thoroughfare leading from and to the Bath Road. Rowden Lane has been shown on many maps to be of comparable status
C to the Bath Road, and the quality of its maintained surface, revealed by the OS maps, is consistent with being used as a vehicular highway. Its width is greater than one would have expected for a footpath or bridlepath. These factors, which have been shown on the plan and maps starting in 1669, are entirely consistent with the picture presented by the 1910 map namely that sections A and B of Rowden Lane constitute a public vehicular highway."

D

79 In other words the judge adopted the caution urged by Mr Braham and did not consider the Finance Act Map in isolation. The main focus of attack on the judge's conclusions drawn from this map is again founded on the proposition that a vehicular right of way would not have ended in a cul de sac. We have already explained why this attack on the judge's inferences drawn from the tithe map does not show that the judge was wrong. But in
E the case of the 1910 map there is an additional factor which supports the judge's conclusion, namely the existence of the football ground and the inference that he drew that people must have come and gone to and from the football ground in vehicles. We note also that the hospital also features on the Finance Act Map where it is (uncoloured) allotment 1304. It would have been uncoloured because it was occupied by a local authority.

F 80 Mr Mould submitted, correctly in our judgment, that the treatment of the disputed section of Rowden Lane on the Finance Act Map shows very clearly that it was regarded at that time as a highway. For it to have been so regarded it must necessarily have been dedicated as a highway at some time earlier than 1910. That in turn entails that the then owner of the land over which it ran had the necessary intention to dedicate at common law (because there was no statutory presumption of dedication at that time). The action
G of Mr Rich (who was in fact the owner of the soil) in claiming that Rowden Lane was a highway is in itself powerful evidence of previous dedication. At the time of the Finance Act Map it is also clear from all the cartographic evidence that Rowden Lane was physically capable of accommodating vehicles. Not only that, but the first claimant asserts that it was in fact used by vehicles (although not by members of the public). It had existed in that physical configuration for centuries.

H 81 In 1937 a Mr Gibbons submitted plans to the Chippenham Borough Council for the construction of a bungalow to be built on Rowden Lane. The plans also showed a road, 12 feet from kerb to centre together with a footpath to be "made up to town council byelaws". At the time the borough council had statutory powers under section 30 (1) of the Public Health Act

1925 to declare by order that "an existing highway" be a "new street" for the purpose of the application of local byelaws. The borough council had in fact adopted such byelaws in 1925. These required a new street to be laid out as a carriage road. It was clearly established that in March 1937 the borough council resolved to make such an order declaring Rowden Lane to be a new street. What was not so clear was whether the resolution was put into effect by means of a formal order. The judge concluded that it had: para 817. Although this conclusion is challenged, it does not seem to us that it matters. The fact of the resolution is itself evidence of the status (or at least the reputed status) of Rowden Lane at the time. That is indeed how the judge treated it. He said (para 819):

> "I repeat that the making of the declaration did not alter legal rights. It did not create Rowden Lane a public vehicular highway, if it had not been one before the resolution. However, I am satisfied, on the balance of probabilities, that it is right to infer that the council resolved as it did, because it was apparent to it that Rowden Lane between the Bath Road and the cattle grid was already a public vehicular highway. Had they been of the view that it was merely a private road, but subject to public bridleway or footpath rights only, it seems improbable that they would have imposed on those undertaking the residential development of Rowden Lane the requirement of laying out a carriage road to provide the principal access to those dwellings over no more than a bridleway."

82 Mr Laurence stressed the general benefit to public health that the inhabitants of Rowden Lane (or perhaps of Chippenham generally) would have enjoyed as a result of the application of the byelaws to Rowden Lane. But in our judgment the judge was right in saying that to resolve to require Mr Gibbons to upgrade a bridleway to the physical condition of a public carriageway all on account of a bungalow would have been overkill (or, as we now say, disproportionate).

83 In the immediate post-war period a number of reports recommended a national survey of public rights of way, especially rights of way on foot and with horses. Part IV of the National Parks and Access to the Countryside Act 1949 ("NPACA") was the result. Lord Denning MR explained in *R v Secretary of State for the Environment, Ex p Hood* [1975] QB 891, 896:

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

A both for landowners and the public to make their representations as and when each map passed through each stage. In 1968 there was to be a review and reclassification."

84 In order to understand the framework it is necessary to refer to some of the statutory definitions contained in section 27 (6) of NPACA. First, a "footpath" means "a highway over which the public have a right of way on
B foot only . . ."

85 Second, a "bridleway" means

"a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway."

C

86 Third, a "public path" means: "a highway being either a footpath or a bridleway."

87 It follows, therefore, that a highway over which the public have a right of way with vehicles cannot be either a footpath or a bridleway. Nor can it be a public path. Lastly a "road used as a public path" (or "RUPP") means: "a highway other than a public path, used by the public mainly for
D the purposes for which footpaths or bridleways are so used."

88 It follows from the statutory definitions that a RUPP is a highway over which the public have rights of way with vehicles (since public paths are excluded from the definition). It also follows that a *private* carriageway over which the public have access on foot or on horseback only cannot be a RUPP. The highest status it can have is that of a public path. The compiling of the draft map, the provisional map and the definitive map were required
E to show any way which in the opinion of the authority "was . . . or was . . . reasonably alleged to be" a RUPP: section 27(2) of NPACA.

89 In accordance with their statutory duties the council carried out the required survey. The judge recorded the process, at paras 773–775. The Claim Map, Draft/Provisional and eventual Definitive Maps, showing and recording the public rights of way in Chippenham borough, all showed
F sections A and B of Rowden Lane coloured as a full public highway or, on this map, as an uncoloured town street with lesser rights of way being claimed only over the unenclosed section, section C, of the lane. Section C of Rowden Lane was claimed as a public right of way, CRB5. This acronym was a non-statutory subset of the statutory category RUPP. It was contained in a memorandum prepared by the Commons Open Spaces and Footpaths Preservation Society and approved by the Ministry of Town and County
G Planning. One subdivision was CRB which stood for a carriage road mainly used as a bridleway. The other was CRF which stood for a carriage road used mainly as a footpath. The memorandum said: "Highways which the public are entitled to use with vehicles but which are in practice mainly used by them as foot ways or bridle ways should be marked on the map as 'CRF' or 'CRB'."

H 90 The important point is that both subdivisions acknowledged that the public were entitled to use the way in question with vehicles.

91 The judge commented (para 775):

"It is unlikely that the council would have claimed CRB5 as a cul-de-sac way, and it is likely that it regarded the enclosed sections A and B of

Rowden Lane as having full public vehicular rights to the point where it connected with CRB5."

92 Mr Burridge, who then owned Rowden Farm, challenged the claim that section C was a RUPP. The ground of his challenge was that Rowden Lane was not a public way at all. This challenge led to an inquiry before an inspector in March 1955. The inspector rejected the challenge because he found that there was evidence of considerable use by the public; and section C was therefore shown on the definitive map as part of a RUPP: paras 832, 833. It is noteworthy that Mr Burridge did not make an alternative challenge that if there were public rights of way they were limited to passage on foot or horseback. If he had made such a challenge, the way might have been recorded as a footpath or as a bridleway. But it was not.

93 In addition the only way in which a vehicle could access section C was by passing along sections A and B. If, therefore, section C was subject to public rights of passage with vehicles, it inexorably followed that so were sections A and B. The Definitive Map was accompanied by a Definitive Statement. That stated in relation to RUPP5 (i e section C of Rowden Lane): "CRB from the eastern end of Rowden Lane leading south east along the entrance road to Rowden Farm, to the Lacock Parish boundary, 100 yards west of Rowden Farm buildings."

94 The judge regarded the treatment of Rowden Lane on the definitive map as strong evidence. In his words, at para 837:

> "I regard this as cogent and compelling evidence that, in or about 1950, Sections A and B of Rowden Lane were regarded as full vehicular highways. It was compiled by someone who could be taken to have knowledge of the highway network at the time."

95 He added, at para 844:

> "I accept the [council's] submission that the material point here is that there is before me now a record made in 1955 of an inspector, who had received and evaluated evidence (which has since been lost) through a statutory forensic process. He found as a fact that considerable public user of section C of Rowden Lane supported its inclusion on the definitive map, not merely as a public footpath or a bridleway, but as a public cartway albeit mainly used in 1950 as a bridleway. The only way in which the public could gain access with vehicles to RUPP/Chippenham 5 in the 1950s was by driving along sections A and B of Rowden Lane. This was because in the Draft and subsequent Maps, the enclosed section of Gipsy Lane was shown as bridleway 2A. Vehicular access was therefore not possible from Gipsy Lane in 1950. In fact, it is probable that Gipsy Lane had been closed to vehicles since about 1910, before the date of the Finance Act Map."

96 Mr Laurence said that no legitimate inference could be drawn from this material about the existence of vehicular rights of way over sections A or B of Rowden Lane. The first reason he gave was that it was no part of the function of an inquiry under NPACA to deal with the status of public carriageways. However, the first claimant's case is that sections A and B of Rowden Lane were not in fact subject to any public vehicular rights. In that case the highest possible classification those sections of Rowden

A Lane could have commanded was classification as a RUPP (on the basis that it was "reasonably alleged" that public vehicular rights existed), although on her case they should have been classified as a public path. Since the object of the statutory inquiry under NPACA was precisely to record public rights of way on foot and on horseback (including RUPPs), if the first claimant is right sections A and B should have been investigated. The fact that they were not is some evidence that they were reputed to B be public carriageways. The second objection is that the inclusion of section C of Rowden Lane as part of a RUPP shows no more than that the inspector formed the view that it was "reasonably alleged" that the public had vehicular rights of way over section C. That is a fair point, as Mr Mould acknowledged. In our judgment the judge may well have given too much weight to the results of the definitive map process. But this was C only one strand in the evidence; and the fact that he may have given too much weight to this particular piece of evidence does not, in our judgment, fatally undermine his overall conclusion.

97 Mr Laurence's principal criticism of the judge really boils down to two main points. First he says that the judge placed too much reliance on the small scale commercial maps, which he should have ignored. Instead he should have concentrated on the large scale plans. Second, the topography D shown by the larger scale maps makes the allegation that Rowden Lane was part of a thoroughfare improbable.

98 We deal first with the argument that the judge should have ignored what he called the "small scale maps" entirely; and should have concentrated only on the large scale maps (i e principally the 1784 map). We reject that submission. First, it conflicts with the statutory instruction in E section 32 of the 1980 Act which says that the court "*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 . . ." (Our emphasis.) Second, the consistency of treatment of Rowden Lane and Gipsy Lane in commercially produced maps for well over a century showed, if nothing else, the reputation enjoyed by Rowden Lane. Section 12 of the Planning F Inspectorate Consistency Guidelines (2nd revision June 2008) (which Professor Williamson produced) concludes by quoting a paper by Christine Willmore dealing with old maps:

> "What is looked for is a general picture of whether the route seemed important enough to get into these documents fairly regularly. A one-off appearance could be an error . . . consistent depiction over a number of G years is a positive indication."

99 That is the approach that the judge adopted, testing each provisional conclusion against what had come before and what came after. In our view the judge's approach to "consistent depiction" was fully justified.

100 The second main argument rests on topography. According to Professor Williamson Rowden Lane and Gipsy Lane (which were two parts H of the thoroughfare found by the judge) meet in an acute V shaped junction. The argument is that it would have been very difficult (although not impossible) for a horse and cart to negotiate the V shaped junction. If Rowden Lane and Gipsy Lane had been used as a connected through route, then horses and carts would have had to have cut the corner. If they

had done this with any regularity then there would have been visible traces of cart tracks, which the map-makers would have recorded. The judge dealt with this point, at para 676:

> "I am not persuaded that the junction of the two tracks, section C and the southernmost continuation of Gipsy Lane, form the impractical 'V' junction described by Professor Williamson, nor that they are simply different private access tracks to Rowden Farm. Rowden Farm Lane is narrower than either Rowden Lane or Gipsy Lane, and there is no visible obstruction on the plan to stop the corner being cut at the 'V' junction."

101 As we have pointed out, many of the commercial maps (including the Ordnance Survey map of 1828) showed a junction at a less acute angle than that to which Professor Williamson spoke. At least two maps (including the 1784 map on which Mr Laurence relied heavily) showed a bulge which could have represented a place for carts to manoeuvre. In addition as the judge pointed out in the quoted passage, the width of Rowden Lane and Gipsy Lane (as compared with Rowden Farm Lane) might have left space for at least smaller two-wheeled carts to make the turn. It must also be recalled that the judge had a site view of which he took full advantage. We are not persuaded that the point about the V shaped junction, even if correct, is of such force as to outweigh all the other material that led the judge to his conclusion.

102 In addition it must not be forgotten that one strand in the council's case was that the disputed section of Rowden Lane was a vehicular highway even if it did not form part of a through route. Mr Harbour had said that there was sufficient attraction along its length to cause the public to use it with vehicles. Professor Williamson appears to us to have accepted this. Thus the question whether vehicles would have negotiated the junction at point K with more or less ease was not determinative of the case.

Maintenance

103 Part of the judge's reasoning was informed by his consideration of evidence of maintenance. It is common ground that proof that a way has been maintained at public expense is evidence that it is a highway. Among the documents that the council disclosed was a minute of the Chippenham borough council from February 1881. It related to a bridge which crossed a brook in section A of Rowden Lane. At that meeting, a letter from Mr Doswell, the highway surveyor of the Chippenham highway district, was read. It asked the council to join with the other owners of adjoining property in contributing towards the repair of a bridge over the brook in the lane leading to Rowden Farm and the field called Hulberts Hold belonging to the corporation. It was proposed by Mr Alderman Dowding, and seconded by Mr Careless, that the council should contribute one tenth of the expense which would be about £1. This was then agreed.

104 Professor Williamson attached particular importance to this minute. He said that it demonstrated that the council and other landowners with property along the lane were behaving in precisely the same way as the residents do currently: contributing equally to its upkeep. This, he said, was inconsistent with a belief that Rowden Lane was a public highway. The judge dealt with this point:

A "726. For me, the interesting thing about this minute is that the letter had been written by the *Highway Surveyor*. He was asking for contributions for the repair of the bridge. Why was the Highway Surveyor involved, if Rowden Lane was entirely private? Moreover, he was merely asking for a contribution towards repair, he was not suggesting that the adjoining owners were obliged to do so.

B "727. In my judgment, the fact that the person taking responsibility of the project was the Highway Surveyor provides support for the view that Rowden Lane was regarded at the time as a public vehicular road. A bridge, especially of that width, would not have been necessary if Rowden Lane were a mere bridleway." (Original emphasis.)

105 We do not find the first of the judge's points persuasive. The request, after all, concerned the repair of a bridge: so who better to deal C with it than the council employee who knew about roads and bridges? The second point seems to us to be equivocal. If, as the council say, Rowden Lane had been dedicated as a highway before 1835 then the highway would have been liable to be repaired by the parish, rather than by the frontagers. On that basis, the minute does not support the council's case. On the other hand, if the highway had been dedicated after 1835 then it would not D automatically have been repairable by the parish. It would only have become repairable at public expense if it had been adopted. If that is the explanation for this minute, then it is consistent with the council's case. However, building on the bedrock that it is common ground that there was some kind of highway over Rowden Lane, the judge's final point namely that a bridge of this width would not have been needed if all that was in question was a bridleway is a good one.

E 106 He returned to this point later in his judgment when he said, at para 916:

"I have already dealt with the 1881 minute concerning the repair of the bridge in section A of Rowden Lane, when dealing with Professor Williamson's observations on it above. In addition, it must be remembered that, given the claimants' concession that sections A and B F are public highways, much of the force of his argument has evaporated. In my judgment, the 1881 minute indicated not only that section A was a publicly maintainable highway but also the fact that a bridge needed to be repaired indicated that it was a public vehicular highway, since the presence of a bridge bearing a track way over it was much more consistent with a public vehicular way than a public footpath or bridleway."

G 107 Although we would not go so far as to say that this particular minute positively indicates that Rowden Lane was a highway, the remaining points are well made. All in all we would not place any real reliance on this episode one way or the other.

108 In the 1950s, Rowden Lane had a hard surface of compacted gravel. At this stage, there was no further evidence of the council or of any H highway authority taking responsibility for the maintenance of the lane. Potholes appear to have been filled in on an "ad hoc" basis by adjacent property owners. In the 1960s, the lane was resurfaced, and this was paid for effectively by the farms and businesses on Rowden Lane. In 1965 the borough council minutes revealed approval of expenditure by the council for the improvement of Rowden Lane (in conjunction with the brewery that

owned the pub). This was about the time that the pub was rebuilt, and as part of the conditions of the planning permission Rowden Lane was to be widened. This necessitated the giving up of some land by the brewery, which it did. This can realistically only be interpreted as a dedication by the brewery.

109 Following the local government reorganisation in 1972 the Wiltshire County Council became the highway authority in place of Chippenham Borough Council. Records were transferred from the latter to the former. However, the records transferred by Chippenham Borough Council to Wiltshire County Council showed only section A of Rowden Lane as a public carriageway. Section B was shown as part of RUPP5. This designation of section B contradicted the definitive map (although it would still have recognised the existence of a public right of way with vehicles). The judge held, at para 789, that this was a mistake which was corrected in 1983. Since at least 1972 a culvert running under section A of Rowden Lane has been maintained at public expense. Presumably this culvert enclosed the brook which had been crossed by the bridge referred to in the borough council's minute of 1881. Since that time or earlier section A as a whole has also been maintained at public expense.

110 The mistake about section B came to light in 1983. In or about 1983 the highway authority resurfaced Rowden Lane. The sections that were resurfaced were sections A and B: para 389. It was the first recorded work to section B at public expense. It was this that brought the mistake to light, because someone in the council queried whether public money should have been spent on section B. Upon investigation it transpired that section B had been incorrectly recorded on the definitive map as part of RUPP 5. That error was corrected. Since that time the council has accepted liability to repair both sections A and B of Rowden Lane (although its cash resources have rarely resulted in actual work).

111 Mr Caddick, who argued this part of the first claimant's case, submitted that the 1881 minute did not support the council's case. For the reasons we have given, we agree. He also submitted that the evidence of contributions made by the frontagers to the resurfacing of Rowden Lane in the 1960s contradicted the council's case. We agree with that too. On the other hand, the council has maintained the culvert since 1972; and has accepted responsibility for the repair of section B of Rowden Lane since 1983. It has carried out work to section A of Rowden Lane since before then. No one has been able to suggest how section A of Rowden Lane could have a different status as a highway from section B. All in all we conclude that the evidence of maintenance (or lack of it) does not contribute significantly to either side's case.

Conveyancing evidence

112 It is now time to consider the conveyancing evidence on which the first claimant heavily relies. As one might expect parcels of land accessed from Rowden Lane have changed hands from time to time. Some light may be shed on the status of Rowden Lane by the way in which access was dealt with by local conveyancers. Mr Laurence accepts that the conveyancing evidence does not all point to the same conclusion. There may be cases in which private conveyancing documents all point one way: viz to the conclusion that there was no highway. In such a case the force of the

A evidence of private conveyancing documents may outweigh the value of public documents such as a tithe map or a Finance Act assessment which were not prepared for the express purpose of recording public rights of way. *Maltbridge Island Management Co Ltd v Secretary of State* [1998] EGCS 134 is one such example. But in the present case it is accepted that the private conveyancing documents do not speak with one voice. Moreover, in so far as they suggest that there was no highway at all they are B simply wrong.

113 It is a general principle of the interpretation of conveyances that where land is bounded by a river or a public highway a conveyance of the land will pass half the river bed or half the soil of the highway, as the case may be. This principle is clearly articulated by this court in *Micklethwait v Newlay Bridge Co* (1886) 33 Ch D 133. All three Lords Justices approved C the principle. It is only necessary to quote one of them, Lopes LJ, at p 155:

> "if land adjoining a highway or a river is granted, the half of the road, or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this though the measurement of the property which is D granted can be satisfied without including half of the road or half of the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road."

114 It will be noted that the presumption comes into play when the land in question adjoins a highway. In *Leigh v Jack* (1879) 5 Ex D 264 E Cockburn CJ explained the rationale for the presumption, at p 270:

> "It is presumed that those who were seised of the neighbouring land devoted the surface of their soil to the public, in order to confer a common benefit on all those desirous of using the highway, without, however, parting with the ownership of the soil itself."

F **115** In other words the presumption is founded on the assumption that the land is bounded by a highway (i e that there has been a dedication and acceptance by the public), and upon the further assumption that the surface of the land is vested in the highway authority. In those circumstances it is difficult to see how the application of the presumption could lead to the conclusion that the owner of land adjoining the highway could have rights of vehicular passage over the surface of the highway otherwise than in his G capacity as a member of the public. Nor, of course, does the application of the presumption give the landowner any right of passage over the other half of the highway in question; or over land forming part of a highway that is not coterminous with his own.

116 The argument based on the conveyancing documents has a number of strands. The first is that there are conveyances from the 19th and 20th centuries that expressly convey parts of section B of Rowden Lane. H These conveyances are respectively dated 11 April 1820, 28 October 1836, 31 July 1841, and 30 April 1919. It is difficult to see how this really advances the first claimant's case. Before 1836 no part of the highway would have been vested in anyone other than the frontagers. Until the last quarter of the 19th century only the scrapings would have been vested in the

surveyor. Even after that, the land itself (apart from the surface of the highway) would have belonged to the frontagers, so a conveyance of the soil of Rowden Lane is not inconsistent with the existence of a highway. Moreover, as Mr Laurence points out, the principle of interpretation would pass these parcels (minus the surface of the highway) even if the conveyances did not mention them at all.

117 The second strand is that where conveyance plans depicting Rowden Lane have survived from 19th century conveyances, it is not expressly called Rowden Lane but the way is annotated with the words "From Rowden Farm" or "To Rowden Farm". This contrasts with the depiction of the main road labelled "To Bath" or "To Chippenham". The inferences that the first claimant seeks to derive from these plans are twofold: that the label "To" or "From" Rowden Farm only suggests that there was no through route, and that the reference to the way serving Rowden Farm suggests that it was a private track. The conveyances with these features include conveyances of 3 November 1851, 29 September 1858, an abstract of title of 3 March 1884 and another dated 5 March 1884; and there is a similar notation on auction particulars in 1881. If these inferences were relied on in order to advance a case that there was no highway at all, they might well have some force. We come back (yet again) to the fact that it is common ground that Rowden Lane is agreed to have been a highway (open at least to pedestrians and riders). So these annotations on the plans must be seen in the context of their describing an acknowledged highway. Moreover the 1669 enclosure map shows the same road as leading to "Rowden Farm *and other lands*"; and the 1784 plan calls the disputed section of Rowden Lane "Rowden Down Lane" as opposed to "Rowden Farm Lane".

118 The third strand is that in 1927 the Lackham Estate was put up for sale in lots by auction; and auction particulars were prepared. Four lots bordered Rowden Lane. The catalogue description of each said that it was accessed by a "private road"; and the special conditions of sale envisaged that each purchaser would be required to contribute to the cost of upkeep. The argument based on this is that given the public nature of the auction and the likelihood of close public scrutiny, the fact that these auction particulars were "of the utmost importance". It can be accepted that these auction particulars do point to the conclusion that whoever drew them up thought that Rowden Lane was a private road. But the fact is that the draftsman of the particulars was wrong. Rowden Lane was a highway (open at least to pedestrians and riders). It would have been misleading simply to call it a "private road". So while the judge might have given more weight to this piece of evidence than he did, it is an exaggeration to describe it as "of the utmost importance". It is one piece of evidence among many; albeit one of the few pieces of evidence that positively supports the first claimant's case. But its force is blunted by the fact that the provision in the special conditions of sale about contributions to the upkeep of the road was not carried through into any conveyance.

119 The Lacock Estate was conveyed in 1927 to a Mr Holt. The conveyance to him granted a right "so far as the vendor has power to grant the same" to pass and repass "with or without horses cattle and other animals carts waggons carriages motor cars and agricultural implements" over Gipsy Lane. The conveyance also included a similar right "so far as the

A vendor has power to grant the same" over Rowden Lane, which the conveyance described as "the lane or roadway leading from Rowden Farm to the Main Bath Road". We accept that the grant of an express right of way over Rowden Lane is suggestive that it did not have the status of a highway. However, the draftsman of this conveyance was, no doubt, under the same misapprehension as the draftsman of the auction particulars prepared earlier in the same year. Moreover the granted right includes both passage on foot and with horses and other animals, both of which were already existing public rights, even on the first claimant's case. Not surprisingly, subsequent conveyances which had the 1927 conveyance as their root of title repeated the grant.

120 In addition, although Mr Laurence placed reliance on section 62 of the Law of Property Act 1225 and its predecessor section 6 of the Conveyancing Act 1881 which obviate the need to include general words in conveyances, these provisions apply only to conveyances made after 31 December 1881. In so far as there are conveyances that pre-date 1882 which do not include general words, they tend to support the inference that Rowden Lane was a vehicular highway.

121 The judge recorded that a number of other conveyances dealing with land adjoining Rowden Lane did not include any express right of way over the lane. These included in particular the resolution to grant the lease of what became the hospital. The judge reasoned, at para 907(5):

> "Given the absence of private easements in favour of the properties fronting Rowden Lane, they and Rowden Farm would be landlocked if Rowden Lane were not a public vehicular highway. The fact that the parties did not include any part of the road in the conveyance, and also failed to stipulate for private access rights, renders it probable that everybody realised that the road had become a public vehicular highway. Even if the current owners of property fronting Rowden Lane owned one half of the subsoil of Rowden Lane which adjoined property, this did not give a right of way over the entire length of Rowden Lane to gain access to the A4."

122 The important fact is that the soil of Rowden Lane never belonged to the owner of Rowden Farm and there is no evidence of any grant of a right of way. It is improbable in those circumstances that Rowden Lane was no more than a private carriageway serving Rowden Farm. The situation on the ground is quite unlike that described by Lord Dunedin in *Folkestone Borough Council v Brockman* [1914] AC 338.

123 Mr Laurence fills the gap by suggesting that the frontagers would have acquired vehicular rights of way by prescription. Given that the premise is that Rowden Lane is a highway we find it difficult to see how private prescriptive rights of passage can come into existence. The status of Rowden Lane as a highway (which everyone agrees) is dependent on the inference that at sometime in the past there was a dedication. As far as one can tell that dedication must have taken place at a time when Rowden Lane was actually being used by carts and other vehicles (otherwise the prescriptive rights for vehicular use would not have come into existence). The existence of a prescriptive right depends on the inference (which may be fictional) of a grant or grants. In this case Rowden Lane ran through land owned by many different owners; so a series of grants would have to be

presumed. The presumed grants would have had to have been made not only in favour of the owner for the time being of Rowden Farm but also in favour of all those other persons who from time to time owned land abutting Rowden Lane. They would have to have been made by a series of landowners each of whom owned a part of the soil over which Rowden Lane ran. Why, then should it be inferred that the dedication was a limited dedication, subject to the frontagers' private rights to use Rowden Lane with vehicles, rather than a dedication which reflected the actual use made of the lane, which included use with vehicles? To infer a whole series of grants and dedications running in parallel is unnecessarily complicated. The principle of Occam's razor surely applies here. The simpler explanation for the factual state of affairs is that there was an unlimited dedication. Accordingly in our judgment the judge's reasoning was correct.

124 We return to the question posed by the judge: given the width and nature of Rowden Lane from the earliest recorded times, how does it come about that there has been a dedication for use by pedestrians and riders but not for horses and carts? A passage in Professor Williamson's cross-examination on Day 4 went like this, at pp 129–130:

> "*Q*. And if they wanted to go along with horses, can you think of any reason why they might want to go along with horses but not want to go along pulling a cart behind the horses?
>
> "*A*. It might reside in the extent to which the use was tolerated, when dedication occurred, i e you might be prepared to tolerate user on foot or by horseback in the same way you might not be prepared to tolerate full use by vehicles largely because of damage done to road surfaces and to crops and standing fields etc. There might be reasons why you would allow one and not the other."

125 If this hypothesis were correct it would lead to the conclusion that vehicular use of the way was not tolerated. But if that were the case, then prescriptive rights would not have arisen either. It is quite implausible to suggest that the landowners over whose soil the way ran would have checked passing vehicles to see whether they belonged on the one hand to frontagers along the way or to persons using the way at the invitation, express or implied, of those frontagers; or on the other hand to members of the public. It is the sort of factual inference that Mr Laurence rightly accepted would be unsustainable.

126 The judge summarised the findings that led him to conclude that Rowden Lane was a highway usable by the public on foot, with animals, and with vehicles, at para 953:

> "(i) Rowden existed as a location since at least 1190.
>
> "(ii) The borough lands were seized by the Crown in 1540, and allotted to the 'inhabitant householders' of Chippenham. This was a group large enough to constitute 'the public'. They probably used horse drawn carts and wagons to carry away wood from the coppice which became their land by 1544. These inhabitants of Chippenham have used Rowden Lane to access the coppice either via the two spur roads, if they existed before 1669, or over the unhedged southern boundary of Rowden Lane before the spur roads were created.
>
> "(iii) The unruly and disorderly members of the public from Chippenham or elsewhere, who trespassed in and stole wood from the

A coppice, also constituted a sufficiently large constituency of people to constitute the public. No complaint was made that they were trespassing on private roads when they were undoubtedly using Rowden Lane to gain access to the coppice. The borough of Chippenham did not own Rowden Lane and therefore could not give consent to anyone to use Rowden Lane.

"(iv) Soldiers with horse drawn wagon and carts must have used Rowden Lane to access Rowden Manor during the Civil War. Such B soldiers must have constituted members of the public, and their use of Rowden Lane must have been trespassory.

"(v) By 1669, Rowden was a well established place to which both Gipsy Lane (as it was to become) and 'Rowden Way' gave access.

"(vi) In 1669, sections A and B of Rowden Lane had a distinct name, i e 'Rowden Way'.

C "(vii) Rowden Lane and Gipsy Lane, as they were to become known, contained the word 'lane' in their name implying a highway running between two major roads or different sections of the same major road. The presence of a useable through route from the Bath Road, along Rowden Lane, over the unenclosed track, up Gipsy Lane and back on to the Bath Road is clearly demonstrated on historical maps. There are sound reasons why such a through route existed. They include the D potential avoidance of paying tolls, the avoidance of badly maintained or unpassable sections of the Bath Road and, at least for a time, to provide some form of access from Gipsy Lane to the market place in Chippenham. This through route is shown in the maps of 1773, 1792, 1828, 1829, 1848, 1862, 1867, 1890 and 1910. Professor Williamson accepted that the maps of 1773 1828 1829 and 1890 demonstrated a E through route.

"(viii) Apart from gates shown at the junction of the Bath Road and section A of Rowden Lane in the 1784 and 1796 maps, no such gates are shown in the maps of 1669, 1848, 1867, 1900, 1910, 1953 and 1974, nor in the aerial photographs of 1946, 1950, 1964 and 1973. Moreover, even by 1784, it is likely that sections A and B of Rowden Lane were a public highway on foot at the very least, and so it is likely that the public was not F excluded from using Rowden Lane in carts or wagons, especially since it was eminently suitable for that use.

"(ix) Spurs 1 and 2 leading to Hulberts Hold and the coppice, south of Rowden Lane, have been depicted in a way similar to Rowden Lane. This is consistent with the use of Rowden Lane and the spurs, by the public in wagons and carts, to gain access to the borough lands, including G the coppice.

"(x) There is an abundance of evidence to justify the inference, which I draw, that Rowden Lane was dedicated to and used by the public as of right with wagons and carts. The public used this to gain access to the borough lands, the infectious hospital (as shown in the 1896 minute in relation to Hulbert Hold, a piece of land owned by the council until 1947), those persons ruly and unruly who used the coppice to cut and H gather wood, soldiers and those using the football ground shown on the 1910 map. Moreover, as the claimants' admission, namely that sections A and B of Rowden Lane was a public highway subject to public rights on foot and horseback, showed, the public had a real reason for using Rowden Lane. Either it was a place of public interest or the public

had a particular purpose for using it. Given this admission, and the width and level of maintenance of Rowden Lane over the centuries, it seems likely that the public would also have used it with wagons and carts. It must be remembered that the coppice was not common land after 1540 and, after 1669, previously common land had been enclosed. After 1669 the use of Rowden Lane would not have been by commoners as an incident of common.

"(xi) Sections A and B of Rowden Lane have been shown to be of a higher standard of status than section C. If, which I reject, section C of Rowden Lane was only a bridleway before the 1970s, sections A and B are, therefore, of a higher status, namely a public vehicular highway.

"(xii) There are, and have been no obstructions or gates limiting or restricting access between sections A and B of Rowden Lane.

"(xiii) There were never any 'Private' signs before 2002.

"(xiv) The manner in and the standard to which sections A and B were maintained (see the Minute of 1881 and the shading on the 1900 map and the quoted correspondence dealing with maintenance), indicate that the highway authority had been maintaining, however intermittently, sections A and B of Rowden Lane.

"(xv) The 1896 minute in relation to the infectious hospital clearly justifies the inference that the council considered Rowden Lane was then a public highway, because otherwise the infectious hospital would be landlocked, given the absence of any private easement *over* Rowden Lane. [Original emphasis.]

"(xvi) The maintenance of the bridge in section A, as shown in the 1881 minutes, would be unnecessary if Rowden Lane were then merely a public highway on foot or on horseback. A wide bridge maintained by the highway authority was plainly excessive if the only public rights were on foot or on horseback.

"(xvii) Rowden Lane was shown on some of the less ancient maps as comprising a track with verges. This is more indicative of a public vehicular use rather than use confined to foot or horseback.

"(xviii) I draw the inference that Gipsy Lane too was a public vehicular highway, on the totality of the evidence, including the shading shown on the Ordnance Survey Map for 1900, the 1910 map and the fact that it bore the name 'Gipsy' Lane. This clearly implied the use of that lane with carts and wagons by travelling gipsies. That use could not have been with the permission of Rowden Farm, since Gipsy Lane was not owned by Rowden Farm. The fact that Gipsy Lane was also a public vehicular highway supports the useable through route contention. Moreover, the Perkins drawing of 1905, derived from maps and other documents which he had seen, referred to a 'cart track' going across the unenclosed sections of Cunniger and Home Down fields.

"(xix) Utilities are found in sections A and B of Rowden Lane. There is no wayleave agreement permitting this, and the inference is that they were installed in the highway under statutory powers. Whilst these are not probative on their own of in public vehicular highway, they are entirely consistent with it.

"(xx) A public house has existed at the corner of the Bath Road and section A of Rowden Lane for many centuries. In the 1960s, when a new

A public house was built, the then narrow section A of Rowden Lane was widened by the dedication of land by the brewery. This could only reasonably have been accepted by the highway authority on the basis that the then existing narrow section A was also public vehicular highway.

"(xxi) Professor Williamson's report virtually admits that section A is a public vehicular highway, and this fact had been conceded by the claimants up to November 2008.

B "(xxii) The 1910 Finance Act is strongly supportive of sections A and B as a wholly untaxed public vehicular highway, as opposed to a private road subject to deduction for minor highway rights.

"(xxiii) The 1937 Chippenham declaration of Rowden Lane as a new street, to be built to certain standards, would seem to be an over-exacting requirement, if the only public rights over Rowden Lane were on foot or

C on horseback.

"(xxiv) The definitive map process, from 1949 to the inquiry in 1955 (in relation to section C as RUPP 5 connecting with sections A and B of Rowden Lane) is highly indicative of sections A and B status as a public vehicular highway, especially when it was shown as such on the relevant maps. Nor is the strength of this conclusion in any way undermined, in

D my judgment, by the fact that section C was subsequently downgraded to a bridleway.

"(xxv) The private conveyancing documents, relating to transfers of property adjoining Rowden Lane, and in particular the absence of express grants of rights of way, are probably explicable on the basis that everybody had regarded the public as having full rights of way over Rowden Lane, as it was a public vehicular highway."

E

127 Even if some of these factual findings can be chipped away at the margins, in our judgment the judge was amply justified in concluding on the material before him that (even without reliance on the evidence of modern use) Rowden Lane was a vehicular highway.

128 The next question that the judge had to consider was the width of the highway. The judge recorded, at para 959, that Mr Laurence accepted

F that if the council established that Rowden Lane is an ancient public vehicular highway, then there is no reason to doubt the applicability of the hedge to hedge presumption. Since the judge did so find, and we have upheld his finding, this issue does not arise. The challenge to the judge's conclusion about the width of the highway was based on the premise that the sole reason for his conclusion was the presumption of dedication under

G section 31 of the Highways Act 1980.

NERCA

129 The judge rejected the first claimant's claim that any vehicular right of way for the public over sections A and B of Rowden Lane was extinguished by section 67 of NERCA. He dealt with it in chapter 22, paras 989–1159 of his judgment. We conclude that the judge was right on

H the points which have been argued substantially for the reasons he gave.

130 Section 67 of NERCA was enacted as a result of public concern about inappropriate use of "green lanes". Green lanes are minor unmade rights of way, over which vehicular rights of way existed but which were generally enjoyed by walkers and horseback riders. Users of mechanically

propelled vehicles ("MPVs"), such as motorcycles, were using some green lanes for recreational purposes and causing damage to them. A

131 Parliament reacted to this concern by restricting the ways that could be used for this purpose. The legislative technique chosen for this purpose was to graft, onto then recent legislation for the official recording of rights of way, the sanction of extinguishment for public rights of way for MPVs in default of such recording by midnight on 1 May 2006. That is the time when section 67 of NERCA came into effect ("the NERCA commencement date"). B

132 The intricacies of the legislative history are described in paras 7 to 13 of the judgment of Dyson LJ in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138, with which Ward and Thomas LJJ agreed. We have briefly outlined the legislative history at para 83 above and it is sufficient for our purposes at this stage to summarise the main steps. Initially, Part IV of NPACA required county councils to maintain definitive maps and statements showing (1) footpaths; (2) bridleways, and (3) RUPPs, or "roads used as public paths". As explained in para 87 above, RUPPS were highways other than footpaths and bridleways which were used by the public mainly for the purposes for which footpaths and bridleways are so used. NPACA was amended by the Countryside Act 1968. This required county councils to reclassify each RUPP as a footpath, a bridleway or a byway open to all traffic, or "BOAT". C D

133 In the Wildlife and Countryside Act 1981 ("WCA"), BOATs were redefined as highways over which the public have vehicular rights of way but which are used by the public mainly for the purposes for which footpaths and bridleways are so used. WCA made provision to amend the definitive map and statement and the *Winchester* case is concerned with the requirements for such applications. E

134 The Countryside and Rights of Way Act 2000 ("CROW") introduced a further requirement to distinguish between RUPPs still shown on definitive maps and statements that conferred the right to use MPVs and those that did not ("restricted byways"). These provisions reflect Parliament's concern that rights of way should be recorded on a register open to public inspection. F

135 The extinguishment of rights of way was a later addition to this process. In the first instance, CROW provided for the extinguishment of unrecorded rights to use ways for MPVs in 2026. However, section 67 of NERCA was subsequently enacted, which provided for their extinguishment in 2006.

136 Section 67(1) of NERCA thus provides for the extinguishment of rights of way which were either not shown on the definitive map or statement, or which were there classified as only footpaths, bridleways or restricted byways, i e not for use by MPVs: G

> "67. *Ending of certain existing unrecorded public rights of way*
>
> "(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement— (a) was not shown in a definitive map and statement, or (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway. But this is subject to subsections (2) to (8)." H

A **137** Section 67 is both dramatic and draconian. It had a "once and for all" effect at the NERCA commencement date. Parliament provided for exceptions from section 67(1), and they are set out in section 67(1)–(8). These exceptions include subsection (2)(b), which falls for consideration on this appeal. This provides:

> "(2) Subsection (1) does not apply to an existing public right of way
B if— . . . (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c 66) (list of highways maintainable at public expense) . . ."

138 Thus the draconian provisions of section 67(1) did not apply if, even though the relevant rights did not appear in the definitive map and
C statement (or are so shown only as a footpath or bridleway), they were, immediately before the NERCA commencement date, shown in the list ("the list of streets") which the council is required to maintain by virtue of section 36(6) of the Highways Act 1980.

139 We now move away from examining the nature of section 67 of NERCA to examining the requirements of section 36. As the judge observes, this provides for a completely different kind of register, namely one relating
D to the maintainability of the highway, not the type of rights that it conferred. Thus section 36(6) (as amended by section 8 of and paragraph 7 of Schedule 4 to the Local Government Act 1985) provides:

> "The council of every county, metropolitan district and London borough and the common council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are
E highways maintainable at the public expense."

140 The effect of the first claimant's claim was to throw on to the council the onus of proving that the exception in section 67(2)(b) was met. Accordingly, it is necessary to consider the statutory requirements relating to the list of streets. Section 36(7) (as amended by section 22(1) of an
F paragraph 4 of Schedule 7 to the Local Government (Wales) Act 1994) stipulates where the list of streets is to be kept, and provides for the list of streets to be made available for public inspection:

> "Every list made under subsection (6) above shall be kept deposited at the offices of the council by whom it was made and may be inspected by any person free of charge at all reasonable hours and in the case of a list made by the council of a county in England, the county council shall
G supply to the council of each district in the county an up-to-date list of the streets within the area of the district that are highways maintainable at the public expense, and the list so supplied shall be kept deposited at the office of the district council and may be inspected by any person free of charge at all reasonable hours."

H **141** There is no provision in section 36(7) for the Secretary of State to make regulations prescribing the form of the list of streets; in particular, whether it could be in electronic form. This may be contrasted with the provisions of section 31A of the 1980 Act (as inserted by section 57 of CROW). Section 31A deals with the information that a landowner must lodge with the council if he wishes to dedicate a right of way to the public.

This makes provision for the council to keep a register of maps, statements and declarations lodged under section 31(6). With effect from 1 October 2007, regulations made pursuant to section 31A provided for the manner in which this information was to be kept. In particular, it provided that it should be kept in both written and electronic form: the Dedicated Highways (Registers under section 31A of the Highways Act 1980) (England) Regulations 2007 (SI 2007/2334), regulation 4. Section 36(7) is, by contrast, completely silent as to the form of the list of streets. The explanation for why section 36 is silent on the medium in which the list of streets is to be kept will be addressed later in this judgment.

142 Returning to section 67 of NERCA, in this case, sections A and B of Rowden Lane were not shown in the definitive map and statement as a RUPP. They were coloured as an ordinary public road (although these sections did not form any part of the council's claim or the inspector's inquiry). In addition they were shown as a road maintainable by the council in a record that the council contended constituted its list of streets. They were indeed a road maintainable by the council as they had become a public vehicular highway before 1835.

143 The issue for determination in respect of this claim, namely the issue whether that record satisfied the exception in section 67(2)(b), was a mixed question of fact and law. Questions as to the actual form of the list and what it contained were questions of fact and questions as to what it should contain or the form it should take were questions of law. This appeal raises no question of fact under this issue and thus there is no doubt thrown on the judge's relevant findings of fact, to which we now turn.

144 The judge found as a fact that the council maintained its list of streets in the form of an electronic database, known as the Exor database ("EDB"). This contained all the information required to be in it as regards the categories of streets for which data was included in it. The EDB was accessible for the purposes of amendment and public inspection at the council's Trowbridge office. The list was headed "list of streets maintained at public expense". It revealed the date of inclusion of an entry so that a search could be carried out to disclose which streets were shown in the list of streets immediately before the NERCA commencement date. This finding disposes of the objection to the EDB on the basis that it did not reveal that information.

145 The EDB included some 19 streets that were in fact maintained at public expense even though they had not become maintainable at public expense. The judge dismissed an objection to reliance on section 67(2)(b) on the basis of their inclusion at para 1144 of his judgment.

146 More seriously, however, the EDB failed to include footpaths and bridleways and a category of minor roads, which the council was liable to maintain. As explained below, Mr Laurence argues that this is fatal to the council's reliance on it under section 67(2)(b). A person wishing to inspect an entry in the EDB could see relevant entries through the council's website, or from a computer terminal in the council's offices or from a printout provided by the council.

147 An entry in the EDB for sections A and B of Rowden Lane had been created in 1994, well before the NERCA commencement date, and could have been inspected on that date. The entry referred to those sections as an

A "adopted" road, which meant for this purpose that the council accepted that it was under a liability to maintain it.

148 The council also kept books known (by reference to their red binding) as the "burgundy books" containing information about roads that it maintained. The judge was prepared to say that, if the list of streets had to be kept in hard copy, these books satisfied the statutory requirements but we are not concerned with that holding. However, the judge's primary B conclusion was that the EDB constituted a list of streets, albeit a defective one for the purposes of section 36(6) of the 1980 Act, and that the exception in section 67(2)(b) of NERCA was, therefore, satisfied.

149 Mr Laurence's challenge to the judge's conclusions of law on the first claimant's NERCA claim falls into two main parts. First, he submits that the EDB could not qualify as the list of streets for the purposes of C section 36(6) primarily because the council had deliberately excluded minor highways, though he does not allege any bad faith on the part of the council. His second submission is directed to the lack of physicality of the EDB which he submits prevents it from being a qualifying list. The first claimant can succeed on her appeal if she succeeds on either of those points.

D *Was the EDB a list of streets for the purposes of section 36(6) of the 1980 Act and of section 67(2)(b) of NERCA?*

150 In support of his first submission, Mr Laurence adopts both a textual and a purposive approach of section 67(2)(b). He relies on the words "required to be kept" and on the concluding words in brackets "(list of highways maintainable at public expense)" in that subsection. These, he contends, are textual indications that the list of streets must be full and E complete. That means, he further submits, that the list of streets had to contain particulars of four categories of highways, namely (1) publicly maintainable footpaths; (2) publicly maintainable bridleways; (3) ordinary publicly maintainable public roads, and (4) minor publicly maintainable vehicular highways mainly used on foot and on horseback. In common with other councils, as Mr Laurence informed us, the council did not include the F fourth category in its list, nor indeed the first and second categories. In fact, the evidence of the council was that its website made that very point clear.

151 In support of his purposive argument, Mr Laurence submits that the self-evident statutory purpose of section 36(6) is that there should be an accurate list of streets available for inspection by the public. Nothing in the Parliament's attitude to the use of MPVs on minor highways was inconsistent with that policy, or diminished its importance. Furthermore, G the purpose of extinguishing vehicular rights of way for MPVs could not be carried out as Parliament had intended, that is, with an exception for those not shown on the definitive map and statement but included in the list of streets, unless there was full compliance with section 36(6).

152 Mr Laurence sought support for his purposive approach in the decision of this court in the *Winchester* case [2009] 1 WLR 138. That case concerned section 67(3), and not section 67(2)(b) of NERCA. Section 67(3) H contains a further exception from section 67(1): this applied, inter alia, if, before 20 January 2005, an application had been made under section 53(5) of WCA for an order making modifications to the definitive map and statement so as to show the way in question as a BOAT. However, section 67(6) of NERCA contains a stipulation for deciding when an

application under section 53(5) of the WCA was made: this stipulation provided that an application under section 53(5) of WCA was made when it was made "in accordance with" paragraph 1 of Schedule 14 to the WCA. and that, accordingly, the application was not valid of it was not so made. Therefore the local authority in that case could not rely on the exception to section 67(1) of NERCA contained in subsection (3). A

153 Mr Laurence submits that the strict approach of this court in that case means that the exception in section 67(2)(b) had also to be interpreted strictly. This court is thus required to be satisfied that the list of streets relied on by the council in this case was a list that complied with the requirements of section 36(6) of the 1980 Act. Accordingly, it would have had to include all four categories of highways. Otherwise the list must be rejected and this court must conclude that the exception was not satisfied. Since the *Winchester* case decides, as he puts it, that a qualifying application under section 67(3) was one that complied strictly with paragraph 1 of Schedule 14 to the WCA a qualifying list of streets under section 67(2)(b) had to comply strictly with section 36(6)(7). Moreover, submits Mr Laurence, the court must interpret section 67(2)(b) without any predisposition related to the merits of the defendant's case on this point. B C

154 Similarly, Mr Laurence submits that, since the EDB is not a list of all the streets required to be included in it, it was not a "list of the streets" for the purposes of section 36(6) and, therefore, the requirements of section 67(2)(b) are not met. While Mr Laurence accepts that a list of streets could contain inaccuracies requiring correction and still qualify as a "list" for the purposes of section 36(6), he submits that a list omitting three of the four categories of highway which should be included simply could not qualify. D E

155 The judge, at para 1092 of his judgment, rejected the argument that section 67(2)(b) of NERCA had to be strictly construed. He held that the exception was of obvious utility despite the different purpose of the list of streets from that of the definitive map and statement. He considered that the *Winchester* case was distinguishable as it turned on different wording in section 67, at para 1102. F

156 Mr Mould seeks to uphold the judge's judgment. If, in order for the exception in section 67(2)(b) to apply, the list of streets had to be fully compliant with section 36(6), there would be uncertainty as to whether a right of way was excluded from extinguishment because it would be necessary to look at the whole of the list and form an evaluative view as to the nature of the exclusions. His submission is that Parliament could not have intended that result. Moreover, if Mr Laurence's interpretation were correct, this court would have to write words into that provision such as "provided that the list complies with section 36(6) of the 1980 Act". This would amount to an impermissible rewriting of section 36(6), and this was outside the scope of interpretation. G

157 Mr Mould contends that the *Winchester* case [2009] 1 WLR 138 is distinguishable because the crucial words in that case were "in accordance with" paragraph 1 of Schedule 14 to the WCA. By contrast, in the present case the list must simply be one that is required to be kept "under" section 36(6) of the 1980 Act. H

158 Mr Mould accepts that a "street" includes the highway. He also accepts, for the purposes only of this appeal, that Mr Laurence is correct in

A saying that the list of streets had to include all four categories of highways listed by him. However, Mr Mould points out that this was not the view of the council as at the NERCA commencement date and that, accordingly, there is no evidence that the council took a deliberate decision not to comply with section 36(6) in the sense of taking a decision that the council knew would not comply with the statutory requirements.

B **159** We agree with Mr Laurence that the court must, in determining a question of statutory interpretation, steer between the Scylla and Charybdis of the textual and purposive approaches, but having thus set our course we arrive at a different destination from that of Mr Laurence. As a matter of plain language, section 67(2)(b) does not, in our judgment, require the list to be fully compliant with section 36(6). The requirement to which it refers is that such a list should exist, as was found to be the case by the judge.

C Moreover, section 36(6) of the 1980 Act contemplates that the list may require to be corrected. It none the less proceeds on the basis that what has to be corrected is a "list", even though it is defective in some respects. Therefore, a list can be a list for the purposes of section 36(6) even though it omits information that is required to be recorded in it, or contains an erroneous entry.

D **160** With regard to the purposive approach, we agree with Mr Mould's submission that Mr Laurence's interpretation of section 67(2)(b) would not promote the purpose of section 67. We understand Mr Laurence's concern that the list of streets should be accurate but the sanction for inaccuracy is not, in our judgment, to be found in section 67 of NERCA but in the enforcement of the statutory duties on public authorities under the 1980 Act, in the normal way, such as by the relator action. The truth is that

E the purpose of section 67(2)(b) is not to protect vehicular rights of way from extinguishment only where there is an accurate list of streets but to give effect to the concern about the misuse of green lanes described above. In the *Winchester* case [2009] 1 WLR 138, Dyson LJ sets out a passage from the foreword to a consultative document issued by the Department for the Environment and Rural Affairs in which the Rural Affairs Minister, Alun

F Michael, said, at para 11:

> "As Rural Affairs Minister, I have been approached by many individuals and organisations who are deeply concerned about problems caused by the use of mechanically propelled vehicles on rights of way and in the wider countryside. I share these concerns, having seen for myself examples of damage to fragile tracks and other aspects of our natural and

G cultural heritage in various areas of the country. There is considerable concern about behaviour that causes distress to others seeking quiet enjoyment of the countryside . . . I do not think that it makes sense that historic evidence of use by horse drawn vehicles or dedications for vehicular use at a time before the internal combustion engine existed can give rise to rights to use modern mechanically propelled vehicles. Those who suffer from vehicle misuse find this incomprehensible and in this

H paper we offer new proposals that are intended to address what many have come to view as the inappropriate and unsustainable way in which vehicular rights are acquired and claimed on rights of way."

161 As to the proposition, based on the *Winchester* case, that there must be strict compliance with section 36(6) of the 1980 Act for the

exception in section 67(2)(b) to apply, we agree with the judge and Mr Mould that the case is distinguishable. That case turns on the provisions of section 67(3)(6). Most importantly section 67(6) requires the application to be "in accordance with paragraph 1 of Schedule 14".

162 We would add that the court in the *Winchester* case did not rule out the possibility of minor discrepancies being disregarded under the principle that the law is not concerned with very little things (de minimis non curat lex). This court gave further consideration to that qualification on the requirement for strict compliance in the later case *R (Maroudas) v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37 (Dyson, Richards and Jackson LJJ). That case made it clear that this court was prepared to contemplate "minor departures", for example the fact that, for a short period of time, the application was not signed as required by the form prescribed by regulations under Schedule 14 for use when making such an application. We accept, however, the complete exclusion of one or more categories of streets cannot be regarded as minor for this purpose. This does not undermine our conclusion on this issue because, for the reason given, the *Winchester* case is not here in point. The inaccuracies in the list did not cause it not to have the essential character of a list of streets. It in fact included over 11,000 streets maintainable by the council.

163 A number of other arguments were made to the judge. Mr Laurence argued for instance that the list had to identify itself as a list of streets pursuant to section 36(6) of the 1980 Act. He also argued that the list failed to comply with section 36(6) because there were some streets in it for which the council had not yet assumed liability for maintenance. The judge rejected these arguments, at paras 1140–1142, 1136, 1145–1146. We likewise reject those arguments. The character of the list was not affected by the inclusion of the 19 streets for which the council had not yet undertaken liability for maintenance. The judge went on to hold that the list of streets was "deposited" at the council's office in Trowbridge for the purposes of section 36(7). Consistently with our conclusion that a statutory list of streets can be kept in computerised form, the word "deposited" has to be interpreted compatibly with that possibility. In the light of our conclusions on the section 67(2)(b) issue, we expect the parties to be able to agree to an order for the dismissal also of that issue either forthwith or as soon as it finally becomes clear that it no longer needs to be decided.

Was the council entitled to keep the list of streets in computerised form?

164 The thrust of Mr Laurence's second submission centred on the fact that the council's list of streets was not kept in physical form. Mr Laurence submits that the EDB is not a list of streets at all because it was kept in computerised form. He further submits that the list must also be such that member of the public can inspect it in its physical form at the council's offices. The judge rejected this submission. Section 320 of the 1980 Act provides that documents required to be kept under that Act must be in writing:

> "All notices, consents, approvals, orders, demands, licences, certificates and other documents authorised or required by or under this Act to be given, made or issued by, or on behalf of, a highway authority or a council, and all notices, consents, requests and applications authorised

A or required by or under this Act to be given or made to a highway authority or a council, shall be in writing."

165 By virtue of section 5 of, and Schedule 1 to, the Interpretation Act 1978: " 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly."

B **166** The judge moreover found that a person reading the EDB or a printout from it could read the entries in it so that the requirements of this definition of "writing" were met. There was no need for there to be any express statutory permission for the council to maintain its list of streets in electronic form, as Mr Laurence had contended.

167 In our judgment, there is no doubt that the judge was correct on this point. The position under section 36(6) is distinguishable from C the register governed by the section 31A regulations. In the latter case, the regulations had to provide for the register to be kept in computerised form because it was desired in that case that both hard and electronic forms of the register should be kept.

Conclusions

D **168** For the above reasons, we dismiss the appeal on this ground. The judge did not rule on a further issue whether the exception in section 67(2)(a) was available to the council. He adjourned that issue to a date to be fixed. In the light of our conclusions on the section 67(2)(b) issue, we expect the parties to be able to agree to any order for the dismissal also of that issue.

E *Result*

169 We conclude that the judge was right to find that sections A and B of Rowden Lane were a public vehicular highway, dedicated at common law. We also conclude that the judge was right to hold that public vehicular rights of passage over those sections of Rowden Lane were not extinguished by NERCA. We therefore dismiss the appeal.

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Appeal dismissed.

GEORGINA ORDE, Barrister

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