Appendix 30

Fortune v Wiltshire CC [2010] EWHC B33 (Ch) (first instance)

IN THE HIGH COURT OF JUSTICE **CLAIM NO: 6BS30497**
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

B E T W E E N:

(1) VERA MARY ANN FORTUNE
(2) ROSEMARY PHOEBE AYRES
(3) JOHN STEWART HESELDEN

Claimants

-and-

WILTSHIRE COUNCIL

First Defendant

-and-

TAYLOR WIMPEY

Second Defendant

APPROVED JUDGMENT

Counsel for the First Claimant: Mr George Laurence QC and Ms Julia Clark, instructed by Nicholsons, Lowestoft, Suffolk.

Counsel for the Second and Third Defendants: Ms Julia Clark, instructed by Hatch Brenner, Norwich.

Counsel for the First Defendant: Mr Timothy Mould QC (written submissions only), Mr Jeremy Burns and Mr Naveen Agnihotri, instructed by the Solicitor to the Council, Wiltshire Council Legal Department, Trowbridge.

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His Honour Judge McCahill QC:

This judgment contains the following chapters.

Chapter 1: Introducton and Background

The parties

1. This is a dispute over the nature and extent of the public's right of way over Rowden Lane, Rowden Hill, Chippenham, Wiltshire, of which the First Defendant is the Highway Authority.

2. Rowden Lane has existed, in one form or another, since at least 1669.

3. The Claimants live at 'Swallow Falls' (First Claimant) and 'Brookfields' (Second and Third Claimants). Both properties front Rowden Lane. The Second Defendant, a property developer with an interest in land adjacent to Rowden Lane, has reached a compromise with the Claimants. The Second Defendant has agreed to be bound by the outcome of this case. Accordingly, it has played no part in the trial before me.

4. Despite the objections of the Claimants, planning permission for residential development comprising 138 houses adjacent to Rowden Lane was granted on appeal in 2002. However, implementation of this planning permission would be thwarted or rendered more difficult, if Rowden Lane were not a public vehicular highway ("PVH").

The Issues

5. The issues which I have to decide in this case include:

   (1) Is Rowden Lane a full public highway, including a public vehicular highway, or is the public only entitled to use Rowden Lane on foot or on horseback ("bridleway")?

   (2) If Rowden Lane is or was a PVH, how did it become a PVH? Rowden Lane has never been formally adopted as a highway maintainable at public expense

under any statutory procedure. If Rowden Lane became a PVH, was it as a result of (i) dedication and acceptance at common law at any time (pre-1835 highways are maintainable at public expense, even in the absence of formal adoption) or (ii) presumed dedication as a highway after public use for 20 years, under s 31 Highways Act 1980. The First Defendant has claimed it has maintained Rowden Lane, since 1983, and probably before 1881.

(3) In any event, is the highway in Rowden Lane – and it is acknowledged by all to be *some* form of public highway - confined to the width of the current metalled road, or does the highway extend 'hedge to hedge', to include both verges bordering the carriageway?

(4) If Rowden Lane was a PVH on or before 2 May 2006 (the commencement date of Section 67 of the Natural Environment and Rural Communities Act 2006 ["NERC"]), did it cease to be a PVH for mechanically propelled vehicles, by reason of Section 67 of NERC, because the First Defendant cannot prove that it was shown in a list required to be kept under Section 36(6) of the Highways Act 1980 ("list of highways maintainable at public expense")?

It is common ground that Rowden Lane was, in fact, shown on a list. The First Defendant alleged this was a compliant Section 36(6) list. However, the Claimants contend that the list on which Rowden Lane undoubtedly appeared was not one which met the requirements of Section 67 NERC or Section 36(6) of the Highways Act 1980 and, as a result, the public lost any vehicular rights over Rowden Lane which it previously enjoyed up to 1 May 2006.

Location and description of Rowden Lane

6. Rowden Lane lies to the south west of Chippenham. The part in dispute is shown coloured yellow, between points M-H-CG, on the plan "GL1" annexed to this judgment as Appendix 1. It runs roughly west-east from the Bath Road (A4), at Rowden Hill.

7. From its western end, close to the A4, it extends along a metalled road to a cattle grid ("CG" on the plan) at its eastern end, where today the metalled road ends. Between these two points, Rowden Lane is approximately 471 metres long. Beyond the cattle grid, a new concrete roadway continues eastwards to a housing development, constructed in the grounds of Rowden Manor in the late 1980s.

8. The first 70 metres of Rowden Lane, ("Section A") between points M and H, run from the A4 to a point just beyond the car park of a public house (built about 1965, and extended in 2000) called the 'Rowden Arms', also known as the 'Hungry Horse'. Until the formal admission in the pleadings was withdrawn by the Claimants shortly before the start of the trial in November 2008, the Claimants had accepted that Section A of Rowden Lane was a PVH. By an amendment to their pleadings, which I allowed, the Claimants now allege that Section A is only a bridleway.

9. Section A was described by the Claimants' expert, Professor Williamson, as:

> [a section which] *is, and has it seems for some time been, maintained as a public road by the local authority. It has the appearance of a suburban street, with pavement, kerbing and street lights.*

10. Having conducted a site view, I agree with, and adopt, that assessment of Section A.

11. The remaining part of Rowden Lane relevant to the dispute ("Section B"), between points H-CG, is about 400 metres long. It runs from just beyond the eastern end of the

car park of the Rowden Arms - namely after a road on the nearside leading to the back entrances of No. 83,85 and 87 Rowden Hill - to the cattle grid.

12. Lying either side of the metalled road, within Section B, are grass verges which abut the boundary hedges or stone walls of the properties fronting or backing on to Rowden Lane.

13. Beyond the cattle grid, between CG to point K on plan GL1, and coloured pink thereon, is Section C of Rowden Lane. Finally, Section D, between points K and L, is shown on the same plan as blue coloured dots.

14. For parts of the Lane, a ditch lies between the boundary wall or hedge and the grass verge. Measured from hedge to hedge, Rowden Lane is between 11 and 13 metres wide. Section B of Rowden Lane is shown topographically in Drawing 4077/A, dated 14 September 2007, also annexed to this judgment as Appendix 2. An aerial view of some of the properties referred to in the judgment is at page 70 in volume 14 of the trial bundle. It forms Appendix 3 to the judgment. Unless otherwise stated, references to Rowden Lane in this judgment are to Sections A and B of the Lane.

15. It is common ground between the parties that Rowden Lane includes a public highway. The dispute between the parties is over the nature of the rights which the public can exercise over the Lane, and the width of the highway over which those rights can be exercised.

16. The highway surface in Rowden Lane is vested in the First Defendant, as Highway Authority, although there are issues over who owns the subsoil under Rowden Lane and whether the verges are wholly private.

Relevant dates for proof of vehicular highway status at common law and under section 31 of the Highways Act 1980.

17. The First Defendant's case is that Sections A and B of Rowden Lane became a public vehicular highway by common law dedication and acceptance many years, if not centuries, before the commencement of these proceedings. The First Defendant relies upon the substantial body of documentary evidence which it submits should be accorded significant weight under section 32 of the Highways Act 1980 in support of its claim for common law dedication and acceptance, which requires no minimum period of public use.

18. However, the First Defendant also relies upon statutory dedication under section 31 of the Highways Act 1980 in relation to section B of Rowden Lane, alleging that the relevant statutory period of 20 years ended in August 2002.

19. Up to November 2008, the Claimants had accepted that section A of Rowden Lane was a public vehicular highway. However, I allowed them to amend their Particulars of Claim to withdraw this admission. The combined effect of section 66 (1) of the Natural Environment and Rural Communities Act 2006 and section 31 (1A) of the Highways Act 1980 means that section A of Rowden Lane cannot have been created a public vehicular highway by virtue of statutory dedication under section 31 of the Highways Act 1980 on the basis of public user occurring after 2 May 2006. Accordingly, the First Defendant's case for a public vehicular highway over section A of Rowden Lane is founded upon dedication and acceptance at common law before 2002.

20. In addition to the mass of historical material which has been placed before me, I have also received oral evidence of modern vehicular user of Rowden Lane. The First Defendant relies upon all the evidence, documentary and of modern user, in support of its case for common law dedication of sections A and B of Rowden Lane as a public

vehicular highway but, in addition, the modern user is relied upon, for the period 1982 to August 2002, in support of the argument that section B of Rowden Lane has been dedicated as a public vehicular highway under section 31 of the Highways Act 1980.

Structure of the Judgment

21. Given the mass of documentary and oral evidence ranging over so many issues and sub-issues in this case, it has been necessary for me to devise a meaningful structure for this judgment. Issues over the width of the highway in Rowden Lane (issue 3, chapter 21) and the impact of the Natural Environment and Rural Communities Act 2006 (issue 4, chapter 22) are relatively self-contained, although chapter 22 contains important correspondence relevant to the reputation and status of Rowden Lane, as well as references to the processes involved in the preparation and revision of the Definitive Map and Statement, more comprehensively analysed in chapter 16.

22. The voluminous historical evidence relied on for common law dedication and acceptance and its analysis (chapters 14 - 20) cover the period from before 1669 to the 1960s.There is, inevitably, an overlap between the evidence of historical and modern user of Rowden Lane. This is most obvious in 1937 (declaration of Rowden Lane as a ‘new street’ under the Public Health Act 1925), in the 1950s (the preparation of the Definitive Map and Statement of minor highways under the National Parks and Access to the Countryside Act 1949 and its special review under the Countryside Act 1968) and reputation.

23. The history of the modern user of section B of Rowden Lane effectively starts in 1937 when Mr Gibbons submitted plans to construct, and subsequently build The Bungalow, the first house to be built on section B of the Lane. The narrative of modern user ends in August or September 2002, when the word 'Private' was painted on the carriageway at the junction of sections A and B of Rowden Lane. This is alleged by the First

Defendant to be the moment when the right of the public to use the way with vehicles was first 'brought into question', within the meaning of section 31 of the Highways Act 1980 which reads:

Dedication of way as highway presumed after public use for 20 years

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

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

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

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

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

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

24. Much of the Claimants' evidence on modern user was directed to matters relied on as establishing an earlier date than 2002 for bringing 'into question' Rowden Lane as a

PVH and/or to negative any intention to dedicate Rowden Lane as a PVH. This evidence created a number of issues, including the following:

(a) whether there had been at some stage, and if so when, a ‘private’ sign at the junction of the A4 and Section A of Rowden Lane, or between Sections A and B;

(b) whether there had been challenges, and if so when, by Dick Jennings of Elm Tree farm and/or Mr and Mrs Burridge (the owners of Rowden Farm) and/or their farm manager to non-residents (ie the public) using Rowden Lane with or without vehicles;

(c) whether there had been stones or other encroachments or obstructions placed on the verges and, if so, when and for what purpose;

(d) the effect of the construction, in 1978, of a new driveway to Brookfields with kerbstones and railway sleepers lining it continuing to the asphalt of the Lane;

(e) the effect of correspondence in 1983,1988, 1989 and 2001;

(f) the effect of the publication by the First Defendant, in 1972, of its draft revised Definitive Map proposing that section C and D of Rowden Lane, then shown as a Road Used as a Public Path, be reclassified as a footpath, under the special review required by the Countryside Act 1968;

(g) whether it was outwith the power of the First Defendant as the Highway Authority to dedicate higher rights as a PVH over sections A and B, if they had been only previously bridleways, and/or whether it was an actionable nuisance so to do;

(h) the nature and frequency of the use by the public of Rowden Lane in vehicles;

(i) the purpose or purposes for which the public used Rowden Lane;

(j) whether parking was possible on the verges or on the Lane,

(k) the installation and the subsequent covering up of a passing bay in the verge outside the paddock owned by Swallow Falls.

25. Given the multiplicity of issues, the number of witnesses who have given oral evidence on some or all of them, and the four principal properties and families (Swallow Falls/First Claimant; Brookfields/Second and Third Claimants; Elm Tree Farm/Jennings family; and The Bungalow/Gibbons family) involved with modern user, I have had to devise a method for dealing with all this material.

26. I begin my analysis of modern user, albeit against a background of earlier Ordnance Survey maps, by dealing with the undisputed evidence of Mr Vaughan, a surveyor, and Mr Price, the Area Highways Engineer.

27. I then analyse the evidence and issues concerning modern user on a property by property basis, starting with Dick Jennings and Elm Tree farm, since Dick Jennings had allegedly challenged unauthorised users of the Lane, removed a ‘Private’ sign, claimed the road was wholly private and privately maintained and had been aggressive and violent in upholding the Lane's private status.

28. Thereafter, I deal with the brother of Dick Jennings, Will Jennings, who was the previous owner both of Brookfields and Swallow Falls. Then I move on to consider in detail Swallow Falls and Brookfields, currently owned by the Claimants. I end my review of the principal properties with the evidence of the Gibbons family, the first family to occupy a home in Section B of Rowden Lane.

29. Having dealt with the four principal properties and the occupying families, I then review the other, often conflicting, evidence on modern user called by the Claimants and the First Defendant.

30. After dealing with my conclusions on section 31 of the Highways Act 1980 (in chapter 13), I discuss dedication and acceptance of Rowden Lane as a highway at common law (chapters 14 - 20), the width of the highway (chapter 21) and the effect of the Natural Environment and Rural Communities Act 2006 (chapter 22).

31. Chapters 23 and 24 contain my summary findings of fact and my overall conclusion.

Properties on the north side of Rowden Lane

32. Walking from the A4 Bath Road towards the cattle grid, one passes, on the north (nearside) of Rowden Lane:

(i) the public house (Rowden Arms/Hungry Horse);

(ii) its car park;

(iii) a road leading to numbers 83, 85 and 87 Rowden Hill (end of Section A);

(iv) The Bungalow and its adjacent land;

(v) fenced rear gardens of properties on the Burleaze estate;

(vi) a footpath running from Burleaze (adjacent to No. 22) across Rowden Lane;

(vii) more fenced rear gardens of the Burleaze estate; and

(viii) the cattle grid (end of Section B).

Properties on the south side of Rowden Lane

33. Walking from the Bath Road towards the cattle grid, one passes, on the south (offside) of Rowden Lane:

(i) the boundary wall (with built in Royal Mail letterbox) and back garden of Alma Villa, located at the corner of Rowden Lane and Bath Road;

(ii) a bridge under which flows a brook;

(iii) Coppice Close, a roadway leading to a small estate, built, at least in part, on land once forming part of Brookfields; (end of Section A);

(iv) a round metalled post embedded in the carriageway adjacent to a boundary wall; next to cottages at Rowden Place;

(v) a group of cottages fronting the Lane, called Rowden Place;

(vi) the old driveway into Brookfields (now leading to further residential development within what had once been the part of the original holding of Brookfields);

(vii) the new driveway and hardstanding (built in 1978) leading to the current and reduced site of Brookfields;

(viii) the paddock (belonging to Swallow Falls);

(ix) Swallow Falls;

(x) a driveway leading, on the left, to the entrance to the caravan storage park at Elm Tree Farm, on the right, to a derelict workshop for assembling double glazing, and, straight on, to open fields;

(xi) Elm Tree farm (now caravan storage);

(xii) Elm Tree Farmhouse;

(xiii) a bridleway leading from the Lane to the south;

(xiv) the Old Piggery; and

(xv) The cattle grid (endof Section B)

Chapter 2: Procedural history

34. The Claim Form in this case was issued on 22 August 2006 in London, two weeks after the First Defendant removed obstructions from the verges outside the Claimants' homes at Swallow Falls and Brookfield in Rowden Lane. However, the seeds of this dispute were sown over 50 years ago, although its most recent history begins in the second half of 2001, with the Claimants' opposition to planning proposals for residential development in or near Rowden Lane.

35. The Claimants applied for an interim injunction on 31 August 2006 before Mr Justice Etherton. That application was adjourned to the trial, and the case was transferred to Bristol. The trial was due to take place in Bristol in October 2007. Unfortunately, no suitably qualified judge was then available in Bristol, and, despite a judge and court being made available at the Royal Courts of Justice to hear the case on the trial dates, there was an objection to that transfer, and the case was adjourned for trial before me. The original time estimate for the trial was four to five days.

36. Following the adjournment of the trial, Taylor Wimpey UK approached the First Defendant to enter into an agreement pursuant to section 278 of the Highways Act 1980 to enable it kto do sufficient work to preserve the planning permission which it had obtained in 2002. On 12 November 2007, the Claimants applied for an injunction restraining the First defendant from entering into the agreement. This was resolved by consent at a hearing before me on 27 November 2007 by Taylor Wimpey UK giving undertakings limiting the scope of work to be done by them and being joined to the action.

37. However, after the trial had been adjourned, extensive amendments were made to the parties' pleadings, numerous additional witness statements were prepared and, quite late in the day Mr Laurence QC was instructed to lead on behalf of the First Claimant. This resulted in a fairly radical overhaul of the Claimants' case.

38. The trial took place before me on 7, 10, 11, 13, 14, 17, 18, 19 and 20 November 2008, and on 15, 16 and 17 April 2009. There was a subsequent interlocutory hearing on 24 April 2009, a site view on 13 August 2009. Two days, 28 and 29 October 2009, were allocated for final oral submissions. These last two days were not required in the end because all closing submissions were made in writing and because, shortly before 28 October the parties agreed an order dealing with a previously contested application to amend the First Defendant's pleadings.

39. The trial was characterised by numerous applications to amend pleadings, new oral and written evidence and almost daily requests for rulings. Understandably, Mr Laurence QC, who came into the case late in the day, was obliged to consider the case afresh and to bring his own legal analysis to bear on the voluminous and expanding documentation in the case. Frequently, this required Mr Burns to deal with requests for further disclosure, new arguments and materials, often at very short notice, whilst having to present his case largely unassisted. At the very least, this background helps to explain the plethora of pleadings in the case.

40. The Claimants' closing written submissions were dated 19 June 2009, 1 September 2009 and 18 September 2009. The First Defendant's closing submissions were dated 21 July 2009 and 11 September 2009.

Chapter 3: Evidence

Documentary and oral evidence

41. In addition to hearing oral evidence from some twenty five witnesses, two of whom were experts in the interpretation of historical documents, I also received written evidence from a number of witnesses which was either undisputed or admitted under the Civil Evidence Act 1995, amongst whom were the First Defendant's Area Highway Engineer and an expert surveyor instructed by the First Defendant. A transcript of the proceedings at trial was prepared each day, and made available to me on the following day.

42. I have also had to consider a mass of historical documentation set out in greater detail in this judgment. It included over 15 maps and plans dated, between 1669 and 1910, as well as more modern maps and plans dated after 1910.

43. Two of the fourteen volumes comprising the trial bundle were dedicated to private conveyancing documentation concerning a number of properties in the vicinity of Rowden Lane, covering the period between 1820 and the 1990s. A further volume contained details of planning applications and the planning history of properties on Rowden Lane from the 1960s onwards.

44. Moreover, I had the advantage of reading Council Minutes, learned publications, extensive correspondence, Council files, as well as decisions by Inspectors and road maintenance records.

45. My understanding of the locality has been greatly assisted by the large number of photographs, aerial and otherwise, and by the DVD of the Lane made during a drive along it by Kevin Fortune, the son of the First Claimant.

46. However, as is so often the case, I derived great benefit from the site view on the afternoon of Thursday, 13 August 2009, which I conducted in the presence of Mr Burns, Ms Clark and a member of the Court staff. Unfortunately, extensive roadworks were being carried out on and in the vicinity of the Bath Road at the time, and, as a result, the A4 was closed to virtually all traffic. Accordingly, only minimal vehicular use of Rowden Lane was observed, although we did observe a number of people walking dogs along sections A and B to the fields beyond and back again. We were granted vehicular access by special arrangements made by the Highway Engineer.

Site view

47. First, we walked the full length of sections A and B, starting from Alma Villa at the corner of the Bath Road and Rowden Lane, up to the cattle grid.

48. During the site view, counsel pointed out to me, at various times, the features of the Lane, its surface, verges (raised and otherwise), walls, hedges, fences, drains, ditches, telegraph poles, electricity cables, gates (opening inwards and outwards), a metal pole next to Rowden Place Cottages, kerbstones, stones and blocks on the verges and driveways (Brookfields), the gate giving access to Brookfields where an alleged assault occurred, road signs, inspection covers, driveways (old and new), hardstanding, old (now derelict) workshop at Swallow Falls, the bridge opposite the public house, the bridge over the A4 at Rowden Hill, new development, the Rowden Cottages and their proximity to the Lane, the old field gate between Swallow Falls and Brookfields, the passing bay (covered up), the spur roads, The Old Piggery, the width of the verges in general and by the cattle grid in particular, as well as other matters, on which each placed reliance. This was a walk between points M-H-CG on plan GL1.

49. Passing the cattle grid, we walked along sections C and D, between points CG-K-L on plan GL 1. My attention was drawn to one verge higher than the other at point K,

limiting or preventing reversing, and to the stile on the nearside leading to a public footpath at point L. We went as far as the new development at Rowden Farm and then retraced our steps to approximately point K, where we walked up the fields (Home Down and the Cunniger) to join the southern end of the Gypsy Lane in the area around point T. There is new development in this area, including Charter Road. Gypsy Lane is now a single track, narrow and overgrown lane which emerges onto the A4, at point P, opposite Ivy Park House where Mrs Burridge lived.

50. We then retraced our steps down Cunniger and then crossed the field diagonally and joined the footpath leading to the hospital at approximately point U on GL1. We emerged from the hospital grounds on to Rowden Road, and we looked at the cul-de-sacs where Burleaze met the field Home Down. It was plain to me that there was parking available in Charter Road and on Burleaze for those who wished to access the fields beyond on foot.

51. Finally, we walked along the footpath adjacent to number 22 Burleaze and into Rowden Lane, where we retraced our steps back down to the bridge in Section A.

52. This is not meant to be an exhaustive recital of everything that was pointed out to me, but it suffices to show the extent of the view which was conducted over a period of approximately two hours.

Written Submissions

53. I have had the advantage of detailed written opening, closing and supplemental submissions. They were necessarily lengthy, complex and wide-ranging. I have considered all these submissions, as I have all the evidence. My decisions are based on all this material, even if it is not specifically mentioned in this judgment.

Chapter 4: Surveying evidence

54. As I indicated above, I begin my consideration of the modern user of Rowden Lane by considering the evidence of Mr Vaughan, a surveyor, and Mr Price, the Area Highway Engineer, neither of whom gave oral evidence before me.

55. Garry Vaughan is a Member of the Institute of Civil Engineering Surveyors. He was instructed by the First Defendant to consider the extent, spatial organisation and relationship of the various features depicted or referred to in various maps, photographs and documents.

Topographical Survey

56. On 7 September 2006, he carried out a site investigation of Section B of Rowden Lane (then, the only Section in dispute) which, according to current highway records held by the First Defendant, is an unclassified county road. He observed:-

1. A wall built of brick and stone which projected into the lane at the commencement of the northern verge outside The Bungalow. The wall gave the impression of private ownership. The width of the carriageway at that point is 5.5m.

2. The southern verge commenced a short distance beyond the projecting brick and stone wall.

3. There appeared to be a drain or sewer laid beneath the southern verge. Three inspection covers were observed.

4. Along sections of the southern verge there were located utility company poles and stay wires.

5. The width of the lane (with verge) was reasonably consistent. Widths measured varied from 11.3m to 13.25m.

6. The oldest feature visible on site was believed to be the hedge and bank with mature trees which bounded the lane on the north side for most of the section in dispute, namely Section B.

7. With the exception of one or two areas which had been allowed to run wild, Rowden Lane was found to be bounded by clear and strong boundary features on both the north and south sides of the Lane.

8. In places, there was evidence of a change of surfacing within the access points to the properties fronting Rowden Lane. At one place, this change occurred part way across the verge. At two other places, this change took place at the back of the verge, namely after the full extent of the highway.

57. On 9 November 2006, Mr Vaughan returned to Rowden Lane to undertake a detailed measured survey. He used very modern and sophisticated equipment which produced a map of great accuracy. Distances were measured to plus or minus 1mm and the collected data was transferred electronically to a computer which produced a digital survey drawing. The accuracy of the survey drawing prepared by Mr Vaughan was orders of magnitude greater than any other form of mapping already available.

58. The next most accurate form of mapping is that produced by the current Ordnance Survey ("OS") map, at accuracies of around 1m (urban), 2.3m (rural). The accuracy of the detail surveyed by him was better than 50mm (2 inches).

59. Having prepared his own digital survey drawing (4077), he then mapped on to it a series of OS maps, starting with the most recent OS map currently available followed by the 1924, 1900 and 1886 editions. As a result, he produced a number of survey

drawings, each combining his own survey drawing with each of those four OS maps, attempting to obtain a best fit. They form Appendices E1, E2, E3 and E4 to his report.

60. The correlation of data between his map and the most recent OS map is excellent, as illustrated by the correlation of hard features at either end of the disputed length of the track.

61. Comparing his digital survey drawing with the most recent digital OS map, he concluded that Rowden Lane had changed very little over the last 10 years. He then looked back at the earlier maps, starting with 1924, through 1900 and ending with the 1886 map. He found excellent correlation between his own digital survey and the 1924, 1900 and 1886 OS maps too.

62. His conclusion, therefore, was that with respect to the agricultural features, there was a high probability of continuity, suggesting that the current configuration of Rowden Lane has broadly remained the same over the last 120 years.

63. In all three maps, Rowden Lane was shown as a numbered parcel of land of similar area (1.498 acres). Brace marks within the parcel of Rowden Lane for each of the three maps implied that the north and south verges were considered to be part of one and the same parcel of land as the carriageway.

64. In none of those three plans was there any sign of a gate or impediment to public access between Sections A and B.

65. In each of the three OS maps:

(i) the depiction of Rowden Lane was consistent with the current layout of Rowden Lane, namely a carriageway with a verge on either side bounded by fence, hedge or wall at the back of the verge;

(ii) the land south of Rowden Lane was divided into three parcels, the first of which is the equivalent of Brookfield plus Swallow Falls, the second is the modern equivalent of Elmtree Farm and the Old Piggery, and the third is the pathway or driveway which currently separates Swallow Falls from Elmtree Farm on the south side of Rowden Lane;

(iii) the cottages at Rowden Place are present;

(iv) Rowden Lane passes beyond where the cattle grid now stands and continues towards Rowden Farm, where it meets a track projecting up to connect with Gypsy Lane;

(v) Rowden Farm is shown as having entrenchments to the west of the farm and a moat enclosing a section of the farmyard. The farm itself is identified as a site of antiquity.

66. In the 1900 OS map, Rowden Lane is shown as 'shaded' (thicker lines) on both sides as far as the cattle grid. This shading was also found on major roads such as the A4 Bath Road, but was not found on other roads, implying that Rowden Lane shared certain characteristics of the A4 Bath Road. This shading is missing from Rowden Lane in the 1886 OS map. Other roads in the area in 1886, including the A4 Bath Road, showed shading along only part of its length, whereas one (the modern A350) was shaded along its entirety.

67. In the 1886 OS map, the verges on either side of the carriageway of Rowden Lane were depicted as rough pasture. Solid line features to either side of Rowden Lane were depicted with mature trees interspersed along the length of the features. This was typically indicative of a classical agricultural hedge bank with mature trees here and there.

68. His conclusion, which I accept, was that, with regard to the agricultural boundary features, there is a high probability of continuity. This suggests that the current configuration of Rowden Lane has remained broadly as it was over the last 120 years.

Aerial photographs

69. Mr Vaughan studied aerial photographs dated 27 July 1973, 16 May 1964, 10 June 1950 and 14 April 1946 in that order. With the exception of the 1973 aerial photograph, which was a laser printed copy, he was able to form a 3D image of the photographs, which he was then able to examine. The purpose of this exercise was to see what utilities or other items or obstructions were shown on the verges of Rowden Lane in those photographs.

70. The 1973 photograph revealed a configuration of carriageway, verge and hedge similar to that he found at the time of his site visit in 2006. Utility poles were visible and cast shadows across Rowden Lane. He could not see any posts or stones obstructing the verge of Rowden Lane, although he saw two vehicles parked on the southern verge, one a white car and the second a lorry or large horse box. The Second Claimant alleged that the horse box referred to in the 1973 photograph was on the verge outside Brookfields. This is a matter of inference only, because she said they owned a horse box that looked like a lorry from above at that time, rather than a statement made from examining the photograph herself.

71. The evidence of Mr Vaughan was not the subject of any cross examination. Instead, the Claimants chose to deal with Mr Vaughan's evidence in their submissions. Indeed he was not called as a witness. In addition to his report, the following admission was made on behalf of the Claimants, namely that it was Mr Vaughan's honest belief that:-

"*Any stones on the verges sufficiently visible to provide warning would be visible on the aerial photographs."*

72. The laser printed copy of the 1973 photograph was not quite as clear as a normal photo quality print. The limitations of this photograph were exposed by the fact that it is common ground that staddle stones were on the verge outside The Bungalow in 1973, yet Mr Vaughan could not detect them in the photograph. Moreover, this aerial photograph did not reveal moulded concrete pots which were then on the southern verge outside Elm Tree farmhouse. Accordingly, the limitations of this photograph must be accepted, at least at the level of seeing posts or stones.

73. An aerial photograph of Swallow Falls, taken in about 1976 but not comprised within Mr Vaughan's report, is in the trial bundle. That photograph, taken at a much lower height, does not show (as a later one taken in the 1990s does), any stones on the verges outside Swallow Falls or the paddock. However, I do emphasise that the 1976 photograph, although contained in the trial bundle, was not examined by Mr Vaughan and does not feature in his report.

74. I turn now to the aerial photographs taken on 16 May 1964. At this time, the current public house and its car park did not exist. Instead, a large detached dwelling house stood within a well clipped hedge.

75. In the 1964 photograph (with references to the comparable item in the other photographs):

(i) There was no verge to Rowden Lane opposite Rowden Place;

(ii) No gate or obstacle to public access to Rowden Lane was shown, and there was free and unimpeded vehicular access along Sections A and B of Rowden Lane. The position was the same in 1950.

(iii) Telegraph poles were clearly spaced out along the length of the southern verge of Rowden Lane, although in 1950 the only telegraph pole was that

adjacent to the garden of Rowden Place. In 1946, even that telegraph pole was not visible;

(iv) The grass verge on the northern side of Rowden Lane was very much as it appears today. I accept that, in 1964, there were six white stones on the verge outside The Bungalow, five of which were west of the access drive near to the edge of the carriageway in what seemed to be an attempt to protect the verge.

(v) By the old (pre 1978) access to Brookfield, he could identify an area of wet gravel, where someone appeared to have left a hosepipe running, and he could see one clearly visible white stone set about 3m from the gable end of the westerly shed on Brookfield. Other than that single stone, the southern verge of Rowden Lane outside Brookfields was unobstructed in 1964. Two small white stones were set on the grass rectangle near to the carriage of Rowden Lane outside Swallow Falls in 1964. In 1950, both the northern and southern verge of Rowden Lane were unobstructed and, except for one or two small trees or bushes within the verges, the position was the same in 1946.

(iv) The carriageway of Rowden Lane appeared to have a gravel surface which ran seamlessly all the way from the A4 to the area where the cattle grid now is. There was, however, a marked change of character of the surface beyond the current position of the cattle grid (Section C), with grass growing in the middle of the track, indicative of less frequent vehicular use or infrequent maintenance. In 1950, the carriageway of Rowden Lane also appeared to have a gravel surface, again running seamlessly all the way from the A4 to where the cattle grid now is. There was no cattle grid there in 1950, nor any marked change in character in the surface on Section C,

nor any grass growing on the running surface. In 1946 too, the carriageway of Rowden Lane appeared to have a gravel surface seamlessly running from the A4 to the end of the disputed section namely where the cattle grid now is.

(v) He was unable to see a cattle grid in the 1964 photographs, though he accepted that the area might have been affected by shade.

(vi) The southern verge of Rowden Lane appeared to be rough pasture in 1964, not the neat clipped lawn that it was in 2006 and still is today. In 1964, the boundaries of Rowden Lane were neat, well maintained hedges with several mature trees spaced along the line of the hedge. In 1950, both the north and south verges of Rowden Lane appeared to have been rough pasture and, although the boundaries of Rowden Lane in 1950 were also shown by mature hedges, only one mature tree was visible in the northern boundary. The hedges in 1950 were not as neat and clipped as they had been in 1964. In 1946, the hedges bounding Rowden Lane appear to have been quite well defined and neat, certainly neater than was visible in 1950.

(vii) The first field east of Brookfields was slightly different in 1964 from today. Whilst the hedge fronting Rowden Lane appeared to be consistent with that which exists today, the field was divided in two in 1964 by a fence which ran south south west from the eastern gate post found 65m from the Brookfield boundary. This gate is still in place today.

(viii) There was a small lay-by or passing place directly in front of the gate 65m from the Brookfield boundary in 1964. That gate was also clearly visible in the 1950 photographs but, by this time, there was no longer a passing place in front of that gate in 1950.

(ix) There was a service cover in front of the gate and tight against the edge of that passing bay in 1964. The service cover was in the same location as the modern service cover 'IC' shown on drawing 4077. In 1950, there was no sign of a service cover in the verge outside the gate 65m east of Brookfield.

(x) By 1964, all the properties relevant to this dispute had been built on Section B of Rowden Lane.

76. Swallow Falls in 1964 had two points of access onto Rowden Lane, divided by a small rectangular area of grass, virtually identical to the current day arrangement. Two small white stones were set on the grass rectangle near to the carriage of Rowden Lane in 1964. This was when Will Jennings, not the Fortune family lived there. Swallow Falls did not exist in the 1950 or 1946 photographs, although, in June 1950, the land was still used as an agricultural field and was bounded by a hedge. That hedge appeared to be consistent with that visible in 1964 and today.

77. In 1964, the first section of Elm Tree Farm, east of Swallow Falls, mostly comprised agricultural buildings and sheds, and the farmyard was bounded by a concrete block wall very similar that which exists today. A lorry or large trailer was parked on the verge next to that concrete block wall in 1964. In 1964, the hedge dividing Rowden Lane from Swallow Falls appeared to be the same hedge that in part remains on site today. In 1950, Elmtree Farm existed only as a series of farm sheds and buildings at the eastern end of the site, and the buildings were only 20-25% of those buildings which existed in 1964. This is indicative of substantial development over the period 1950-1964. In 1946, there were no buildings at Elmtree Farm.

78. The Burleaze estate was under construction in 1964. Even numbers 2-12 appear occupied, and numbers 30 and 32 were just about to have the roof constructed. The

land east of No 32 Burleaze was still farmland in May 1964. Burleaze was not built in 1950 in any form. It was merely open farm land.

79. At the eastern end of Rowden Lane and on the southern verge, farm buildings were located in 1964. This corresponded with the Old Piggery site. There was a number of large sheds packed very closely together where animals, probably pigs, were visible in the pens. The entrance to those farm buildings appeared to have been well used in 1964, as did the entire length of Rowden Lane to that point.In 1950, the eastern end (Old Piggery) comprised a small development of one or two farm buildings which were accessed at a different point to that visible in 1964. However the buildings in 1950 appeared to have received regular vehicular traffic.

80. I accept Mr Vaughan's evidence and analysis of the photographs.

Configuration of the highway

81. Rowden Lane is a carriageway on either side of which is a verge, within which are positioned public utilities. However there is very little, beyond Section A, in the way of street furniture, road sign, lamp posts and the like.

Position within the road hierarchy

82. In modern estate terms, roads serving less than five residential properties can be designated as private drives. Roads which serve as through routes or distributors to other roads are usually in public maintenance, as are roads which serve more than five properties.

83. Currently, Rowden Lane is classified as an unclassified county road which, in Mr Vaughan's opinion, was consistent with the level and nature of the traffic using Rowden Lane. Including the properties at Rowden Farm, Section B of Rowden Lane

serves 12 postal addresses. Mr Vaughan's opinion was that that number of properties should be or deserved to be served by a public adopted highway. He considered it would be inappropriate for such a number of properties to be accessed only by a private road, given the inevitable problems in maintenance to which it would give rise. Lack of maintenance in turn raised issues of safety, public health and the need for police, fire, ambulance and refuse services to have proper access along the Lane. He considered that planning permission has been granted to a number of properties which would have been refused had the status of Rowden Lane been private.

84. None of this evidence was challenged, although it was the Claimants' case that much of Mr Vaughan's evidence, including that dealing with Rowden Lane's position within the road hierarchy, lay outside his professional competence. Nevertheless, I regarded Mr Vaughan's evidence as helpful background information, but of course it is for me, and not Mr Vaughan, to decide the status of Rowden Lane on the totality of the evidence.

The Definitive Map

85. In Appendix E5 to his report, Mr Vaughan reproduced the areas identified upon the 1953 Definitive Map onto a reduced copy of his base plan. He also extracted the dimensions identified on the Definitive Map Statement of 1 May 1953. There is, however, an anomaly with the 182 metre dimension, referred to on the Definitive Statement, running from the cattle grid in the direction of Footpath 1 shown on the Definitive Map. This anomaly highlights the potential unreliability of local authority records, such as the 1974 records (discussed later) held by Chippenham Borough Council before the First Defendant became the Highway Authority.

86. Mr Vaughan made the point that tasks such as the colouring or measuring of plans were left to junior clerks unaware of the legal significance that one day might be placed on a particular scaled dimension or on a particular block of colour.

87. However, what is of significance is that the Definitive Map of 1 May 1953 shows the entire length of Rowden Lane, Sections A and B, to be a full public highway.

Conveyances and plans

88. Having considered the conveyance, and the plan attached thereto, of Swallow Falls to the Fortune family on 24 July 1970, Mr Vaughan concluded that the property conveyed, as described in the conveyance and plan, did not include any part of Rowden Lane or its verges. Having carried out a similar exercise in relation to the conveyance dated 30 September 1963 of Brookfields to Mr Ayres, he also concluded that the conveyance of Brookfields did not include any part of Rowden Lane. He examined the agreement dated 27 October 1977 with Langcote (referred to elsewhere in this judgment) and to the plan attached to it. Again, it was quite clear from that document that Brookfields did not include any part of Rowden Lane.

89. He also considered the conveyance, dated 3 October 1946, of Rowden Farm to Mr and Mrs Burridge, which transferred to the purchaser:

…so far as the Vendor has power to grant the same… full right and liberty for the purchaser… over and along the lane or roadway known as Gypsy Lane… and …on the said Ordnance Survey map and leading from Field 171 on the said map… to the main Bath Road…

90. The second part of this quotation relates to Rowden Lane. Again, he concluded from that conveyance that the land conveyed did not include ownership of any part of Rowden Lane.

91. The last conveyance which Mr Vaughan considered was dated 4 December 1919. It related to a conveyance of what was then known as Rowden Estate, coloured pink on the plan attached to the conveyance. The land south of Rowden Lane - including Brookfields, Swallow Falls, Elm Tree Farm, and the Old Piggery and beyond the cattle grid to include Rowden Farm, as well as land on the northern side of Rowden Lane (excluding The Bungalow) – once formed part of this estate. That plan indicated that part of Rowden Lane fronting Brookfields and Swallow Falls fell outside the Rowden Estate, and so could not have derived rights from it.

92. Elm Tree Farm and the Old Piggery, together with Rowden Farm were part of the Rowden Estate, as were those parts of Rowden Lane abutting them.

93. I accept Mr Vaughan's evidence on these documents, although their interpretation is a matter of legal argument. I consider the conveyancing history of the area in chapter 17 of the judgment.

Wayleaves and Foul Sewer

94. Mr Vaughan examined Wayleave Agreements for electricity supply, dated June and November 1954, to which W H Jennings was a party. The first concerned Alma Villa and the second concerned Swallow Falls. A third agreement, dated October 1954, involved F H Gibbons, and again dealt with electricity power supply. These agreements gave the electricity company the right to go over private land owned by W H Jennings and F H Gibbons. However, these did not relate to the disputed Section B of Rowden Lane, in respect of which no Wayleave Agreements had been made. On the contrary, utilities in the verges and running along Rowden Lane appear to have been installed under statutory provisions, on the basis that Rowden Lane was a public highway.

95. As far as the foul sewer was concerned, the records of Wessex Water show a public adopted foul sewer running along Rowden Lane from Elm Tree Farm to Rowden Place. Some of the service covers for that system have been shown on drawn 4077. Wessex Water holds no private easement documentation in respect of the sewer laid in Rowden Lane.

96. I accept this evidence.

Conclusions of Mr Vaughan

97. The conclusions of Mr Vaughan, which I accept, are:

1. The width of Rowden Lane west of Elm Tree Farm has remained constant since 1886. Individual trees and hedge shrubs may have come and gone but there was no mapping evidence to suggest that the hedge bank which exists today has been moved.

2. Brace marks on 0S maps suggest that Rowden Lane has historically been considered as one parcel.

3. There is no indication since 1886 of any gate or obstruction to public access along Section B.

4. The aerial photographic evidence illustrated four main points:

   (a) lack of obstruction on the verges;

   (b) the apparent growth and development of Brookfields Farm;

   (c) the existence of public utilities since 1964;

(d) the seamless nature of the surfacing of Sections A and B of Rowden Lane between 1946 and 1973.

5. The logical conclusion was that whoever was responsible for the servicing of the most westerly section of Rowden Lane (Section A) was probably responsible for the surfacing of the disputed section.

6. Between 1946 and 1973, the evidence would tend to suggest that stones or other obstacles on the verges were minimal in nature. Moreover, apart from the single stone reported outside Brookfields, there is no support to the Claimants' contention that they had substantially obstructed the verge in front of Brookfields during the period 1963 to 1973. Nor is there any photographic evidence that, since 1963, the Ayres family fenced off the verge with wire fencing. Indeed, the 1964 photograph was of sufficient clarity to reveal such features had they existed.

7. A review of all the conveyancing documentation suggests Brookfields and Swallow Falls did not own any part of Section B of Rowden Lane or its verges.

8. The existence of a large number of services and utilities within Rowden Lane itself is consistent with it having public status, as is the history of development of properties accessed from it.

98. Mr Vaughan referred to his experience over the last 15 years with land disputes, where he had noticed a tendency for members of the conveyancing profession to adopt a "belt and braces" approach towards issues that are not documented perfectly. For example, where the public status of particular streets has been in doubt, statutory declarations have sometimes been taken from longstanding 'vendors' asserting their established rights once and for all, even if history indicated that the way had been a public highway all the time. In other words, the description of private rights over a

particular street does not mean that public rights do not exist. This reflected no more than caution by those responsible for preparing conveyances.

99. Twentieth century conveyances both of Brookfields and Swallow Falls show that, when conveyed, they did not expressly include any part of Rowden Lane, its carriageway or verges.

100. Although I have set out at considerable length the detailed and complex evidence of Mr Vaughan, it should be noted that the Claimants' case is that there would be no need to set out in detail all the private rights enjoyed by these properties over the verges and carriageway of Rowden Lane in modern conveyances, since they would be deemed to be transferred in any event, without the need for complex wording, under Section 62 of the Law of Property Act 1925.

Chapter 5: The undisputed evidence of the Area Highways Engineer

101. Kristian Price has been the Area Highways Engineer responsible for Rowden Lane since February 2006.

Removal of objects in August 2006

102. He was responsible for overseeing the removal of items from the verges outside Swallow Falls and Brookfields, for the second time, on 8 August 2006. On this occasion, they removed three formed concrete bollards, two half kerb stones, six white wooden posts, one white metal post and fourteen white plastic posts with metal bases. The position of these stones and posts was shown in the plan 'KP1', at page 694, and in the photographs at page 698, in Volume 2.

Passing vehicles

103. When these items were being removed, Mr Price photographed cars trying to pass on Rowden Lane, some 25 metres east of Brookfields. At this location, the metal carriageway was 3.5 metres wide and the width of the 2 passing vehicles was 4.06 metres. As a result, one vehicle had to use the verge to pass.

104. He measured the varying widths of the carriageway on Rowden Lane, which ranged between 2.76 metres and 4.6 metres wide. On his plan KP5, at page 700, he marked the position of foul sewer manhole covers, telegraph poles and manholes.

105. Given the varying width of Rowden Lane, modest at the best of times, passing vehicles would have to use the adjacent verges to pass and re-pass. This was all the more the case when caravans used Rowden Lane to gain access to Elm Tree Farm Caravan storage area, and when ordinary cars encountered tractors, agricultural and refuse vehicles.

Utilities

106. Mr Price made some enquiries into other wayleave agreements. He discovered a wayleave agreement with BT for Brookfields, but none for Swallow Falls. This accords with the First Defendant's view that the telegraph pole, currently positioned well within the boundary hedge or fence of Brookfields, did require a wayleave agreement to permit its installation, whereas the pole adjacent to Swallow Falls did not require a wayleave agreement as it was within the public highway.

Correspondence

107. Mr Price reviewed some correspondence, all of which is dealt with elsewhere in this judgment, emanating from the Fortune family which, on its face, is broadly inconsistent

with that family's contention that the verges outside their property belonged to Swallow Fall and were private.

Modern maintenance

108. Finally, he carried out some investigation in to maintenance records for Rowden Lane.

109. Different recording systems had been used over the 20 year period preceding his witness statement in August 2007. Highway maintenance records are now kept for only 5 years. However, Mr Price has been able to recover some records within that period for Rowden Lane. The whole length of Rowden Lane, Sections A and B, were inspected, and no defects were found on:

(a) 17 October 2003;

(b) 19 April 2004;

(c) 18 October 2004;

(d) 28 April 2006;

(e) 23 October 2006; and

(f) 25 April 2007.

110. The record sheets for those inspections are set out at pages 729-733 inclusive in Volume 2.

111. On 28 October 2005, an unknown enquirer telephoned to complain about stones on the verge and a home made 'No Parking' sign on the southern verges of Rowden

Lane. This prompted a visit by a Council employee to Rowden Lane on 31 October 2005 to look at these items.

112. Accordingly, although the record is incomplete, there is a record of safety inspections of the entire length of Rowden Lane on those dates and an inspection of Section B on 31 October 2005.

113. Mr Price also produced memorandum, dated 29 March 1983 which indicated that the First Defendant was giving consideration to resurfacing Rowden Lane in 1983/1984, should funds be available. Although I deal with the matter in greater detail elsewhere in this judgment, there is also correspondence from the First Defendant indicating that it had carried out surfacing work on Rowden Lane in 1988 and 1989.

Chapter 6: Elm Tree Farm and the family of Richard Francis ("Dick") Jennings

114. Dick Jennings was born in or about 1918, and died in 1999. His widow, Phyllis Mary Jennings, celebrated her 95th birthday on 17 April 2009. After they married, they lived at 2 Rowden Road, an adjacent road running parallel with Rowden Lane. Their eldest child, Mary (Mary Puntis), was born on 26 November 1943. They have 3 other children Richard ("Little Dick") born in 1946, Carol and the youngest, Martin, born in 1957.

115. On 31 March 1945, Dick Jennings purchased the land on which he subsequently built Elm Tree Farmhouse and Elm Tree Pig Farm. In 1953, the construction of Elm Tree Farmhouse was completed, and the family moved in.

116. In 1993, the pig farm closed completely, and the farm area is now used by Martin to run his caravan storage business.

Planning History of Elm Tree Farm

117. The planning history for Elmtree Farm includes the following:

(i) 2 November 1981: planning permission granted for the use of agricultural land fronting Rowden Lane to be used for storage of up to 25 touring caravans;

(ii) 7 September 1987: planning permission granted for change of use of part of the farm to caravan storage. It was a condition of permission that this use should cease on 7 September 1990;

(iii) 25 April 1988: planning permission granted to change of use of a redundant farm workers mess room to light industrial use – This may have been connected with the packaging business run by Martin Jennings;

(iv) 30 October 1989: planning permission granted extending the area of the caravan storage park. This contained the condition:

Prior to the commencement of the use of the site for the storing of caravans the approved passing bay shall be constructed in accordance with the details hereby permitted.

This permission allowed an additional 14 vans to be stored.

(v) 1990: planning permission for an extra 25 caravans.

(vi) 19 August 1993: permission for a further 64 vans, permitting a total of 128 caravans. This permission required the passing bay to be extended.

<u>Mary Puntis</u>

118. Mary, a retired School Teacher, was at Teacher Training College between 1962 and 1965. However she returned home during holiday times, and often at weekends. Elm

Tree Farm was her home until she married in December 1967. Between 1968 and 1970, she and her husband lived in Southampton, but they returned to Chippenham in 1970. Between 1972 and 1979, she and her husband lived in Burleaze, the new estate built in the late 1960s which backed on to Rowden Lane. In 1979, she and her husband moved to Saltersford Lane, one mile from Elm Tree Farm, and she still lives there.

119. She worked part time at the farm between 1970 and 1980 and taught two nights per week. She then taught full time between 1980 until she retired in 2003.

120. She has enjoyed a very warm, close, loyal and supportive relationship with her parents throughout her life. Not only did she work for her father on the farm, but also she wrote letters for him. She cut her mother and father's hair and, latterly, she used to play skittles with her father every week.

121. I am perfectly satisfied that she had a well balanced view of her father's character and personality. She was realistic about him, and was fully aware of his strengths, weaknesses and propensities. As the eldest in the family, a professional, and the writer of her father's correspondence, I am satisfied that she had the most detailed knowledge, amongst her siblings, of her father and of his views and opinions.

122. I regarded her as a reliable and accurate witness of transparent honesty, in whose evidence I could find no taint of bias or quest for financial gain.

123. Following Dick's death, her brother Martin (who used to run his packaging business at the farm, but now runs it elsewhere) inherited the caravan site. Under his mother's will, he is due to inherit Elm Tree Farmhouse too. I cannot therefore see how Mary stands to gain materially from the outcome of this case. Moreover, her brother Martin has no plans to sell Elm Tree Farm. He has already turned down a very significant offer from developers to purchase it. His intention, if and when he acquires the farmhouse, is to

demolish it, and to build his new home there. He will rely on the caravan storage business to provide his pension income.

124. Martin currently lives at 1 Rowden Place, the cottage nearest the A4. It is opposite the public house, and close the end of section A. He moved there in 1980, when he married.

125. Mary's sister, Carol, has not been a witness in this case. She was mentioned by Mary only to inform the court that she did have a sister. She had worked on the farm for seven years before she left in 1970, when she married.

Assessment of Dick Jennings

126. I unhesitatingly accept Mary's assessment of her father. He was never violent in the home. He never smacked her, although he would give her 'the rough end of his tongue'. She said that he could be cantankerous, but never violent. She rejected, and I find rightly so, some of the allegations which were made against her father. In particular, I reject the suggestion that he drove at any one with his tractor, or went for Mr Pullin with a pitch fork.

127. I am perfectly satisfied that had either of these events occurred, they would have been so notorious in the locality that she would have heard about them. Nor is it a case of these incidents being known to her mother, but concealed from Mary. I accept Mary's evidence that her mother had never heard of any such suggestion either.

Challenges to non-residents

128. I find that Dick Jennings did not challenge users of the lane, or chase people off from using it, because Rowden Lane was *private*. I accept, however, that there was a period of time, around 1965, when he got cross with lorry drivers who drove down Rowden

Lane, having been led by a poorly located road sign to believe that they had turned into the B4528, the road to Lacock. One of these lorries damaged his wall when trying to turn round and go back. I shall deal with this period more fully when dealing with road signs.

129. I also accept that he objected to people parking in the passing bay which he installed in the verge in front of the paddock shortly after 1989, and which he was required to extend in 1993, as a letter written by his planning consultant to the Chief Planning Officer, on 23 March 1983, indicated:

My client has agreed to extend the passing pay by 3 metres. Drawing enclosed. My client has found that this passing bay has been used for short and long term parking and its efforts to stop it happening has ended in his being personally threatened with physical damage.

130. Of course, at the time those comments were made, neither Dick Jennings nor the planning consultant could have known that, years later, there would be an issue in this litigation over whether the general public drove cars over, and parked on, Section B of Rowden Lane.

Mrs Jennings

131. Mrs Jennings has not given evidence. She could not deal therefore with an alleged conversation which Ms Ayres said she had with her in 2002, in which Mrs Jennings is supposed to have accepted that the lane was private. Ms Ayres produced a note of that conversation (14/41).

132. I am not satisfied that Mrs Jennings went beyond making the point that the Lane had been *maintained* by the residents. I am not satisfied that she was saying there were no public vehicular rights over the carriageway or the verges. It is so wholly inconsistent

with what I find was the well known and long held view by Dick and Phyllis Jennings, namely that Rowden Lane was a full public highway, 'privately kept'. I consider it to be improbable, given the views expressed by her husband, both orally and in writing, that the Lane was public, that she would ever have said that the Lane or verges were wholly private.

Dick Jennings's view of the status of Rowden Lane

133. I give two examples of Dick Jennings's view of the status of Rowden Lane.

134. The first is contained in a letter, probably dated about March 1983, which Dick Jennings wrote to JP Davies, the County Surveyor, at the Highways Department, Wiltshire County Council. It read:

Dear Sir,

With reference to the last paragraph of your letter, I would like to point out that I have contacted your office on 3 separate occasions regarding the condition of Rowden Lane.

On the third occasion, some 18 months ago, I received a visit from an engineer at Wooton Bassett. His inspection of the lane supported my view that repairs were urgently needed but that the council did not have the funds to carry out the work.

I remember that many years ago, perhaps 40 years ago, the council posted a notice in the lane which stated that they were taking over responsibility for the upkeep. Since that time, little or no upkeep has been undertaken, and surely now some funds should be made available after all this time.

There are places in the lane, where it can be clearly seen that vehicle sumps and axles have been striking the surface, causing damage to the vehicles and further

deteriorating the surface. The surface is further deteriorating with every thunder storm and frost.

In addition, some 3 weeks ago 2 vehicles were involved in a collision which was caused in part by trying to negotiate the best course in the lane.

Since my efforts over the years, to improve the condition of the lane, have fallen on deaf ears, I have decided never again to have any private interest in the matter.

Furthermore, should any of my vehicles suffer any damage as a result of the condition of the lane, I shall present the council with the repair bill.

135. That letter was passed by the County Surveyor to the Area Highway Engineer who, in a memorandum dated 29 March 1983, wrote:

"With reference to your memo dated 10 March 1983, I consider that it will be prudent to place the road on my list of roads requiring surfacing during the year 1983/84 should funds be available and to give it reasonably high priority although I would not consider the surface to be a problem to vehicles at the present time, having regard to the unclassified nature of the road".

136. The second example of Dick Jennings view is set out below in his letter, dated 1 July 1983, to the Department of the Environment in support of his appeal against a refusal to permit a further 25 caravans to be stored at Elm Tree Farm, in addition to the 25 permitted in 1981. There had been an objection to this application in 1983 by the Second Claimant, Ms Ayres. Addressing her specific objection, he wrote this:

<u>Reference letter from Ms R P Ayres</u>

Ms Ayres lives in a bungalow which is set well back from the lane and is screened from the lane by mature trees. Her view of the lane is therefore very restricted. She

does not drive a car and therefore her practical interest in the lane must be minimal. She is incorrect when she says that the lane is not a council road. It is a council road and has been for 30 years or more. You may obtain confirmation from this from the Highway Department. Her entrance to Rowden Lane is at the lower end where it widens into Rowden Place which is 5.5M wide with a footpath. In view of this, and the fact that she has submitted 2 letters, I consider that the information she has presented to you to be unreliable.

137. In the same letter, he made another comment which is said to be inconsistent with this view. He said this of the Council's submission:

"Ref para 5.1

I find this statement very interesting. Are the council trying to imply that this is a well used public footpath? I have lived in Rowden Lane for over 30 years. Very few people use it as a footpath due, I suspect, to the fact that it does not lead to any where except farms and that not many people enjoy the smell of a pig farm".

138. It has been suggested on behalf of the Claimants that this comment militates against the argument that Rowden Lane was much used by the public. It is difficult to comment on this, since the document to which the letter was replying is not in the trial bundle.

139. On balance, I think his comment related to Rowden Lane as a whole, rather than the small driveway or path between the entrance to the caravan storage park at Elm Tree Farm and Mr Fortune's workshop at Swallow Falls. This driveway or path does not really lead to farms but to open fields.

140. In my judgment, Dick Jennings was merely indicating that he did not think many people walked along Rowden Lane, presumably in answer to a suggestion that more caravans on the Lane might impede pedestrian access. Whatever it relates to, it does

not negative his view, clearly expressed in precisely the same letter, that the Lane was a full public highway which the Council was willing to maintain.

141. Given these views, and his frustration at previous failures on the part of the Council to maintain Rowden Lane, one can understand how he regarded Rowden Lane as a 'public Lane, privately kept'.

142. Accordingly, I reject the evidence of Kevin Fortune and Mr Soady that Dick Jennings alleged that the Lane was private. It may well be that there was some misunderstanding of his phrase "public Lane, privately kept" where the listener has allowed the reference "to privately kept" to colour recollection. Moreover, the fact that the Lane was privately kept for some periods of time, and not always maintain**ed** in fact by the Highway Authority, does not mean that it was not a highway maintain**able** at public expense. The Highway Authority may simply have had insufficient funds to maintain it, or did not regard it as a priority.

Martin Jennings

143. Regrettably, however, the Jennings family has not spoken with one voice on the issue of whether the Lane was private. In particular, Richard Jennings junior ("Little Dick", born 1946) and Martin (born 1957) have from time to time expressed contrary views.

144. In 2002, the Highway Authority became concerned about stones, posts and other obstructions appearing, or already present, on the verges in Rowden Lane. On 29 April 2002, the Area Highway Officer, Mr Raubenheimer, wrote a letter to the residents of Elm Tree Farm, Swallow Falls and Brookfields, complaining about obstructions on the verges, namely stones in the case of Elm Tree Farm, and posts in the case of Swallow Falls and Brookfields. The letter was in the following terms:

I am in receipt of a number of complaints about the presence of stones on the highway verge at the above location. In response to these complaints an inspection has taken place and it is noted that there are stones on the verge in front of your property.

The road side verge forms part of the highway. Therefore any object placed on the highway verge effectively constitutes an obstruction of the highway. These stones placed on the highway verge are a hazard to users on the highway and could contribute to or cause an accident or injury to users of the highway.

I therefore ask that you make arrangements to remove these from the highway verge within 14 days of the date of this letter. In the event that you are unable to do this I will instruct my Highway Maintenance Contractor to remove the objects from the verge and take to tip. You should be aware that the Highways Act 1980 not only empowers me to take this action but to recover the costs so incurred from you.

Should you have any difficulty in this matter please contact me at the above address.

Yours faithfully

Emil Raubenheimer

Area Highway Officer

145. That letter was delivered to Elm Tree Farm, Swallow Falls and Brookfields by Mr Raubenheimer on 30 April 2002.

146. Martin Jennings telephoned Mr IR Gibbons of Wiltshire County Solicitor's Department on 26 July 2002 to discuss, inter alia, this letter. Mr Gibbons made a manuscript note of that telephone conversation, which was subsequently typed. I find it was an accurate record of the telephone conversation. It read:

I received a telephone call from Mr Jennings of Elm Tree Farm, Rowden Lane, Chippenham at about 1.30pm today. He said he wished to talk to me at some length about the situation at Rowden Lane. (He advised me some way through the conversation that our conversation was being recorded). He referred to the letter which was sent to him dated 29 April 2002 from the Area Highway Officer, Mr Raubenheimer, requesting removal of stones from the verge. He explained that his father had put the stones there some 30 years ago. At that time Rowden Lane was a private lane servicing the farms. He said that at the time the letter came through his neighbours, including Mr Ayres, decided to put posts up.

Mr Jennings responded to Mr Raubenheimer by saying that if he could prove the verge was highway then he would not remove the stones. Mr Jennings consulted a solicitor to ascertain the legal ownership of the grass verge. He was advised and accepted that the land is not on his deeds and he does not own it. He still cuts the [grass] to keep it tidy. He said he does not care what his neighbours wish to do about the issue, it is not a problem so far as he is concerned.

He mentioned that he had been approached by a developer and had told them that his land was not for sale.

He referred to a second letter which he received (which I understood to be a copy of the letter of 21 June 2002) which was sent to the Chairman of the Rowden Residents Association. He said it should not have been sent to him as he had already by this time removed the stones. I apologise that we had bothered him if this was the case.

It would appear that the main purpose of his call was to draw the council's attention to a problem between his neighbour Mr Fortune and his neighbour Mr Ayres. He told me that Mr Ayres has threatened to issue a writ against Mr Fortune if by Monday 28 July Mr Fortune has not removed a made up lay-by in front of his property which Mr Ayres claims is illegal. Mr Jennings said that the lay-by was put there by his father (now

dead) as a condition of planning permission for his business involving the storage of caravans. The lay-by was constructed to council specifications (I understood this to mean specifications of the planning authority of North Wilts District Council). The purpose was to facilitate the passage of vehicles down that part of the lane. Mr Jennings also operates a packaging business. The farm ceased operations some while ago.

The lay-by had been there for 15 years or so. He understands that Mr Fortune wishes to avoid Mr Ayres taking civil action in respect of the lay-by and has engaged a contractor to dig it up tomorrow. Mr Jennings says it is up to Mr Fortune to do what he likes, but he is concerned that if the lay-by is removed it may put his caravan business and the planning permission in jeopardy. He wanted to draw this to the urgent attention of the council and wished to know what the council intended to do about the situation.

I confirmed the council's view that the verges formed part of the highway. He did ask me what evidence I was relying on for that statement. I informed him that evidence had been produced to the residents but clearly there was a disagreement which might ultimately have to be tested in the courts.

I advised him that I would consult the Director of Environmental Services about the information which he had provided to me and the council would consider the position.

147. The reference in that note to Mr Ayres is probably a reference to the Third Claimant, Mr Heselden. I find, on the balance of probabilities, that Kevin Fortune did remove the passing bay but only after, and as a result of, improper and unjustified pressure applied by Mr Heselden on Kevin Fortune, including the threat of legal action.

148. In August/September 2002, someone had painted overnight the word "Private" on the carriageway of Rowden Lane, just beyond the end of the public house car park, at the

junctions of Section A and B of Rowden Lane. This is shown at page 87 in volume 14 of the trial bundle. I find, on the balance of probabilities, that this was done by, or on the instructions of, the Second and/or Third Claimants.

149. Martin Jennings was not called as a witness by either party in this case. Nevertheless, the Claimants rely upon his assertion in that telephone conversation that, in the early 1970s, Rowden Lane and/or its verges were considered to be private. This contradicts Mary Puntis's description of her father's belief. The suggestion was made that Martin must have got this information from his father, and that this showed inconsistency in his views on the status of the Lane.

150. I accept Mary Puntis's evidence that Martin's knowledge of the relevant history was extremely limited. He was born in 1957, some 14 years after Mary.

151. The fact of the matter is that, having taken legal advice, Martin removed the stones. He must have accepted the Council's position. Indeed, I find that Martin Jennings fully anticipated that Rowden Lane would one day be widened, and absorb some or all of the verges, because he planted a hedge to preserve the visual amenity of Elmtree Farm House against such a contingency. The hedge which he planted, with its trimmed and castellated tops, is shown in photographs 39 and 40 on page 34 in Volume 8. In my judgment, Martin accepted that Rowden Lane and its verges constituted a public highway.

152. In so far as there remains a conflict between the views of Mary and Martin, I prefer Mary's more detailed and intimate knowledge both of the area and of her father's views. I find that Dick's views were truly represented in the letters he sent to the Highway Authority and to the Planning Inspectorate.

Little Dick Jennings

153. The real conflict of oral and written evidence in this branch of the Jennings family was between Mary and her brother Richard junior ("Little Dick"). His written evidence was to the effect that:

1. Rowden Lane was always a private lane, privately maintained. Although requests were made to the Council to assist with the maintenance of the Lane this was always refused.

2. In the 1960's, because of a misplaced road sign, lorries turned left into Rowden Lane, mistakenly thinking it was the Lacock Road.

3. At the bottom of the lane (ie near the A4) there was a "No Through Road" board. After complaints, a proper sign was put up by Wiltshire County Council stating "Private lane – no through road", although he thought this was removed when the public house was built/refurbished in the 1960s.

154. One of the sad features of this case is the rift which has existed for decades between Little Dick, his parents and his sisters. He ceased to have anything to do with his family in about 1968, on leaving the farm. Martin was then only 11. However some 7 or 8 years ago, Martin contacted Little Dick and they have since tried to restore a fraternal relationship.

155. In his oral evidence, he expanded on the "Private" signs, and alleged that his father told him that Rowden Lane was private. He said that his father had been violent to him on a few occasions.

156. Little Dick married in 1968, and around that time purchased Number 16 Burleaze. He now lives in Chippenham. He had not spoken to his father since 1970/1971. The rift

started when he overheard a discussion between his parents and his siblings about how much he was going to be paid on the farm. Mary Puntis did not even recognise Little Dick, when they were both in the same court room. He had to be pointed out to her.

157. In cross-examination, he acknowledged that he was no longer sure about whether the word “Private” appeared on any sign close to the A4, as he indicated in his first written witness statement. However he then talked about another sign - not the one by Alma Villa to which he was referring in his witness statement - further up which said “Private Lane”.

158. The conveyance of Elmtree Farm to Dick Jennings in 1945 did not expressly convey to him any part of Rowden Lane to him. Nor was any private right of way over Rowden Lane expressly granted.

159. Little Dick’s recollection of Rowden Lane in the 1950s was of a track which began at the junction of Sections A and B. It was really impassable except by tractors because of a grass camber. However this is not consistent with the evidence of Mr Vaughan, whose scrutiny of the aerial photographs discloses no such camber. Contrary to Little Dick’s evidence, the aerial photographs showed a hedge existed in the 1950s on the boundary of Elmtree Farm.

160. I never doubted Richard Jennings’ honesty. He gave his evidence in a forthright and straightforward way. I do believe, however, that he is confused in his mind about what signs were placed where. Nevertheless, I accept his evidence that there were some strong words and physical interaction between himself and his late father at the time they fell out.

161. I have considered whether, given the concession that Dick Jennings senior might have said anything to get planning permission, he was saying different things to different people at different times, depending on his purpose.

162. I am satisfied, on the balance of probabilities, that his genuine view always was that the Lane was public but, somewhat sarcastically, added that it was “privately kept”. In this regard, I also reject the evidence of Kevin Fortune to the effect that Dick Jennings told him that he believed the lane was private, when discussing the lay-by which, in 1989, was being built into the verge in front of the paddock next to Swallow Falls.

163. The fact remains that the lay-by, once it was constructed, was never challenged or removed by Mr Fortune, until he removed it as a result of what I find was improper pressure from Mr Heselden.

Signs

164. Despite evidence to the contrary given by Little Dick and other witnesses, I unhesitatingly accept the evidence of Mary Puntis, supported by a number of witnesses, that there were only two signs in existence at the Bath Road end of Rowden Lane.

165. The first was a black and white metal council sign stating “No Through Road”. This was on the wall outside Alma Villa. It was more or less parallel with the A4 and meant to be visible to those turning into Rowden Lane from Chippenham. This sign was there as long as Mary Puntis could remember. She was born in 1946. The sign however disappeared when the public house was rebuilt in 1965. There was no explanation for why these two events were linked, but it may have been to remove any discouragement to people using the public house, the car park to which was accessed from Rowden Lane.

166. Many years later, the ‘No Through Road’ sign was replaced with its modern coloured equivalent installed on a pole on the near side of Rowden Lane. This sign is still there. It is a modern coloured sign depicting a cul-de-sac.

167. The second sign was a wooden board painted, erected and removed by Mary Puntis, again around 1965, which was temporarily fixed to a telegraph pole near the post box at the mouth of Rowden Lane. It read ”Lane to Farms only”. This sign was erected to address the temporary problem caused the erroneous siting on the A4 of the turning for the Lacock Road, the B4528. This had been positioned in such a way as to suggest to those travelling out of Chippenham that the road to Lacock was left down Rowden Lane, whereas it was the next turning on the left after Rowden Lane. Once the Council located correctly the sign for Lacock, the problem of lorries and vehicles coming down Rowden Lane abated. Therefore, as she told me, the sign was removed by Mary Puntis.

168. In summary, I find that there never was a sign on or on the approach to Rowden Lane containing the word “Private”.

169. As I have already indicated, I also reject the suggestion that Dick Jennings drove his tractor at vehicles driving down Rowden Lane. His sole concern was that lorries were been driven down Rowden Lane by drivers, thinking they were on the road to Lacock. This then created significant problems, when they tried to turn around. One such lorry, whilst executing a three point turn to go back to the A4, damaged the wall outside Elm Tree Farm.

170. Dick Jennings’ activity in remonstrating with drivers was purely concerned with problems of their being on the wrong road. It was never to do with the suggestion that people were unlawfully using a private lane or road. Where the evidence of Mary

conflicts with that of Richard and others on this issue, I prefer the evidence of Mary Puntis.

Chapter 7: W H Jennings, his land (including, until 1970, Swallow Falls) and family

171. W H ("Will") Jennings was the brother of Dick Jennings. Before he bought any land in Rowden Lane, he lived in Alma Villa, at the corner of Rowden Lane and the A4. His son, Brian Jennings, gave evidence before me.

172. Until his death on 16 February 1938, David Townsend owned, inter alia, land on the south side of Rowden Lane between the brook, on the west, right up to the cattle grid. This land was subsequently sold off in different portions and became, as one walks from the bridge over the brook in Rowden Lane towards the cattle grid on the offside, Brookfield, Swallow Falls, Elmtree Farm and the old piggeries in that order.

173. On 31 December 1944, the personal representatives of David Townsend sold to Will Jennings the land which became Brookfields (although originally much larger in size than its current area, as the result of sales of land) and Swallow Falls. The conveyance to WH Jennings is not in the trial bundle, but the plan showing the land which he acquired on 31 December 1994 is shown attached to his statutory declaration at Volume 5, page 208.

174. Not long after Will Jennings acquired that large area of land, he sold off, on 22 January 1945, the land known as Brookfields to Lewis William Hunt. Part of that land was sold off or developed by the Ayres family. I shall return to deal with Brookfields later in this judgment.

175. It would appear that the real purpose behind Will Jennings's purchase of the land was to build himself a new home, Swallow Falls. He lived there between 1955 and 24 July 1970, when he sold Swallow Falls to Leslie and Vera Fortune, the parents of Kevin

Fortune. Vera Fortune is the First Claimant. It therefore follows that Will Jennings and his family, at Swallow Falls, were next door neighbours of Dick Jennings and family at Elm Tree Farm.

176. In 1945, RF "Dick" Jennings had also purchased the land which was to become Elm Tree Farm from the personal representatives of David Townsend. The personal representatives of David Townsend also sold the Old Piggery, immediately adjacent to the cattle grid, to Frederick Gibbons (of The Bungalow) on 30 March 1945.

177. None of those conveyances of land on the south of Rowden Lane, by the personal representatives of David Townsend, contained any express grant of a right of way over Rowden Lane.

178. When the Fortune family purchased Swallow Falls in July 1970, searches of the Register of Local Land Charges and written enquiries of the local authority revealed that an order had been made under the Public Health Act 1925 declaring Rowden Lane to be a "new street", but that Rowden Lane itself was not a highway maintained at public expense.

179. However, when Will Jennings later sold Swallow Falls to the Fortune family in 1970, he conveyed a right of way, at all times and for all purposes, over Rowden Lane for the purpose of gaining access to Swallow Falls from the Bath Road.

180. How could Will Jennings convey a right of way which no-one had granted to him?

<u>New street?</u>

181. It seems that some effort was made on Will Jennings' behalf to obtain confirmation that Rowden Lane was a publicly maintainable highway. I infer this from a letter written by

solicitors for Will Jennings to the Town Clerk at Chippenham. That letter has not been produced in evidence, but the reply from the Town Clerk, dated 25 June 1970, reads

WH Jennings

Swallow Falls Rowden Lane

I have fully considered the matter of Rowden Lane and a reference to the Order declaring part of the Lane a new Street, raised in your letter of the 23rd June. I find that although there was a Council resolution on the subject it appears that no Order under Section 30 Public Health Act 1925 (since repealed) was made. Any entry in the land charges register is therefore really not binding and I shall take steps to delete the same.

In the circumstances the road must be considered to be a private street with a liability to repair reposing in the frontagers in some agreed proportion. I hope these observations will answer your point.

182. I believe that the solicitors who wrote to the Town Clark had been retained by WH Jennings. This is because a different firm of solicitors had conducted the local authority searches on 4 and 5 June 1970.

183. It seems to me that the solicitors acting for the Fortune family raised the question of how the purchasers would be able to access the Swallow Falls if, as the searches had earlier revealed, Rowden Lane was not a highway maintainable at public expense, and no private right of way had been granted to Will Jennings.

184. I believe this is why an enquiry was made about Rowden Lane as a ‘new street’. Because no comfort was found in this reply, the next stage was to rely upon a right of way which Will Jennings had acquired by prescription. This is probably the source of

the right of way conveyed to the Fortune family. Nevertheless, some supporting evidence of this prescriptive right was required, and this, I believe, is why Will Jennings made the Statutory Declaration to which I now turn.

185. It may well have been that, up until this point, Will Jennings had been led to believe that Rowden Lane was a 'new street' and a public highway. No one seems to have addressed the possibility that the whole of Rowden Lane was a public highway, albeit not entirely maintainable at public expense.

186. This case has been bedevilled by understandable concern over who was responsible for maintenance of the Lane, without first enquiring whether the Lane was a highway, albeit a highway not maintained or maintainable at public expense.

Statutory Declaration

187. Will Jennings explained the right of way in a Statutory Declaration, which he made on 23 July 1970, the day before the conveyance to Mr and Mrs Fortune:

I WILLIAM HENRY JENNINGS of Swallow Falls, Rowden Lane, Chippenham in the County of Wilts, Company Director DO SOLEMNLY AND SINCERELY DECLARE:-

1. On the Thirtieth day of December One thousand nine hundred and forty four I purchased a plot of land adjoining Rowden Lane in the Borough of Chippenham in the County of Wilts which said plot of land is coloured pink on the plan attached hereto (hereinafter called "the said property").

2. In or about One thousand nine hundred and fifty-three a dwelling house was built on part of the said property and is known as Swallow Falls, Rowden Lane, aforesaid.

3. *Ever since December One thousand nine hundred and forty four I have been in occupation of the said property and throughout the period since the dwelling house was constructed I have lived there.*

4. *The property adjoins a lane known as Rowden Lane which leads from the main Chippenham/Bath Road to a farm known as Rowden Farm. Throughout the whole of the period since December One thousand nine hundred and forty four there has been a right of way used by myself and all persons authorised by me jointly with other persons at all times and for all purposes over Rowden Lane for the benefit of the said property and other property and no adverse claim has ever been made in connection with the said right.*

5. *That part of Rowden Lane which is marked green on the said plan [approximately Section A] is maintainable by the Chippenham Borough Council as the highway authority. The remainder of the said lane is repairable by users having property abutting Rowden Lane and was last completely repaired about 6 years ago when a tarmac surface was laid. At the time of that repair I made a contribution to the cost of one-twelfth share. The remainder of the cost was born by the then owner of Rowden Farm, my brother Richard Francis Jennings of Elmtree Farm, Rowden Lane aforesaid, and the firm of Gibbons and Gooden who carry on a pig farm at the bungalow Rowden Lane aforesaid …*

188. It is interesting to read that, although he suggested that Section A of Rowden Lane was maintainable by the local authority, the local authority's answer to the pre-contract enquiry did not appear to draw a distinction between Section A and Section B of Rowden Lane, although it may well be that the local authority was only concerned with that part of Rowden Lane immediately in front of Swallow Falls on the plan attached to the pre-contract enquiries. Moreover, he did not say that Rowden Lane at this point was not a public highway.

189. On 25 November 1971, Will Jennings who, following the sale of Swallow Falls had moved to “Windrush”, The Butts, Chippenham, sold the paddock between Brookfield and Swallow Falls to Leslie and Vera Fortune. In that conveyance too, Will Jennings also conveyed an express right of way over Rowden Lane, and the local authority’s answers to searches again confirmed that Rowden Lane was not a publicly maintainable highway.

Chapter 8: Swallow Falls and the Fortune Family

190. Kevin Fortune's first witness statement, dated 18 August 2006 stated:

The Claimants accept (and have throughout this matter accepted) that section A is a full vehicular public highway.

Change of Case

191. The Claimants’ case significantly altered in two respects:

(a) the admission that section A was a full vehicular highway was withdrawn; and

(b) from 15 April 2009, it was no longer disputed that the public did have rights over Rowden Lane, but those rights were limited to rights of way on foot and on horseback.

192. Up until this time, Kevin Fortune had described the Claimants’ position, in relation to Section B, as follows:

(1) The Lane is not a public highway, but is a private road over which only residents of the Lane have rights of way;

(2) If it is a public highway, the public rights over it are footpath or at most bridleway rights -there is no public vehicular right of way over the Lane;

(3) Even if, which is denied, the Lane is a full vehicular public highway, it does not include the verges.

193. Whilst it is clear from this summary that the Claimants always had an alternative case based upon limited public rights, it struck me that the case had been prepared for trial to establish, and the witnesses evidence was directed to, the wholly private nature of section B of Rowden Lane. The withdrawal of the concession that section A was a full vehicular highway was a surprising one, given the weight of the claimants' own evidence that section A had been a full vehicular highway maintainable at public expense.

Sign

194. In his first witness statement, Kevin Fortune described some of the topographic features of Rowden Lane, including the fact that the front walls of the Rowden Place cottages not only formed the boundary of the Lane but were exactly level or in line with the boundary of the verges allegedly owned by the Claimants. The "Private" sign was described by others to be just by the first cottage. Significantly, however, he made no reference in this witness statement, or in any of his four witness statements, to the existence of the "Private" sign which, for the first time, he mentioned in his oral evidence. Moreover, he never mentioned it in any of his letters to the Highway Authority.

Change in status of Rowden Lane

195. Until a disciplinary hearing of some Council workmen took place in 1983, Kevin Fortune considered that everybody regarded the Lane as a private. He supplemented

this by saying that, at no time, did the Council carry out any repair or maintenance work on the carriageway or verges. The last resurfacing of the Lane in 1989 was, he thought, paid for by Dick Jennings himself, despite a letter indicating that the Defendant had maintained the surface in 1988 /99.

Verges

196. He confirmed that concrete moulds had been placed outside the upper verge in front of Elm Tree farmhouse, because they were there in 1970, when his family moved in. I agree with this. Dick Jennings had placed them there probably around the time that Burleaze estate was being built.

197. However, I do not accept his evidence that, since 1974, his mother had put posts and stones on the verge between Swallow Falls and the Lane, whether to stop damage to the grass verges or otherwise. The aerial photograph, taken in 1976, does not disclose any such items.

198. In my judgment, any stones that were placed outside Swallow Falls or the paddock, shown in the photograph 2/418A, had been placed there after planning permission was granted in 1993 to store 128 caravans at Elm Tree Farm.

199. The photograph at 2/418A is undated. Kevin Fortune thought it was taken in 1991 or 1992. Mary Puntis thought the photograph was taken in the middle of the 1990s, because there was no indication of Martin Jennings' packaging business. Kevin Fortune dated the photograph by a white BMW motorcar parked in front of the house which had been purchased new in February 1989 and sold on 20 November 1994. The renovation works at Swallow Falls, shown in that photograph, had been substantially finished in 1992.

200. On 16 March 1993, the Area Highway Engineer wrote to Mrs Fortune to complain about:

a considerable quantity of building materials which have been placed on the roadside verge, and that interference with the grass verge has occurred.

201. Complaint was also made that:

builders' rubble and materials and plastic coverings have been allowed to litter the roadside and ditches.

202. These facts incline me to believe that the photograph was taken between 1993 (March) and 1994 (November), and the stones were probably connected with protecting the verges from the increased numbers of caravans which were being towed along the Lane, past Swallow Falls and into Elm Tree Farm. The builders' rubble, not shown in that photograph, had been removed at some time after March 1993. It was probably left over from the building works at Swallow Falls.

Absence of challenge to 'highway verges'

203. That letter of 16 March 1993 is of further interest because of its complaint of:

the abuse of the highway verges outside the above addressed property, by the placing of building materials and excavations on and in the grass verge.

204. It will be noted that the letter was asserting that the verges formed part of the highway. There is no indication that this assertion was ever challenged by a member of the Fortune family, despite their willingness to engage in correspondence with the Highway Authority.

205. The absence of such a challenge may not be too surprising, because, in the previous year, a letter had been written on behalf of Mrs Fortune to the highway authority complaining about the dangerous condition of a manhole cover in the verge outside Swallow Falls.

Dangerous manhole cover in the verge

206. On 8 May 1992, Kevin Fortune's mother wrote to North Wiltshire District Council complaining about the condition of a dangerous manhole cover in Rowden Lane. Although the letter was signed by Mr Fortune's daughter, it purported to be a letter written on her behalf. It was the First Claimant's name and address which appeared in the top right hand corner of the letter. The letter continued:

The manhole is situated on the left hand side of the lane in the verge. The cover is very loose and is causing a hazard. I would be grateful if somebody could inspect this manhole and rectify the problem.

207. The Area Highway Manager replied to Mrs Fortune on 2 June 1992, stating:

Your comments regarding the condition of ironwork in the verge at Rowden Lane are noted. I am pleased to inform you that my Area Supervisor has been asked to inspect the site on Wednesday 20 May and to take action as appropriate. Thank you for your interest and bringing this matter to my attention when it is to be hoped that remedial works will be affected without undue delay.

208. This was a reference to the manhole cover in the verge outside Swallow Falls.

209. If the verges were not part of the highway, why was the complaint made to the local authority?

Construction on the verge

210. In 2005, Kevin Fortune had built a double skinned wall or structure to house or shield their gas tank. This protrudes on to the grass verge immediately adjacent to the boundary wall. It is shown, in purple on the plan 4077/A at Appendix 2 to this judgment, in the verge between Swallow Falls and Elm Tree Farm.

The passing bay

211. A passing bay, constructed for Dick Jennings, was installed in the grass verge outside the paddock, not far from its boundary with Brookfields. This was removed in 2002. It should, however, be noted that the passing bay, built in 1990, had not been the subject of complaint to the Highway Authority, once it had been installed, until Kevin Fortune removed it in 2002. Moreover, despite his solicitors being asked to confirm whether he had been responsible for the removal of the passing bay in 2002, there is no correspondence before me admitting that he had been responsible for it. However he did admit this in his evidence before me.

212. One of the reasons which he gave not making an issue of the passing bay in 12 years was because of Dick Jennings' unpredictable temperament and because he was a neighbour. However, this does not account for his failure to do something about it in the years after Dick Jennings' death in 1999.

213. Kevin Fortune accepted that people did park in the passing bay before it was removed. There was at least one member of the public, John Friend, who used it to park when he walked his dog. Mr Friend was not a resident of Rowden Lane.

214. On 12 August 2002, he wrote (giving his full name, address, telephone number and e-mail address) to the First Defendant to complain about the covering up of the 'layby'. He wrote:

I frequently parked in this layby before it was obstructed to walk my dog. Now the only sensible turning spaces near the cattle grid are at the very end of the lane, using private property.

215. Here was an example of a member of the public who frequently used a motor car to drive along and park in Rowden Lane in order to exercise his dog. Kevin Fortune also produced photographs showing cars parking on the verges in Rowden Lane, albeit after the First Defendant had removed stones and posts from the verges in 2002 and/or 2006.

216. However Kevin Fortune's evidence on whether many cars used or parked in Rowden Lane was somewhat inconsistent. His general evidence was that there was little public vehicular use of Rowden Lane, that there was very limited parking near the Old Piggery, and that he had never seen vehicles parked on verges on the back of Burleaze, nor or on the southern verge next to the Old Piggery. He only saw parking at the western end of Rowden Lane near to the public house, especially after 2000, when the car park was reduced in size and customers of the public house parked on the verges.

217. However the photographic evidence showed that it was perfectly possible for vehicles to park opposite the entry to the Old Piggery, and he accepted that, if the verges were clear, one could park on them, including on the southern verge next to the Old Piggery.

218. I am of the view that Kevin Fortune was minimising the volume of public vehicular traffic using Sections A and B, and parking on section B of Rowden Lane. Moreover, he seems to have been unaware of or underestimated the recreational use of the fields beyond the cattle grid.

Planning History: Workshop

219. In October 1980, a planning application was lodged by Mr and Mrs L Fortune to use a shed forming part of the curtilage of the Swallow Falls for the assembly of pre-manufactured aluminium frames and glass materials to form double glazed windows or sliding door units. The intention was to have the business run by members of the family. Indeed Kevin Fortune is still engaged in that business, albeit is now run from elsewhere. However, between 1979 and 1985/6, the business was carried on from Swallow Falls by Kevin and his father, who died in 1982. Although there was no showroom at Swallow Falls, I am satisfied that members of the public, not resident in Rowden Lane, drove along Rowden Lane to the workshop to see samples of windows, or to check on the progress of their work, even if they were redirected elsewhere to see examples of their completed work.

220. Goughs, solicitors, were retained by the Fortune family for that planning application and, in their letter of 9 October 1980 to the Chief Technical Officer at North Wiltshire District Council, they wrote:-

…Workshop at Swallow Falls, Rowden Lane, Chippenham.

Mr and Mrs L. W. Fortune

…

6. Minimal use of highway is involved. A delivery lorry brings aluminium to the premises approximately once a fortnight and deliveries of glass are made by van. There is no pressure on traffic in Rowden Lane.

7. *There is safe access to the premises either by existing farm track to Rowden Lane where it adjoins Elm Tree Farm or in the case of need via Swallow Falls itself…"*

221. From this, it can be seen, at least in 1980, the solicitors for the Fortune family, presumably on instructions, were suggesting that Rowden Lane was a public vehicular highway. I reject Kevin Fortune's evidence that the reference to the 'highway' was a reference only to Section A, and not to Section B. It is plain from internal documentation (1/129C) that this was not how the highway authority viewed the application.

Planning Permission: Residential Development

222. In May 1988, Kevin Fortune applied for planning permission for the erection of six detached houses and garages on the paddock, which his parents had purchased from Will Jennings. That application was refused. Mr Ayres, in a letter dated 7 June 1988, wrote the Chief Planning Officer to object to that development stating:

The lane consists of a stretch of road which is from the Bath Road to the rear of the Rowden Arms car park council road. However, at this point to the proposed development and beyond it is totally private. I am the owner and maintainer of the lane from the area of the rear of Rowden Arms for a distance of 50 yards approximately and would not permit the travelling of further traffic over my stretch of lane.

223. In his application, Kevin Fortune indicated that his proposal involved the "construction of a new access to a highway". When Kevin Fortune's application was considered by the Development Control Committee on 27 June 1988, Rowden Lane was referred to by a council officer as "a single track unclassified lane which connects with the A4 at Rowden Hill (next to the Rowden Arms) and terminates at Rowden Farm".

224. I regard it as improbable that this application was made by Kevin Fortune in the belief that Rowden Lane was a private road. In evidence, he said that he assumed that the Highway Authority would adopt the road, once it was constructed to an appropriate standard. However before the road could be adopted it would have to be a highway, and presumably any adoption would not be confined to the frontage of Swallow Falls and the paddock, but would have to extend over the whole Lane.

225. The plan attached to the planning application did not show the verge in front of the paddock forming part of the planning site, the implication being that it was not in the ownership of the Fortune family. Moreover, in a letter to the planning department, dated 4 October 1989, he referred to the 'verge fronting my property', which carried the same implication.

226. No reference was made by any Council employee to stones or any obstructions on the verge outside the Swallow Falls all the paddock, with an on-site inspection took place in 1988 in connection with this application

Objections from Swallow Falls to change of use at Elm Tree Farm

227. When the 1989 application for planning permission for storage of an extra 14 caravans was being considered, Kevin Fortune wrote to the Planning Department, on 4 October 1989, as follows:

Dear Sir,

Regarding our telephone conversation on 2 October 1989, with reference to a Planning Application made by Mr R Jennings, Elmtree Farm, Rowden Lane, Chippenham (Ref N891877F) for additional storage of caravans.

I have been prompted to act on this matter following an approach by Mr Jennings on 30 September 1989 to discuss my views. Since your consideration is being determined by the installation of a passing layby, I wish to point out that this will encroach the verge fronting my property. As I explained to Mr Jennings that I would investigate the matter and report back to him, your help would be appreciated.

My points of view are as follows:

1. *If the lane is city council owned, should it not have been adopted at a suitable made up level, incorporating footpaths etc.*

2. *If the adoption was made some 45 years since, as believed by Mr Jennings, why have we been led to believe (by Mr Jennings) that this was a private road within the past 18 years. At least once having paid partial costs of resurfacing.*

3. *The layby was situated on top of the sewer, which presently runs under the verge, this would need to be reinforced to ensure that heavy vehicles would not cause same to collapse.*

Perhaps your Council Surveyor could give us his views on this?

Following our telephone call on 3 October 1989, I was pleased to learn that a Planning Application would be required from Mr Jennings, prior to the installation of a layby, and further that all interested parties ie Highway, Water Boards, etc should be notified accordingly.

In view of the foregoing may I suggest that you inform Mr Jennings as to the uncertainty of ownership, as it is my understanding that he is under the impression that Planning Applications are not required and none have been sought.

He further seems to think that providing my permission is given, that he can proceed with the layby immediately.

I am further informed that Mr Jennings thinks that provided he installs the layby, his application, Re Caravans, is automatically approved, and to this end I have seen Mr Prangle of Prangle and Cary Roadwork Contractors surveying the site, perhaps with a view to commencing excavations?

I await your comments, with hopefully proof of ownership in order that I may assess the situation.

228. I observe that in that letter, Kevin Fortune referred to the 'verge fronting my property', implying that he was drawing a distinction between the verge, of which he did not claim ownership, and 'my property'.

229. Mr Samuel, Chief Assistant (Development Control), replied to that letter on 28 December 1989 as follows:

With reference to your letter of 4.10.1989 to Mr D Evans, Planning Department, North Wiltshire District Council, I have now received the following answers to the three questions you raise regarding Rowden Lane and the proposed passing bay.

1. *When originally adopted Rowden Lane would have been at a suitable standard for the traffic using it at the time. Over the years traffic has generally increased on almost all roads, but at the present time it is not considered that there are justifiable reasons for giving priority to Rowden Lane for improvements.*

2. *Mr Jennings' interpretation of events as described in your letter does not alter the fact that Rowden Lane has been a road adopted and maintained by the County Council as Highway Authority, for many years.*

3. *Mr Jennings' contractors for constructing the passing bay will need to consult the District Council as regards the sewer in the verge.*

230. Two years later, on 30 October 1991, Kevin Fortune wrote to the Council opposing another planning application for extra storage of caravans at Elm Tree Farm, and asking for details of the date when "the private road was adopted" as follows:

I am writing with reference to the above application regarding extra storage for caravans.

As a resident of Rowden Lane, I am concerned as to the effects the additional usage will have on a single track lane.

I would be useful therefore if you could provide answers to the following:

1. *The date the private road was adopted. My understanding is that before the Council adopt roads they should be made up to certain standards. With 84 caravans and numerous other vehicles passing this road I feel it should be made up to a width allowing vehicles to pass.*

2. *The date of planning acceptance for installation of a passing layby in Rowden Lane.*

3. *For my records, I would be obliged if your Highway Department could send a schedule showing maintenance work carried out on Rowden Lane over the years.*

Your help would be most appreciated in this matter.

231. The Planning Officer replied to that letter, on 1 November 1991, in the following terms:

Thank you for your letter dated 30 October, 1991, to which I refer. I presume your letter should be treated as an objection to the current planning application and I will therefore summarise the points made and report them to the Planning Committee on 4 November, 1991, when the current planning application will be considered.

With regard to your other questions, the passing bay was installed pursuant to Condition 2 from Application Reference N.89.1877.F and the decision notice and approved plans are available for public inspection at the Planning Department during normal office hours. With regard to your questions over the adoption and maintenance of this highway I have copied your letter to the Wiltshire County Council who are the Highway Authority and have asked them to reply direct to you.

PS: The current application has now been withdrawn."

232. Although that application was withdrawn, a new application for the extra 64 caravans was made on 23 July 1992.

Changes in the recording of Rowden Lane

233. Kevin Fortune received two further letters in reply to his question about Rowden Lane, in his letter of 30 October 1991.

234. Mr Harbour (the same Mr Harbour who is the First Defendant's expert) wrote to him on 20 November 1991, stating:

I refer to your letter dated 30, October, 1991 addressed to Mr D Evans, Planning Department, North Wiltshire District Council which has been forwarded to me for my attention. A letter was sent to Mrs M J Fortune of your address on 3 November 1989 which covered the Highways' enquiries contained in your current communication. However, I will again reiterate the content of my previous letter and state the following:

The Highway records handed over in 1974, by the former Chippenham Urban District Council, showed Rowden Lane as a full highway maintainable at the public expense from its junction with Rowden Hill, south eastward for approximately 70 metres. The remaining length of Rowden Lane was shown as a road used as a public path, R.U.P.P.5, Chippenham. However it would appear that the County Council's legal highway records were revised to show this section of Rowden Lane, up to the cattle grid at the boundary of the [Burleaze] Estate, as a full highway maintainable at the public expense, after investigations by the Director of Planning and Highways, some time around 1983. These revised records now accord with other records held by the Director of Planning and Highways and the Chief Executive and works have been done to it as an unclassified road prior to 1983.

With regard to your enquiry concerning the maintenance of Rowden Lane, I have passed a copy of the letter to the Director of Planning and Highways for him to reply direct to you, in due course, on this point. ...

235. On 3 December 1991, Mr Brown, the Area Highway Engineer, wrote to Mr Fortune stating:

I refer to your letter regarding the above dated 20 November 1991 [this was the date not of Mr Fortune's letter, but the date of Mr Harbour's letter to him previously quoted] and passed to me for my attention with reference to item number 3 of your enquiries.

According to my records general maintenance in the form of surfacing, for strengthening was carried out during the course of 1998, followed by surface dressing maintenance in 1989.

236. On 20 August 1992, Kevin Fortune, again dealing with the July 1992 application by Dick Jennings to increase the number of caravans to be stored at Elm Tree Farm, wrote to the Chief Planning Officer at North Wiltshire District Council saying:

The main consideration would be the effect on a Single Track Lane from the increased volume of traffic. The lane at this present time would not be suitable for the amount of traffic that this application would create and the passing layby, installed previously, is not adequate.

A bottleneck is also created with cars parked in the road further down the lane opposite the Rowden Arms car park, which is adjacent to the access of 3 No houses in Rowden Hill.

Making up the road to present standards, ie with footpaths and a revised access into the public house car park, could [alleviate] any future problems.

237. On 19 August 1993, the planning application was successful, and permission was given to store a total of 128 caravans on the land. Furthermore, a condition was imposed requiring the passing bay to be extended.

Summary of Kevin Fortune's objection

238. It would therefore appear that Kevin Fortune's objection was not so much based upon the Lane and verges being private, but rather that he wanted Rowden Lane to be brought up to modern standards appropriate for a public vehicular highway. Moreover, he did not seem to be suggesting forcefully that Rowden Lane or its verges were private. His only reason for thinking the Lane might have been private was because it had been repaired and maintained by the residents, and this is not necessarily the determining factor.

239. He also suggested that non residents using Rowden Lane by car would be challenged by Dick Jennings or, before 1985 when she died, by Mrs Burridge or her farmhand. I have already rejected the suggestion that Dick Jennings challenged members of the public driving in Rowden Lane, except in the very limited circumstances of the

misplaced sign to Lacock which caused lorry drivers to take their vehicles down Rowden Lane by mistake. I accept that Dick Jennings was a difficult man, but I do not accept that he acted violently towards Mr Pullin as Kevin Fortune implied.

240. As far as the evidence of challenges by Mrs Burridge or her farmhand is concerned, I prefer the evidence of the Gibbons family and of Mary Puntis on this issue.

241. I do not accept that agricultural vehicles and motorcars were unable to pass each other in Rowden Lane. Any difficulty would have been resolved by using the verges. Nor do I accept Kevin Fortune's evidence that it was mainly farm vehicles which used the lane.

Assessment of Kevin Fortune

242. I have some sympathy for the position in which Kevin Fortune has found himself in this case. However, I am perfectly satisfied that he is seeking to rewrite history. His evidence on the existence of the “Private” sign is a classic example of this, as are the inconsistent ways in which he has regarded the status of the Lane and its verges, depending on his purpose. I find that he has come under the influence of the Second and Third Claimants and, as a result, this has significantly undermined the accuracy and reliability of his evidence.

243. Except where I have stated otherwise, where the evidence of Kevin Fortune conflicts with that of the witnesses called by the First Defendant, I prefer the accuracy and reliability of the latter.

Vera Fortune – The First Claimant

244. Vera Fortune was born on 9 October 1932. She is now the sole owner of Swallow Falls. She said that when she and her husband purchased Swallow Falls, both Will

Jennings (a customer of Mr Fortune) and their own solicitors told them that the property was situated within a privately owned Lane, and that it was not maintainable at public expense. She understood that she also owned the verges - even though the walls had never enclosed them - as well as the land and house known as Swallow Falls.

245. However, I have seen no letter of advice from the solicitors to Mr and Mrs Fortune at this time. I have seen the conveyance and the pre-contract searches and enquiries, from which it is obvious that Mr and Mrs Jennings would have been told that Rowden Lane was not maintainable at public expense, but rather had to be maintained by the frontagers. However, Will Jennings' Statutory Declaration did not say that Rowden Lane was a wholly private road untainted by any public rights. Although the searches revealed that Rowden Lane was not a publicly maintained highway, they said nothing about its public or private status.

246. Vera Fortune described how the Lane was about 8 feet wide when they moved in. I presume this is a reference to the gravel track, and excluded the verges. She said that in 1974, stones and posts were put on the verges outside Swallow Falls to prevent damage from tractors. The aerial photographs taken in 1973 and 1976 do not support this assertion. Interestingly, she stated that cars parked on the verges in front of Swallow Falls before the posts were put up there. I find that this was a reference to the period immediately before 2002, when Kevin Fortune placed the posts in the verge in front of Swallow Falls and the paddock.

247. She referred to two signs containing the word "Private" in Rowden Lane. The first was visible on turning into the Lane and said 'Private lane to farms only', whereas the second was positioned by the cottages and read 'No through road Private'. These signs were present from the time they moved there in 1970 until the early 1980s. I do not accept this evidence. On the balance of probabilities, I have found that no sign in

Rowden Lane contained the word ‘Private’, except that painted on the carriageway in August or September 2002. She was in error in thinking that the ‘Private’ sign on the carriageway was obliterated on 12 November 2002. In fact, this had been done in September 2002. 12 November 2002 was the occasion when the Council removed items from the verges for the first time, and Mr Raubenheimer was assaulted.

248. She too thought that the staddle stones outside The Bungalow remained on the verge until about 2002, when Laing showed interest in developing the land. In fact, I find that they had been removed in or shortly after 1991, as a result of theft of some parts of the stone. This was before the option agreement was made in 1995.

249. The items removed from outside Swallow Falls in 2002 comprised 20 steel reinforced plastic posts, with replacement cost of £1138.34 including VAT. Later, they were replaced by the Fortune Family. In 2006, they were removed again by the First Defendant. To replace those items now would cost £2276.68 inclusive of VAT, but their current value is half that, namely £1138.34 including VAT.

250. Vera Fortune said that the verges outside Swallow Falls were maintained by the Fortune family. In the 1970s, tarmac was laid for the first time over the dirt track and that was resurfaced in the early 1980s. She said that the resurfacing had been carried out at the expense of local residents, and not by the First Defendant.

251. In my judgment, this is inconsistent with the evidence, which I prefer, from the *First* Defendant to the effect that in 1983 work was done on Section B, which gave rise to the disciplinary hearing. Further, the First Defendant carried out further work there in 1988 and 1989.

252. She admitted that she wrote the letter to the Council in May 1992 about the dangerous manhole cover, although subsequently she said, probably correctly, that it had been signed by her daughter Maria who had typed it. In any event, I am satisfied that she

knew of, and agreed with, the contents of the letter. To the extent that the letter was typed and signed by Maria, it demonstrated, in my judgment, the family's true view that the verge was public not private. Moreover, she could not remember challenging the letter sent by the Highway Authority in March 1993, asking her to remove the builders' rubble from the "highway verges". The Fortune family simply got the rubble removed. However, on her case, the verges belonged to her, and she would have had no obligation to remove it.

253. I have already referred to the pressure that Mr Heselden was applying to Kevin Fortune. On 18 March 2002, solicitors acting for Vera Fortune wrote to the First Defendant asking them to confirm the status of Rowden Lane on the map supplied. This map highlighted the whole of Sections A and B of Rowden Lane. The solicitors also asked whether any part of the Lane had been adopted and, if so, the width of any adopted road.

254. On 27 March 2002, Mr Gale replied to that letter, saying that he was surprised that the letter had been written because he had believed that the Chairman of the Residents' Association would have informed him of the position. However, he repeated the position, namely that the full length and width of Rowden Lane was recorded on the highway record as an unclassified road maintainable at the public expense. This was shown on a coloured plan which he sent to the solicitors. He concluded his letter by stating:

As with many ancient highways, there is no formal record of adoption. The County Council's view, supported by historical evidence, is that, on the balance of probabilities, the recorded status is correct. No evidence has been provided to challenge this view.

255. As with Kevin Fortune's evidence, I believe that Vera Fortune's evidence is highly selective. She has assumed, because the road was at times maintained privately, that it had no public status. I regarded her evidence as inconsistent and unreliable on the private nature of the lane and verges. In my judgment, her evidence added little to that of Kevin Fortune.

Chapter 9: Brookfields

256. The land originally described as Brookfields was much more extensive than that currently owned by the Second Claimant. It formed part of the land purchased by Will Jennings from the personal representatives of David Townsend on 30 December 1944.

257. On 22 January 1945, he sold Brookfields to Lewis William Hunt, who built a bungalow at Brookfields in 1946. In 1959, Mr Hunt's widow sold Brookfields to Stanley Coleman, who died on 10 June 1961. His personal representatives, including his daughter, sold Brookfields to Albert George Ayres, the father of the Second Claimant, on 30 September 1963. Albert Ayres has since died.

258. What is left of Brookfields, after sales of various parts of the land, is owned by the Second and Third Claimants, with registered title number WT153310. The registered plan is in Volume 5, at page 222. This title, according to the registered plan, seems to comprise a dwelling house and two outbuildings.

259. No express right of way was granted in the conveyance, dated 30 September 1963, by Cyril Clark to Albert Ayres, to gain access to Brookfields, nor did Brookfields enjoy any express right away over the rest of sections B or A of Rowden Lane. The verges were not conveyed expressly to Mr Ayres, and the land sold was described as 'land adjoining Rowden Lane'.

Planning History of Brookfields

260. The fragmentation of the greater part of the original Brookfields is not entirely easy to chart. From 1972 onwards, a number of planning applications were made by Mr Ayres for residential development of a large area of the original Brookfields.

261. It would appear that Mr Ayres's application for planning permission was heavily driven by the fact that he was in acute financial difficulty, bordering on bankruptcy. The 1972 application was opposed by a number of statutory consultees. The County Surveyor, on 30 May 1972, wrote:

I am not in favour of this application as Rowden Lane is only 10 feet to 12 feet wide along the frontage of this site, adequate sight lines could not be provided for the access to this site without affecting other parcels of land at the junction of Rowden Lane and the trunk road is substandard. … the application does not indicate the number of units or means of access.

262. The Borough Surveyor, on 15 May 1972, wrote:

Road frontage is on to Lowden Lane which in this section is a private road.

263. I assume this is a reference to Rowden Lane. The application site covered about 2¾ acres and appeared to encompass virtually all the original holding of Brookfields. Eventually planning permission was refused, on grounds that (i) the site was not included for development in the appropriate Chippenham town map and (ii) because Rowden Lane, given its narrow width and its junction with the trunk road, was considered unsuitable to accommodate the traffic which would have been generated by the development of the site.

264. Mr Ayres appealed against that refusal on 24 August 1972, stating:

Rowden Lane is quite capable of being made suitable for the small increase in traffic following development as has been done in other cases in the county.

265. Mr Ayres was not there suggesting that Rowden Lane was private. By January 1973, this appeal was withdrawn.

266. However, by June 1972, Blossom Properties Ltd of Kent was making an application for the development of six detached dwellings in approximately 0.6 acres. This too was refused on 20 September 1972 for similar reasons. A further application was made by Blossom Properties Ltd for three detached houses and for outline planning permission on two adjacent areas. This was dismissed on 13 September 1975 and, on appeal, in 1977. Eventually, on 17 December 1979, outline planning permission was granted to Blossom Properties Ltd for one house and garage. The agent for Blossom Properties Ltd was Mr K A Boswell of Surrey. It is impossible to know, because there are no plans attached to the documentation in the planning bundle, whether those applications related to any part of the old Brookfields site.

267. However, the same agent, Mr Boswell, also acted for Langcote Property Company Limited ("Langcote") of Kent, in relation to planning applications between 1981 and 1983. These applications did relate to the substantial part of Brookfields, in fact to the entirety of Brookfields, less the title currently held by the Second and Third Claimants.

268. In summary, it appears that successful applications were made in 1976 and 1979 for the erection of single dwellings within the original Brookfields site facing Rowden Lane. At page 230 in the planning bundle is a plan prepared by Mr Boswell on behalf of Langcote showing the proposed development for which Langcote was seeking permission in 1981 and 1982. That shows the location of the two proposed dwellings for which permission had been granted, although the intention of the application was to develop the rest of the Brookfields site apart from that retained for the dwelling house.

269. Planning applications were consistently refused, and upheld on appeal, as late as 1983, with the appeal site being shown at page 255 in the planning bundle. The appeal site covered the whole of the original Brookfields site, including the areas in respect to which permission had already been granted, but excluded the reduced Brookfields area currently occupied by the Second and Third Claimants.

270. After 1983, permission must have been granted because it was apparent on the site view that development had taken place, and was still taking place within the area sold by Mr Ayres to Langcote.

Second Claimant as owner of Brookfields

271. On 24 October 1977, Mr Ayres sold and conveyed the entirety of the original site of Brookfields to Langcote. On the same day, 24 October 1977, Langcote conveyed to the Second Claimant and Robert Henry James a part of Brookfields, namely a dwelling house and two outbuildings corresponding to the area within title WT153310, currently owned by the Second and Third Claimants. What was retained by the Second Claimant corresponds approximately to about one-tenth of the original area of Brookfields.

The new driveway

272. Owing to the partitioning of the former area of Brookfields, it was no longer possible for the Second Claimant to use the then existing driveway into Brookfields, since this formed part of the land acquired by Langcote. As a result, on 24 October 1977, Langcote granted to the Second Claimant and Robert James a licence to use the existing driveway for a minimum period of 6 months, while they built the new and current entrance into the much reduced area of Brookfields. The relevant part of the agreement read:

The grantor hereby grants licence to the grantees to use and enjoy the existing access way for the purpose of gaining access from the highway known as Rowden Lane to "Brookfield" along the route coloured blue on the plan annexed hereto …. by day or by night with or without vehicles or animals for all purposes connected with the use and enjoyment of Brookfield.

273. Those same words are shown on the property register of the Second and Third Claimants' title WT153310, recording the fact that Brookfield had the benefit of those rights made in that agreement on 27 October 1977.

274. What is noteworthy is the fact that the agreement, to which the Second Claimant was a party, referred to Rowden Lane as a *highway*, and one over which vehicles or animals could have been taken before using the driveway the subject matter of the agreement. In cross-examination, Ms Ayres said that this was just an assumption by the lawyers.

275. The old and new driveway entrances to the original and the reduced Brookfields site are shown on page 448 of Volume 2 of the trial bundle. The new driveway is in the foreground with concrete blocks at the junction with the carriageway of Rowden Lane, and the old driveway is further away from the photographer.

276. On 14 April 1998, Blossom Properties Ltd became the registered proprietor of title WT169884, comprising the then undeveloped land on the former main Brookfields site. It therefore seems that the old Brookfields site is now the subject of at least two separate titles namely:

(a) Title No: WT169884 in the name of Blossom Properties Ltd, representing the whole of the land initially purchased by Mr Ayres in 1963, except the part currently owned by the Second and Third Claimants. I do not know whether Langcote and Blossom Properties Ltd are associated companies, but it seems

that the land which Langcote acquired on 27 October 1977 was, as at 1998, owned by Blossom Properties Ltd.

(b) Title No: WT153310 of which the Second and Third Claimants are registered proprietors. This comprises their current home and out buildings.

The Third Claimant – John Heselden

277. Mr Heselden is a former police officer who holds, or has held, a firearms certificate. He served in the Metropolitan Police until 1980, and then worked in an international position, which he told me he could only discuss *in camera*. He became ill in 1990, and eventually retired from that post on medical grounds in 1994.

278. Since 1996, he has lived with the Second Claimant at Brookfields, although his connection with the area began in September 1980, following his departure from the Metropolitan Police. His first contact with Brookfields was around September 1980, when he was looking for a farm near his then home in Lowden.He needed some help in connection with his family's livestock.

279. He confirmed the presence in 1980 of a sign stating "Private lane to farms only" positioned outside the cottages in Rowden Place. At this stage, he also noticed that the staddle stones were still outside the verge in front of Brookfields. On accessing the new, "upper" drive to Brookfields, he said he observed the hard standing next to the Lane, which was a continuation of, but adjacent to, the new drive on which railway sleepers and single kerb stones had been placed. He also observed that, on the verge outside Brookfields, were electrical fencing stakes and electrical fencing netting.

280. He continued to visit Brookfields between 1980 and 1983, and, at the end of this period, he had observed that the "Private" sign had disappeared. He said that he had assisted the Second Claimant in cutting grass from the verge during the summer of

1984, and that Mrs Gibbons opposite gave her “consent” for Miss Ayres to cut her private verge in front of The Bungalow. In conversation with him, Mrs Gibbons is alleged to have confirmed that the road was private.

281. When he moved into Brookfields in 1996, he said that the railway sleepers and stones were still outside the property on the hard standing. His arrival at, and co-ownership of, Brookfields in1996 corresponds approximately with the earliest date on which some of the Gibbons witnesses described the advent of materials on the verge and driveways outside Brookfields. He went on to state that he had seen Shirley Collins telling members of the public that the lane and verge was private, and not for their convenience or that of their dogs.

282. Not only did Mr Heselden see the removal of the “Private” sign as associated with the Jennings’ planning applications, but he also considered the removal of the staddle stones from the verge outside The Bungalow to be connected with either the 1990 Gibbons planning application or proposed development contemplated by the option agreement. Both views are wrong. I am satisfied that the stones were removed to the back of the house for security reasons, because some of the tops of the stones had been stolen. Mr Heselden thought that they had been removed to the back of the house towards the end of the 1990s, whereas they were in fact removed in or around 1991, around the time that Shirley and Tony Collins moved into the Bungalow.

283. His witness statement too was silent on who had painted the “Private” sign on the carriageway of Rowden Lane in August/September 2002. Council workers attended in September 2002 to obliterate that painting on the carriageway and, as I have already indicated, returned on 13 November 2002 to remove obstructions on the verges.

284. Mr Heselden gave his account of that incident involving Mr Raubenheimer. He said:

Miss Ayres tried to see what was going on, the highway officer, who looked angry, then blocked her view with his body. Miss Ayres climbed up the gate a little in order to see over the highway officer's head and the highway officer then used his clipboard which he moved from side to side to block Miss Ayres view. He then struck Miss Ayres across the face with his clipboard knocking her to the ground. I went to Miss Ayres aid, and when I opened our locked gate and went outside, I saw that a JCB was forcefully moving stones that had previously been concreted in place in the verges, and placing these into the back of a lorry, breaking some beyond reuse. The sleepers and stones and the hard standing and lower drive had already been placed in the lorry.

285. He said Mr Raubenheimer 'struck Miss Ayres across the face with his clipbooard'. He did not there suggest any contact between the two except Mr Raubenheimer's clipboard knocking her to the ground. He also described how, on 8 August 2006, council employees again removed new stones and posts which had been placed by the Claimants upon the verges which they regarded as their property.

286. He concluded his witness statement by stating that the Highway Authority never carried out any formal maintenance in the Lane or on the verges, and that there was no logical reason for any member of the public to pass over the Lane, since it simply led to the properties bordering Rowden Lane. He did not mention any recreational use of the fields at the end of Rowden Lane, nor of cars parking on the lane.

287. In my view, Mr Heselden is a secretive and cunning man with an assertive personality. If I may borrow a phrase used by Mr Burns when cross examining him, he was someone who would "throw his weight around". When the campaign against development began in 2001/2002, he challenged people who used Rowden Lane, including those going to the caravan storage depot at Elm Tree Farm.

288. Most significantly, I did not regard Mr Heselden as a truthful witness.

289. In a letter to the local authority, dated 13 March 1989, Mr Heselden used a name which was not his own full name, and an address (Brookfields) at which he did not then live. This was seven years before he moved into Brookfields, and just under nine years after his arrival in Chippenham. In that letter, in which he referred to himself as 'J Stewart', he asked the Highways Department a question about the minimum size of piping for taking water away from some agricultural land. Not only did he make no reference to the surname Heselden, but also he gave his address as Brookfields Farm. It was when the Highways Department tried to make contact with Brookfields Farm, to discuss the letter,that they were told that the address was merely used for correspondence but that the author did not live there. Even though Mr Heselden had a separate home of his own, he did not want to use his own name and address because he wanted "an impartial response."

290. His query related to his previous home at Foxham which was subject to flooding because somebody had interfered with a ditch. He said that:

each time I turn to other organisations for assistance, people reported back to me that they had been warned off and told not to assist me.

291. He believed that people had been warned off because some other people, who had caused the flooding by filling in a ditch with a view to building property, did not want any public scrutiny. Therefore, he felt it necessary to obtain this "impartial response."

292. Whatever his reason for writing this letter, it reveals him to be secretive and not straightforward in his dealings.

293. According to his witness statement, it became public knowledge that Laing Homes was interested in developing the land next to the Bungalow. He said this occurred, towards the end of the 1990s possibly a little later. The option agreement was made on 11 July 1996. This was one day before Mr Heselden was registered as joint proprietor of

Brookfields, along with the Second Claimant. The earliest correspondence, which I have seen, from The Claimants to the developers about the private nature of the Lane was in the second half of 2001.

294. I now turn to two letters written, I find, by Mr Heselden, on his own behalf and on behalf of the Second Claimant, to Kevin Fortune. The first letter was dated 8 February 2002 and is in the following terms:

Dear Kevin and Marie,

Please find enclosed a copy of the exact wording of the stated case law which I have already mentioned to you.

In Hale -v- Norfolk County Council, the court decided that the local authority could not always rely on the "hedge-2-hedge" presumption. If the owner of the land adjoining the highway had not done anything to show that his land was to be part of the highway, then it did not become part of the highway. The presumption applies in the same way where the highway is not owned by the highway authority i.e. where the road is a private road but is subject to public rights of way.

THAT IS NOW LAW ON THE POINT OF HIGHWAYS AND VERGES.

As you can see the most important part is, ***if the owner of land adjoining the highway had not done anything to show that his land was to be part of the highway, then it did not become part of the highway.***

While the post you put in shows that the verge is yours and claimed, and a good job, if this lay-by is not covered with soil and grass seeded, the County council could take the view, that the lay-by could now make the verge become a part of the highway. If left, there is a very real danger that the lay-by could torpedo all our efforts and we could all

lose our verges, which will always stop development, to the developers. It is the only danger point now that the verges are posted off.

Anyway, we have found out that DMH, [solicitors] acting for developers have now approached the council so, please find attached a copy of our recent reply to the County Council which is self explanatory. I expect that once they get that, they might make a site visit!

Many thanks

John & Phoebe

295. Because Kevin Fortune did not then cover up the passing bay, Mr Heselden wrote again on 27 April 2002 as follows:-

Dear Kevin,

Since our latest of many meetings of Saturday 20 April concerning the illegal lay-by in your verge and the potential risks to the loss of our land and property that your lay-by could cause, if not removed, and of course as explained, it will allow the developers to take control of the lane and go ahead with their planning, which they cannot do by virtue of the stated High Court case if it was removed.

I have not heard anything at all from you even though we agreed that you would place a note in my letter box by Friday last to let me know what the situation was, and naturally I wonder what the responses from Mr Orchard of Pardoes was and if he was helpful, and the situation with regard to the lay-by.

I would be pleased if you would kindly let me know the situation as it stands ASAP, because as explained to you fully, without confirmation of some positive progress, I really do not have any option if I am to protect our interests, other than to make

representations to my insurance company in the next couple of days and the matter as you know will be entirely in their hands, which as you know because of the potential implications to your family at facing a possible claim for any losses I have been trying very hard to avoid. I can only delay or put off that action if you can assure me in writing, that you will definitely insure or have arranged the removal of the lay-by.

I look forward to hearing from you.

All the best.

John

296. When cross examined about this letter, Mr Heselden said that his insurance company had been concerned about the status of the lane. He denied ever pressurising Mr Fortune. I have not seen the correspondence passing between Mr Heselden and his insurance company. However, it is not obvious to me how his insurance company would be concerned with a passing bay in front of a neighbour's property. Moreover, as the tenor of the letters themselves plainly indicates, this letter represented a worrying escalation of the pressure which Mr Heselden was applying to Mr Fortune.

297. I also regard this correspondence as demonstrating that Mr Fortune had only recently put up the posts outside Swallow Falls. I deduce this from the reference "It *is the only danger point* now that the verges are posted off" (my emphasis). I regard this as a reference to something which had happened not long before the letter was written. I find that before those posts were erected outside Swallow Falls and Brookfields in 2002, no such posts had been installed.

298. Mr Heselden was also somewhat terse with Kevin Gale, of Wiltshire County Council's legal department in his letter dated 11 January 2002, where he wrote:

I refer to your letter of 30 December 2002 to Mr K Fortune, of Swallow Falls. I note that you purport that you sent my solicitor a letter dated 28 October 2002. No such letter was ever received by my solicitor, and I do not accept that your claim of doing so, is in any way genuine. If there was such a letter, then there should be no reason why you should not send me a copy of that letter, and while it should not be necessary, as the client of that solicitor, for the record the request is also made under Freedom of Information Act 2000 and Data Protection Act 1998.

I trust that you will ensure that a copy of this questionable letter is supplied to me without delay.

Also, if my solicitor has never received such a letter, then now having that knowledge, <u>if</u> this letter exists, there should also be no reason why you should not fax it directly to him immediately, Mr J Orchard of Pardoes, Solicitors, on 01278-429249.

Thank you.

Yours faithfully

Mr J Hesseldon.

299. It is part of the style of Mr Heselden's correspondence that he finishes it off with the phrase "Thank you." He has also, in those letters to Mr Fortune, and in other correspondence, referred to a "stated case" and to the case of *Hale v Norfolk County Council*.

300. On the same day that Mr Heselden wrote that letter to Kevin Gale, he also wrote, I find, another letter on the letter heading of 'Rowden Residents' Association' to Mr Gale. He denied full authorship of that correspondence which, in my judgment, he

plainly wrote. The reference to “Thank you” at the end, and its reference to “a High Court ruling” are typical of his style.

301. When asked about the Rowden Residents’ Association he denied that he was the Chairman. Whether or not somebody else held the nominal title, Mr Heselden was the power behind it.

302. He said that no correspondence was sent out from Rowden Residents’ Association unless it had been “vetted.” He wanted to make sure that nothing said by the residents undermined the case of the Ayres family. It was precisely for this reason that he was writing the letters. I reject his evidence that his solicitor had any involvement in drafting this letter. The style of the letter is simply not professional enough for that to have been its source. Moreover, the letter was written in the first person and in an assertive and somewhat bombastic style, which I do not find to be consistent with its having been written by a solicitor.

303. It is difficult to know what substance there was to the Rowden Residents’ Association. Certainly very few other residents of Rowden Lane, if any, seem to have been asked to join it. It was, in my view, not much more than a different manifestation of the Second and Third Claimants. If such an organisation existed outside Brookfields, I reject Mr Heselden’s evidence that he was neither a member nor chairman of it.

304. On 6 April 2002, another letter was written by the Chairman of Rowden Residents Association to Wiltshire County Council. Unlike the earlier letter of 11 January 2002 which had been sent by email (but had no address on the letter), the letter of 6 April 2002 invited a reply to Brookfields. This was a substantial letter, comprising two pages at 265 and 266 in Volume 1. Again that letter ended with “Thank you”, had some of its text in bold print and underlined and made reference to the “stated case” of *Hale -v- Norfolk County Council* twice. I have no hesitation in including that this letter too was

written by Mr Heselden. It was written in the first person which Mr Heselden told me may have been the solicitor.

305. It is not so much the content of these letters, save for one matter to which I shall turn, which is of importance. What is of interest is Mr Heselden's reluctance to be associated with them. I regard this as relevant to his credibility. He is very anxious to be seen as distant from the main action in this case. In my view, he was at the heart of the action and directing it.

306. The first reference Mr Heselden made to the existence of a "Private" sign on Rowden Lane was in his first witness statement dated 24 January 2007. I have summarised his witness statement above. In the letter of 6 April 2002, Mr Heselden, I find, wrote:

"If you fail to provide us with legislation that empowers your Director of Highways to do the above, then we will take this as acceptance by your council that your Director has no such legal rights to do so and the status of our section of Rowden Lane, remains as historically shown on records, a Private lane in which there is a footpath RUPP5. And nothing more than that. We trust that if you cannot show us this proof that you will have no objection to a sign in our lane, showing that it is Private with a footpath. After all it is our privately owned lane, not yours.

It beggars belief how you can claim that the information given to DMH was correct, when neither you nor your junior had considered the most relevant stated case of Hale -v- Norfolk County Council, before making your claims to them, which proves the advise given by you was seriously lacking and in error…"

307. This reference to a private sign in that letter is somewhat prophetic since in August/September 2002 overnight the word "Private" was painted on the carriageway at the junction of Section A and B of Rowden Lane. I find this was done at the instigation of Mr Heselden.

308. Significantly, although Mr Heselden was discussing a sign with the word “Private” on it in that letter, he never once made reference to the existence of the “Private” sign at the entrance to Rowden Lane between 1980 and 1983, to which he first made reference in his first witness statement some 5 years later. I cannot imagine Mr Heselden, who deployed everything he could to advance his case that the lane was private, not making reference to the existence to this piece of evidence, if it existed.

309. His reply to this suggestion was that he had, in fact, told his solicitor about the existence of the sign. I reject that evidence. If he knew of that sign at the time he was writing these letters to the Council to support the case that the lane was private, he would have undoubtedly have deployed that piece of evidence long before his first witness statement.

310. Mr Burns put it bluntly to Mr Heselden that he had lied about the sign in 1980 and that he had lied about not being the chairman of Rowden Lane Association. I agree. In my judgment, Mr Heselden was not truthful about those and many other matters in his evidence, to which I have made reference.

311. He was keen to be in the background, in the shadows, and not to be seen as involved. Yet, the reality was exactly the opposite. I find that, from the time Mr Heselden knew there was a risk of development that could adversely affect his property in Rowden Lane, he orchestrated a campaign to highlight the private status of the Lane and its verges. It was under his influence that the obstructions, sleepers, stones or bollards on the verges and hard standing escalated.

312. If, on the Claimants’ case, the lane was private and not much used by the public in vehicles, why would the Second Claimant go to the bother of placing sleepers and other obstructions on the hard standing which would have to be removed for delivery vehicles? Moreover, the problem of cars, associated with the public house, parking in

the Lane by Brookfields seems to have been particularly associated with the reduction in the size of the car park when the public house was extended in 2000.

313. I find that these items were not present before Mr Heselden arrived in 1996. They began to intensify for the first time after it was realised that there was a risk of development of the land opposite Brookfields, probably in 2002 .However, the items placed outside Brookfields on the verges and hard standing were not considered by him to be enough. Hence his pressure on Mr Kevin Fortune, not only to put posts outside Swallow Falls but also to obliterate the passing bay which he saw as the weak spot of their claim.

314. In my judgment, any stones or other items placed on the verge outside Brookfields, Elmtree Farm House, Elm Tree Farm and Swallow Falls and its paddock, up to and including 2001, had been placed there for purely decorative purposes or to prevent damage to the grass verge. They were never placed to counter any dedication of Rowden Lane as a public vehicular highway across its entire width.

315. I expressly find that there were no posts of any significance outside Brookfield or Swallow Falls before 2001.

316. I did not regard Mr Heselden as an honest, accurate or reliable witness. In my judgment, he has lied to the court.

<u>The Second Claimant</u>

317. Rosemary Phoebe Ayres was 11 years old when Brookfields was purchased.

318. Her evidence was that both her parents' solicitors and the vendors of Brookfields had assured her parents that the Lane and its verges were privately owned. However, the 1963 conveyance to Mr Ayres made no reference to the verges and the land conveyed

was described as ‘land adjoining Rowden Lane’. No easement had been granted in favour of Brookfields to get to it or to pass over any other part of Rowden Lane.

319. It seems to me likely that the solicitors acting for Mr Ayres would have conducted a local land charge search and discovered, as had others, the existence of the 1937 resolution declaring Rowden Lane to be a ‘new street’. Searches conducted in 1958 (Brookfields) and 1970 (Swallow Falls) had disclosed this entry. None of the 1963 conveyancing file, apart from the conveyance, has been produced, nor has any letter, if any existed, from the solicitors then acting for Mr Ayres, explaining to him the rights he was acquiring and the obligations he was undertaking under the conveyance.

320. It seems to me that, in 1963, the emphasis was also on whether the Lane was being maintained publicly or privately, rather than whether it was a public highway. Certainly, in the 1977 agreement with Langcote, and on registration of the title in 1996, Rowden Lane at this point was described as a highway. I reject her explanation that lawyers either wrongly assumed it was a highway or, knowing that it was not a highway, still allowed it to be described as a highway.

321. Ms Ayres said she remembered the cattle grid being there in 1963, although, owing to the shade on the 1964 photographs, this cannot be confirmed by the aerial photographs, as interpreted by Mr Vaughan.

322. When they moved to Brookfields in 1963, she said that Mr Ayres put tarmac over the clinker from the edge of the roadway, over the verge area, and into the old driveway and also placed posts and stones on the verge outside Brookfields. The posts were placed on the high verges by the old driveway and stones placed on the remaining area of verge. Moreover, she alleged that the verge outside Brookfields was fenced from time to time until the 1990s with electric stakes and wires to enable animals to be

grazed there. She added that the family's lorry, trailer and horsebox were parked regularly on the verge.

323. The impression she was seeking to convey was that the verges were constantly occupied or used in a way indicative of private ownership.

324. She also described how, for some 30 years until 2002, concrete moulds had been positioned on the verge outside Elm Tree farmhouse, and also how Dick Jennings used to park trailers on the verge outside Elm Tree Farm, where stones were subsequently placed. Mary Puntis denied the suggestion that her father, who was meticulously tidy, kept trailers or vehicles regularly on the verge outside the farm, although she accepted that the moulds made by Ron Wheeler had been placed outside Elm Tree farmhouse in the late 1960s or early 1970s.

325. Opposite Brookfields, on the verge outside The Bungalow, Ms Ayres said there were staddle stones since, as she understood it, the 1950s until the late 1990s or even 2000, when she believed they were removed because Laing was showing interest in buying the land adjacent to The Bungalow. Of course, the option agreement was made in 1995, much earlier than Ms Ayres said the staddle stones were removed to smooth the way for a successful planning application which might have involved a widening of Rowden Lane. I find that the staddle stones were moved shortly after 1991.

326. She described the “Private Lane to Farms only” sign which she said was there in 1963 and remained until it disappeared in 1983. However, this sign was never mentioned in the Brookfields correspondence to the developers in 2001 and 2002, where she and Mr Heselden sought to persuade them that they could not implement any planning permission they obtained, because Rowden Lane and its verges were private. In cross examination, she accepted that it was “possibly” the case that she had never written about the sign, until her second witness statement in January 2007.

327. None of her witness statements suggested who had painted ‘Private’ on the carriageway in August 2002.

328. In 1978, the new driveway was put in, together with the hardstanding, without, she alleged, any planning consent. She said that this was because the Lane was private, and the fee sent for the planning consent had been returned. I have seen no documentation in relation to this, and so I simply do not know whether, given the classification of Rowden Lane at the time, it would have required planning consent as a matter of law.

329. Nevertheless, the point which Miss Ayres wanted to make was that this new driveway was bordered with kerbstones which continued in a curve into the Lane, forming a wide splay. Moreover the hardstanding was adjacent to the driveway, and was constructed over what had been a section of the grass verge. She maintained that once this new driveway had been built, railway sleepers were placed over the hardstanding and individual kerbstones placed along the edge of it.

330. I find this surprising. If, as she described, the lane was so infrequently used, and then only by residents, why was there any need to block off the hardstanding? On her evidence, vehicular traffic increased only after 2000, when the public house car park was reduced in size. I find that the railway sleepers and stones were placed there, on a permanent basis, no earlier than 2002. I make this finding, even if the photographic evidence (supplied by the Claimants after delivery of my draft judgment) showed five sleepers on the hardstanding in 1988, because I do not accept the evidence of the Claimants’ witnesses that that they were permanently situated there since 1978.

331. She claimed that Rowden Lane and its verges had always been maintained by the residents, and never by the Council. Indeed, she said that in 1989 it had been resurfaced by Mr Prangle, and paid for solely by Dick Jennings in order to improve the

prospect of success of his planning application. However, the highway authority had carried out the works in 1988 and 1989 in Rowden Lane. No documentary evidence was produced to support the proposition that Dick Jennings paid for this work, nor was it the evidence of Mary Puntis that he had.

332. Ms Ayres made three allegations of violence against Dick Jennings.

333. The first was that he drove his tractor at Mr Gibbons and Mr Gooden. She said that they were terrified of him. This was not confirmed by any of the Gibbons witnesses.

334. She also described an incident when Dick Jennings was supposed to have gone for Mr Pullin with a pitchfork, because he had accidentally dislodged a stone on Mr Jennings' verge when he was cutting the grass with a tractor. Kevin Fortune said that he was present when Mr Pullin described this incident to his father. However, Miss Ayres never saw the incident herself and Kevin did not describe the incident himself. Mrs Jennings knew nothing about it, nor did Mary Puntis. I am sure that, had such a thing happened in this small community, it would have been notorious.

335. Finally, Miss Ayres suggested that Dick Jennings gestured to her, as if he was going to shoot her, over her letter of objection to his planning application in 1983. The first time she made this allegation was in her fourth witness statement, made in April 2009.

336. I am not satisfied that any of these incidents occurred.

337. She said that she had never known members of the public to use Rowden Lane for recreational and, indeed, there was no logical reason for the public to pass over the Lane at all. As far as she was concerned, the users of the lane were the occasional walkers, residents, visitors to residents and farm vehicles. She added that there were fewer cars in and around Chippenham in the 1940s, because it was situated within

poor farming country and, even in 1963, no or few motorcars used the Lane, just farm vehicles. However, Mr Gibbons had a motorcar as indeed did Mr Jennings.

338. I am not persuaded that cars in the 1950s and 1960s were as rare as she suggested. I prefer the Gibbons witnesses on this point.

339. She also alleged that Mrs Burridge would challenge anyone using the Lane, who was not a resident of Rowden Lane. However, this was not the view of the Gibbons witnesses. Moreover, she disagreed with them about the extent of parking on the lane. She suggested that cars could not park outside the Old Piggery, nor indeed anywhere beyond Swallow Falls because it was the last available turning point. She thought it was only after 2000, when the public house was extended and the car park correspondingly reduced, that there was an increase in cars and dog walkers on Section B of the Lane.

340. I reject this. It seems to me that, ignoring the grass verges outside Brookfields and Swallow Falls, there is, and has always been, ample car parking space (i) on the verges at the back of Burleaze (ii) by the entrance to the Old Piggery (iii) on the verge adjacent to the Old Piggery (iv) in front of Elm Tree farm house and, until it was removed, (v) in the passing bay. That is all within section B.

341. She maintained that she had no input into the letters written on behalf of Rowden Residents' Association, even though her home was used as the address for correspondence. She did, however, confirm that Rowden Residents' Association was not a true association, merely an action group. It held no meetings and had no membership forms. Its purpose seems to have been largely to redress what she regarded as the 'loose cannons' of the River Valley Protection Group which, no doubt to her annoyance, had held meetings with the developers.

342. Finally, she gave evidence about a number of specific events. The first was the telephone conversation which she said she had with Mrs Jennings in April or May 2002, in which Mrs Jennings is alleged to have said that the Lane was private. I have dealt this above.

343. On 22 June 2002, she alleged that Tony Collins got very angry with her because of her claim that the Lane was private and because she was putting posts on the verges. She said that he was trying to get her to stop her claims, because it was interfering with his planning application and that he had hoped to have his 'dosh' by Christmas. That conversation was denied by Tony Collins. It was alleged by her, for the first time, in her fourth witness statement in April 2009. I prefer the evidence of Tony Collins on that issue. He denied any such conversation, saying that, in any event, ‘dosh’ was not a word he would have used.

344. She described an occasion in September 2002 when Council workmen came to obliterate the word ‘Private’, which had been painted on the carriageway, and had tried to remove some of the obstructions on the verge. The police had been called and they advised the Council workman to leave the scene, which they did.

345. However, on 13 November 2002, the Council had sought the assistance of the police to remove these obstructions. This was the occasion on which the alleged assault took place.

346. In her witness statement, describing this incident, she said:

He then struck me on the face with the clipboard knocking me to the ground.

347. This account is more suggestive of a deliberate assault than the account which she subsequently gave. As I have indicated elsewhere in this judgment, it was very surprising that no reference was made to this assault when Mr Hesleden wrote to Mr

Gray MP on 14 November 2002, the following day. In the end, Miss Ayres said that the account of the incident given to me by Mrs Collins was ‘fabricated’, and that she had been set up by the police and Mr Clark, one of the workmen employed by the Council to remove the obstructions.

348. She described how the CCTV installed at the front of the Brookfields had been ‘invaluable’ in capturing a number of incidents and, on at least one occasion, the tapes had been given to the police for analysis. I am not aware of any tape for 13 November 2002 being produced to anybody for consideration.

349. The final event occurred on 8 August 2006 when, again, the Council came to remove posts and stones which had been replaced on the verges by the Claimants. She valued the metal reinforced cone shaped stones, 2 feet high and concreted into the verges, which had been removed on this occasion at £850. Those items are currently retained by the First Defendant. However, the items which were removed in November 2002 were disposed of by the First Defendant, which has subsequently compensated the Claimants in respect of them.

350. I do not underestimate the importance of the issues in this case for Miss Ayres. I make full allowance for the illnesses from which she has suffered, and the effect which any medication she had taken may have had upon her words and deeds.

351. Nevertheless, I still regard her as a very determined and manipulative person, who was resolved to do whatever she could to prevent planning permission being implemented. That is understandable. However, in my judgment, the picture which she has sought to paint - of a lane rarely frequented by the public, being challenged whenever they did, with no parking space and with a sign indicating that the Lane was private - is far removed from reality.

352. In my judgment, she not only minimised the true extent of the public user of Rowden Lane, but she also exaggerated the nature, extent and duration of obstacles on the verges and the hardstanding.

353. I did not find her to be an honest, accurate or reliable witness. She was the one who introduced the allegation against Mr Raubenheimer in her second witness statement made in January 2007. She accused him of assault. In my judgment, that was a false allegation. The reality was that she slapped him, because she had lost her temper and was not getting her own way.

354. It suffices for me to say that, where the evidence conflicts, I prefer the evidence called by the First Defendant to that of Miss Ayres, except where the contrary is stated.

Chapter 10: The Gibbons family, The Bungalow and the Old Piggery

355. By a conveyance, made 6 February 1937, Arthur Joseph Colborne sold and conveyed to Frederick Harold Gibbons an area of land on the north side of Rowden Lane running between the start of Section B and the beginning of the modern Burleaze site.

356. Frederick Gibbons and his wife Nita had 4 daughters, Shirley (Collins), Susan (Fitzsimons), Jean (Ward) and Barbara (Waldron). Frederick Gibbons died on 10 November 1968, and Nita died on 6 June 1998.

357. It was on this area of land that Mr Gibbons built The Bungalow in 1937. Shirley Collins and her husband, Tony, moved into The Bungalow in 1991.

Family Business

358. The rest of the land is a field on which the Gibbons family ran a nursery and vegetable business. They also grew flowers and sold turkeys at Christmas. They used to sell vegetables, flowers and turkeys to the public there.

359. Subsequently, on 30 March 1945, the personal representatives of David Townsend sold to Frederick Gibbons an area of land, forming part of a larger close of land formerly known as Rushy Ground. It became known as the Old Piggery.

Partnership with Mr Gooden

360. In the 1940s, Frederick Gibbons and Percy Gooden went into business together running the piggery. Following Mr Gibbons' death, the land and buildings, known as the Old Piggery, were conveyed into the name of Nita Gibbons and Mr Gooden.

361. By a Deed of Gift and Appointment, dated 31 August 1994, Nita Gibbons transferred her beneficial one half share into the names of herself and her four daughters. The area of land involved was about 4.345 acres.

362. The Gibbons family is and was a very close one and, although the daughters moved away from home when they married, they kept in regular and close contact with their parents at The Bungalow. This was the first building to be constructed on Section B of Rowden Lane.

363. Jean (Ward) was born in 1941, Shirley (Collins) in 1945, Barbara (Waldron) in 1947 and Susan (Fitzsimons) in or about 1950. Susan died at some time unknown to me but after 2006. I heard evidence from Jean, Shirley and Barbara. I was impressed by their evidence. They were witnesses of transparent honesty, accuracy and reliability.

364. In reaching that conclusion, I have not overlooked the financial advantage which may accrue to them if Rowden Lane were to be declared a public vehicular highway. I also regarded Tony Collins as a witness of honesty, accuracy and reliability.

Option Agreement

365. The potential financial advantage stems from an option agreement, dated 11 July 1996, between Laing Homes Limited, Nita Gibbons, her four daughters and the Gooden family, whereby Laing bought an option to purchase both the bungalow, the adjacent land as well as the Old Piggery. Clearly Laing wishes to develop that land if it can.

366. Moreover, the Gibbons family has entered into another agreement, dated 14 November 2002, with Blossom Properties Limited, Laing Homes Limited, Redcliffe Homes Limited (and some other adjacent property owners), with a view to maximising their prospects of planning success. If all the various areas covered by the agreement were developed, the whole of the south side of Rowden Lane, excluding Swallow Falls, Brookfields and Elm Tree Farm, would be developed, together with the northern section of Rowden Lane between the start of Section B and the commencement of the Burleaze Estate.

367. Despite the financial incentive which those agreements may represent, and after subjecting their evidence to close scrutiny, I unhesitatingly accept the evidence of those three witnesses. They were all impressive witnesses of honesty, accuracy and reliability.

Planning Appeal

368. The Claimants place reliance on material supplied by Mrs Gibbons in support of her appeal against a refusal to grant outline planning permission for residential

development on the land adjacent to The Bungalow in or about 1990. The relevant document is contained on page 157 of volume 1. It is not entirely plain to me whose document this is. The top quarter of the page recites the planning history of Rowden Lane, largely concerned with Elmtree Farm. Only one page of the document has been produced, and I am not at all clear whether this is the Council Officer's report prepared for the appeal or whether it is a submission made on behalf of Mrs Gibbons. However, even assuming for the moment that it is part of a submission made on behalf of Mrs Gibbons, it seems to me that the relevant passage is somewhat ambiguous. It states:

The highway improvements to the junction of the A4/A320 requested by Wiltshire County Council have now been carried out. A roundabout exists at this junction and the County Council has no objection in principle to this application subject to the road frontage, which is in the applicant's ownership accommodating a 4.8m width road with a 1.8m wide footpath along one side". (my underlining for emphasis).

369. This passage seems to refer to the highway recommendations made by Wiltshire County Council in a letter, probably dated in August 1990. That letter said:

Highway Recommendations

Residential development; adjacent to "The Bungalow" Rowden Lane

No objection subject to:-

1. *A Grampian condition requiring Rowden Lane to be widened to 4.8m between the access to Rowden Arms and the site access prior to any works commencing on site.*

2. *A Grampian condition requiring the provision of a 1.8m wide footway between the Rowden Arms access and the site access prior to occupation of any dwelling.*

370. I do not therefore read the words, I emphasised above, as an indication that the Gibbons family owned the verge. Rather, if the road had to be widened, it could have been taken out of their front garden which was immediately adjacent to the grass verge.

The Gibbons family's knowledge of the area

371. Shirley Collins and Susan Fitzsimons were originally approached to be witnesses by the First Defendant. They saw Mr Gale of Wiltshire County Council in April 2006, and they provided their own witness statements in or about September 2006. Fuller witness statements were taken from them and from Tony Collins by solicitors acting on behalf of the Second Defendant in June 2008.

372. The documentation originally supplied by Shirley Collins and Susan Fitzsimons to the First Defendant is found at Volume 2/781 and 1/385-6 (Shirley Collins) and 1/384 (Susan Fitzsimons). The brief statement by Susan Fitzsimons, at 1/384, was never signed by her, nor did it contain any declaration of truth. Susan died at some time between 2006 and 2008.

373. It is convenient to summarise the knowledge which Jean Ward, Shirley Collins, Tony Collins and Barbara Waldron of Rowden Lane before turning to the detail of their evidence.

374. Jean Ward, the eldest, was born in 1941. She lived in The Bungalow between 1941 and 1963. In 1963, she moved to South Wales but, in 1968, moved to her present address in Woking, Surrey where she has lived since. However, from 1963, she regularly visited her parents at The Bungalow and, when her mother died, she continued to visit her sister Shirley Collins and her brother-in-law, Tony Collins, who have lived at The Bungalow since 1991. Jean Ward's husband often worked abroad,

and so she would often come with her children and stay at weekends and during the summer holidays.

375. Shirley Collins was the second oldest child. She was born in 1945. She married her husband, Tony, in 1966. She worked on her father's pig farm until it closed in the middle of the 1970s. She lived at The Bungalow between 1945 and 1966. On her marriage, she and Tony lived in the New Forest until 1968, the year her father died. In 1968, she and Tony moved back to Chippenham to be close to her mother. From 1968 onwards, she visited her mother daily and, in 1991, she and Tony moved into the bungalow where they still live.

376. Tony Collins moved to Chippenham in 1964 where, for a very short period, he worked in the Wiltshire Police. Not long after 1964, he met Shirley Gibbons, now his wife. His acquaintance with The Bungalow, therefore, began in 1964. Over the period 1964 to 1966, he was a regular visitor to The Bungalow and to Rowden Lane. In 1968, Tony Collins was working as a postman, and had his afternoons free. Accordingly, he would regularly help out at the Old Piggery during the afternoons and on Saturday mornings.

377. Barbara Waldron was born in 1947. Until recently, she worked as a NHS receptionist. She has a strong and independent personality. Born in 1947, she lived in The Bungalow until 1967, when she moved to Swindon. In 1979, she moved to her current address, also in Woking, Surrey. However, from 1967 onwards, she would regularly return to Rowden Lane to visit her family. In addition, she would telephone her mother several times a week.

378. They were all very supportive of their parents. They were all regular visitors to The Bungalow, even after marriage. When they were not visiting, they were in regular contact by telephone.

379. I am satisfied that, individually and collectively, they have a detailed and reliable knowledge of the history of Rowden Lane and the properties on it. They have all impressed me as honest, accurate and reliable witnesses.

Summary of the Gibbons evidence on the 11 topics

380. Their evidence is substantially to the same effect. It deals with the following 11 topics, except where the contrary is stated.

381. However, Shirley Collins alone gave evidence about an alleged assault she witnessed on 13 November 2002, when she said that the Second Claimant, whilst standing on the gate inside her property, slapped a council employee, Emil Raubenheimer, "pretty hard" and then ran off into her house. This incident is alleged to have happened when council workmen were trying to remove objects that had been placed on the grass verge in front of Brookfields and elsewhere on Rowden Lane.

382. The 11 topics, about which all the sisters gave evidence, with a few exceptions, were as follows:

(1) Familiarity with Rowden Lane and the adjoining properties;

(2) The Gibbons' farm, vegetable and piggery businesses between 1947 and the middle 1970s;

(3) The maintenance of the surface of Rowden Lane and the verges;

(4) Use of the lane by the public in vehicles;

(5) Parking on the lane;

(6) Signs on the lane;

(7) Staddle stones placed on the verge outside the bungalow between 1963 and the 1990s;

(8) Stones, bollards and other obstructions on verges in Rowden Lane placed by others;

(9) Family belief as to the status of Rowden Lane;

(10) Challenges by owner/occupiers of properties adjacent to Rowden Lane to members of the public using Rowden Lane;

(11) The passing bay in the verge outside Swallow Falls.

383. Jean Ward did not give evidence on points (10) and (11) above, and Barbara Waldron did not give evidence on point (11).

Family helping out

384. The essence of their evidence was that their father had been in partnership with Mr Gooden, since about 1945-47, in the piggery business. This continued until the middle 1970s. In addition to this, Mr Gibbons grew vegetables and flowers next to the Bungalow. He sold these not only to wholesale purchasers but also to the public from The Bungalow. At Christmas time, he also sold turkeys to the public.

385. After the cessation of business at the Old Piggery, some of the buildings were knocked down, but a derelict barn still remains there. This barn is used by Robert ("Nobby") Harding to store his circular saw and cut wood. The probability is that this wood is kept not for resale, but for his own use. He is divorced from his wife, Gillian Harding. They have a daughter, Claire Harding. Gillian and Claire gave evidence before me.

386. All the girls in the Gibbons family seem to have helped out both in the pig business and in the nursery/vegetable business run next door to The Bungalow.

Rowden Lane in and after the 1950s

387. In the 1950s, Rowden Lane had a hard surface of compacted gravel. Barbara Waldron could recall roller skating on the lane with her sisters. Jean Ward's earliest memory of vehicles using Rowden Lane was, at the end of the Second World War, when a column of Army tanks mistakenly turned up Rowden Lane. They drove up the length of Rowden Lane, and then turned around in the fields at the eastern end. She could remember standing with her mother outside The Bungalow, waving at the tanks as they drove back onto the A4 Bath road. At this stage, there was no evidence of the Council or of any 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.

388. However, in the 1960s, the Lane was resurfaced, as WH Jennings indicated in his Statutory Declaration, and this was paid for effectively by the farms and businesses on Rowden Lane.

389. In the early 1980s, Rowden Lane was again resurfaced. No contribution towards the cost of this resurfacing was demanded from Mrs Gibbons. In my judgment, this resurfacing was done, at no cost to the residents, by the Highway Authority in or about 1983. It was probably the work, which gave rise to the disciplinary hearing of the workers who carried out resurfacing in Rowden Lane in 1983. This disciplinary hearing revealed that Section B of Rowden Lane was incorrectly shown on the map only as RUPP 5.

390. In any event, it would seem that this work, done in 1983, represents the first recorded maintenance of Section B of Rowden Lane at public expense for some considerable

time. The failure to do so earlier, according to Mr Dick Jennings' correspondence, was because the Council simply did not have the necessary funds and did not regard Rowden Lane as a priority.

391. As far as the verges outside The Bungalow are concerned, their evidence was that their father was meticulously tidy. He kept the hedges and the verge trimmed, not because he regarded himself as owner of the verge, but because he wished to keep the front of his house attractive and tidy.

Wall and raised verges

392. At the commencement of the raised verge outside The Bungalow, the remnants of a wall built of brick and stone projects towards the carriageway. No explanation has been given for the presence of this remnant of wall.

393. However, a scrutiny of some of the old Ordnance Survey plans and photographs may explain this remnant of wall drawn to my attention during the site view. Appendix 14 to Mr Harbour's report contains a copy of the first edition Ordnance Survey map for 1886. This shows the location of the earlier Rowden Arms Public House. This may well have been demolished when the current public house was built in the 1960s. However, from the 1886 map, it can be seen that the Rowden Arms public house lies in the middle of a plot, the eastern boundary of which protrudes into Rowden Lane itself. Rowden Lane was not of uniform width, and the effect of this projection would have been slightly to narrow it at that point.

394. The matter is shown more graphically in an aerial photograph at page 419 in Volume 2, which shows the original extent of the public house car park before it was altered to allow for the construction of the road leading to numbers 83, 85 and 87 Rowden Hill. In that photograph, a boundary wall can be seen separating the car park from The

Bungalow. It seems to be a continuation of that boundary wall which has projected onto the verge.

395. Accordingly, I do not regard this wall as inconsistent with the verge forming part of the highway. The explanation may be that the public house car park originally extended further into Rowden Lane before the commencement of the verge outside the Bungalow.

396. The gate which Mr Hudson spoke of in his witness statement may have been in connection with the car park. None of the other witnesses mentioned it, nor was it observed by Mr Vaughan in his topographical survey or in the old maps and photographs which he analysed. In the conveyance of the land (to become The Bungalow) to Frederick Harold Gibbons in 1937, there is a drawn plan of the area. There is no indication on that plan of any gateway across Rowden Lane, merely a narrowing of Rowden Lane between what was to become the car park and Rowden Place opposite.

397. However, the existence of a gate, which I do not accept, even if it were capable of opening and closing across Rowden Lane, would not inevitably prevent Rowden Lane becoming or being a public vehicular highway. Mr Hudson did not suggest this gate was padlocked.

398. The raised verges outside The Bungalow and Brookfields, together with the remnants of the wall, pointed out to me on the site view, are relied upon by the Claimants as some evidence that the verges were or are privately owned, and not subject to any public vehicular rights. The origins of the raised verges and the wall have not been explored in the evidence. However, raised verges may have been the result of accumulated vegetation or debris left, over time, on the verges on which grass has grown.

399. However, in my judgment, neither the remains of this wall, nor the height of the verges outside The Bungalow and Brookfields, are conclusive against, or necessarily inconsistent with, the existence of a public vehicular highway across the entire width, hedge to hedge, of Rowden Lane.

Users of Rowden Lane

400. The Gibbons' identified a wide-range of people and vehicles using Rowden Lane from their recollection. They included:

(1) Until the late 1960s, lorries and members of the public visiting the Gibbons nursery and vegetable business to purchase vegetables, flowers and, at Christmas time, turkeys;

(2) Until the 1970s, agricultural vehicles, lorries and workmen visiting the Gibbons and Gooden pig farm and the Jennings family pig farm;

(3) From the early 1970s, individuals using the sheds at Rushy Ground (the Old Piggery);

(4) Until the 1980s, agricultural vehicles, lorries and women going to Rowden Farm;

(5) Individuals walking, cycling and riding horses (at least until the cattle grid was installed some time between 1964 and 1970).

(6) Residents of Rowden Lane accessing their properties;

(7) Members of the public walking, cycling and driving up Rowden Lane to access the fields around Rowden Farm, and the river behind Rowden Farm to go fishing and swimming;

(8) Post vans, bin lorries, milk vans and bakery vans;

(9) From the 1980s, caravans going to and from Elmtree Farm;

(10) By the 1980s, vehicles accessing Kevin Fortune's window business at Swallow Falls;

(11) From the 1990s, the various families in the converted homes at Rowden Farm;

(12) Individuals driving up Rowden Lane by walk their dogs on the field past the cattle grid;

(13) During the 1980s, lorries and workmen accessing Martin Jennings packaging/cling film business;

(14) Individuals accessing Gypsy Lane to cycle and ride horses. Mrs Burridge, who died in 1985, the former owner of Rowden Farm would regularly drive up Gypsy Lane.

401. I accept that some of this use is by owners, or licensees of owner/occupiers of properties, on Rowden Lane.

402. However, I find that significant use of the Lane is, and since at least the 1950s has been, made by the public in mechanically propelled vehicles in order to gain access to the wide fields and amenities, including fishing swimming and walking along public paths, at the end of Rowden Lane, beyond the cattle grid.

403. Whilst there may have been other ways of accessing these fields, for example (i) via Gypsy Lane or (ii) driving to and parking in the hospital car park and then accessing the fields from the footpath from the car park or (iii) cutting through from Burleaze to Rowden Lane via the footpath adjacent to 22 Burleaze, I am satisfied that Rowden

Lane was a very convenient way of gaining direct access to this open and attractive land, over parts of which the public also enjoyed rights of way.

Parking

404. Moreover, an advantage of using and parking on Rowden Lane was not having to park in front of people's houses up by the cattle grid. Once vehicles had driven past Elm Tree Farm, there were no other houses fronting the Lane. The public parked their cars by the cattle grid, in my judgment, because they were driving to the end of Rowden Lane for recreational purposes.

405. The Gibbons witnesses stated that vehicles were parked on Sections A and B of Rowden Lane, especially when the public house car park was full, and also up by the cattle grid. They even parked in front of The Bungalow. The Gibbons family never complained about this, or warned people off, because they always knew the Lane was public. Parking areas used included those outside Elm Tree farmhouse, by the Old Piggery, on the verges by the Old Piggery, and on the verges at the back of Burleaze where owners have put gates to gain access to the back of their property from Rowden Lane. Some residents of Burleaze even park on the verges in Rowden Lane, having driven along Rowden Lane to get there.

Signs

406. The Gibbons witnesses denied the existence of any sign at any stage on Rowden Lane which contained the word "Private". There were two exceptions to this. The first was the painting of the word "Private" overnight on the carriageway at the junction of sections A and B in 2002. The second was the very recent sign which has been placed at the cattle grid describing the road to Rowden Farm as private. However this is after the end of Rowden Lane relevant to this case.

Warning off non residents

407. The suggestion has been made by or on behalf of the Claimants that the Collins/Gibbons family themselves warned off people who used the lane or parked on the verges outside the bungalow. It is also suggested that the Gibbons family themselves had stones on the verge, indicative of their assertion of ownership over the verges, rather than the verges forming part of the highway.

408. I accept the evidence of the Gibbons witnesses that there never was any challenge by any of them, including Shirley Collins, to members of the public, for using, whether on foot or by vehicles, the Rowden Lane carriageway or verges. I also accept that they had never been challenged by Dick Jennings, or by Mr and/or Mrs Burridge, nor had they seen anyone being challenged by Mr Jennings, Mr or Mrs Burridge or their parents for using the Lane or the verges, or for parking there.

Staddle stones

409. It is accepted by them that staddle stones (rather like a mushroom, with a cap at the top and a vertical stone at the bottom) were placed on the verge outside The Bungalow in about 1963. Robert ("Nobby") Harding had sold them to Mr Gibbons for £30. They remained there, not as an assertion of ownership of the verge on which they were placed, but for decorative purposes only. Following the theft of the tops of one or more of the straddle stones, they were taken off the verge in the early 1990s, and kept at the back of the bungalow. They are still there. They were not moved for any reason connected with the option agreement.

Stones and obstructions on other verges

410. The Gibbons witnesses also gave evidence about other stones and obstructions on verges outside other properties on Rowden Lane.

411. Their evidence was to the effect that stones on the driveway (preventing entry, turning or parking) – but not on the verges - had been placed outside Brookfields no earlier than 1996. However, they noticed a distinct escalation of obstructions and stones on the verges in and after 2002.

412. Nevertheless, they had to accept, especially when shown a photograph taken in the early 1990s showing stones on verges outside Elmtree Farmhouse, by the entrance to the caravan storage park and outside Swallow Falls and paddock, that some items had been placed there before 1996. Nevertheless, I am satisfied that there was a change in attititude and very significant escalation in 2002.

413. I find that before 2002, any thing placed outside Elm Tree Farm and Swallow Falls was for decorative purposes or to protect the edges of the verge, which had been kept so neatly, from caravan wheels.

Reputation

414. They said that the views of their late mother and father, were that Rowden Lane had always been a public highway, despite the document in relation to the planning appeal concerning The Bungalow, to which I have referred above. As I have already indicated, I am not satisfied that this document was referring to the verges. I am satisfied that their parents always believed Rowden Lane to be a public but unadopted vehicular highway.

Passing bay

415. They confirmed that the passing bay had originally been installed in or around 1989 but that it was removed in 2002. The passing bay was removed by Kevin Fortune, as I have already indicated, as a result of improper pressure applied to him by the Third Claimant. I am satisfied that this pressure formed part of the campaign which the

Second and Third Claimants wished to run as part of their objection to the planning application. The petition which they raised, and the other correspondence from 'Rowden Residents Association', formed part of the same campaign. I shall deal with these matters more fully, when dealing with my assessment of Mr Heselden.

416. I have dealt with the Gibbons evidence as one narrative. There were I accept, minor differences in recollection between those four witnesses, but they did not undermine my confidence in the honesty, accuracy and reliability of each of them.

Assessment of Gibbons evidence

417. I accept their evidence. In particular, I accept their evidence (i) as to the significant public vehicular user of Rowden Lane since the 1950s; (ii) that there was no "Private" sign; (iii) there was no challenge to members of the public using the carriageway and/or verges of Rowden Lane, whether by car or on foot; (iv) that the staddle stones were not assertions of ownership, but were mere items of decoration, and (v) that, in 2002, there was a considerable escalation in new obstructions on the verges outside Brookfields and Swallow Falls.

418. I am satisfied that, before 2002, stones or other items, placed on the verges, driveway and hardstanding in Rowden Lane, had been put there mainly for decorative or protective purposes, and not to negative any dedication of the carriageway or verges as public highway.

419. In my judgment, the Gibbons family has a reliable, accurate and intimate knowledge of the lane. They were the first family to live on Section B. Their father built The Bungalow in 1937.

420. Where their evidence conflicts with that of the Claimants or the Claimants' witnesses, I prefer the evidence of the 'Gibbons' witnesses, except where the contrary is stated.

The alleged assault by the Second Claimant on Emil Raubenheimer

421. I turn now to the conflict of evidence over the alleged assault by the Second Claimant on Mr Raubenheimer on 13 November 2002.

422. I have reminded myself of the gravity of this allegation, and the need to scrutinise the evidence most carefully before being satisfied that Ms Ayres unlawfully assaulted Mr Raubenheimer.

423. In the trial bundle, attached to the witness statement of Shirley Collins, are the police witness statements of Mr Raubenheimer, Christopher Clark (an employee of the company involved in the removal of the obstructions), Police Constable Caroline Vost, Police Constable Gardner, Police Sergeant Glasgow and Police Constable Mazurk. None of those has been called to give evidence before me, and their witness statements, although attached to the witness statement of Shirley Collins, are not evidence in the case before me. Indeed, the whole issue of whether or not there was an unlawful assault is irrelevant to the primary issues which I have to decide. Nevertheless, it was originally raised by the Second Claimant in her witness statement and, to a limited degree, is relied upon by the First Defendant as relevant to the credibility of the Second Claimant. If the allegation that the Second Claimant unlawfully assaulted Mr Raubenheimer is proved, it shows the intensity of her feelings over the issues in this case. It would also establish that she has not, at least on this issue, been a truthful witness.

424. In analysing this issue, I have not relied upon any of those police witness statements. I have, however, had the advantage of reading the interview under caution of the Second Claimant. In that interview, she denied any gratuitous assault upon Mr Raubenheimer. She denied slapping him deliberately. She suggested that he was trying to frustrate her attempts to see what was being removed from the verges by

Brookfields, by holding up a clipboard to her face. She maintained that the clipboard held by Mr Raubenheimer came into contact with the side of her face causing some injuries. She produced photographs of facial marks which she said had been caused by Mr Raubenheimer, as a result of whose actions she instinctively put out her hand, which innocently may have come into contact with Mr Raubenheimer. However that was never a deliberate assault, but rather an involuntary reaction to losing her balance as a result of being hit with the clipboard. This was the account she repeated in her oral evidence

425. Shirley Collins described the incident both in her witness statement and in her oral evidence. She said that she was at home looking after her grandson who had just come out of hospital. She described how she became aware of a commotion going on opposite The Bungalow at Brookefields and went out to see what was happening. She saw the Second Claimant standing on the inside of the gate at the entrance to Brookfields. She saw Mr Raubenheimer standing in front of her with his back to Shirley Collins. She recalled another council worker standing some distance back and police officers further down the lane. The Second Claimant, she said, was shouting at the council worker and then slapped him pretty hard, after which she says ran off into her house.

426. This account is, I find, inconsistent with the Second Claimant's account both to the police and repeated in her evidence.

427. Shirley Collins was cross-examined on the basis that she never saw the incident, and that she had derived the information from the police witness statements. The implication was that she was making up the allegation against the Second Claimant. This was pursued on the basis that she had not made a witness statement to the police which, it was suggested, she would have done had she been a genuine witness of the incident.

428. Her answer was that she had never been asked by the police to give a witness statement. She was adamant that she had seen the episode, that Miss Ayres did slap the council worker, and that she had not seen the police witness statements at the time that she had made and signed her witness statement.

429. There are two other aspects of this incident which are worthy of note.

430. The first is that no CCTV footage of the event was produced by the Second or Third Claimants, even though they had installed a CCTV system to record events in the Lane outside Brookfields. This is to be contrasted with another episode when Mr Heselden produced CCTV footage from the camera to the police.

431. The second is a letter written, I find, by the Third Claimant, the day after the incident. The Claimants' complaint was that the objects were being removed from the verges two days before a Planning Inspector visited the Lane. That unsigned letter to the local MP, inviting a reply to Brookfields, purported to come from 'Rowden Residents' Association'. It complained of a 'serious incident' on 12 November 2002. However, no allegation of improper behaviour by Mr Raubenheimer, or of his hitting Ms Ayres with a clipboard causing injuries, was made.

432. I have no hesitation in accepting the evidence of Shirley Collins on this issue. I find that the Second Claimant did unlawfully and unjustifiably slap Mr Raubenheimer on the face because she was very agitated and cross with him. The event took place at an important time in the planning process. She was highly emotional at that time. She said she went back into the house immediately, and made no complaint at the time to the police.

433. In her evidence to me, she tried to explain how her own disability, attributable to a medical condition, would have precluded her from being involved in the event as

described by Shirley Collins. I regard those explanations as contrived after the event to seek to minimise her involvement, and to explain away what she had done.

434. I utterly reject the suggestion that Shirley Collins pretended to be a witness to something which she had never seen, and made up an account derived from police witness statements.

435. I accordingly find that the Second Claimant did deliberately slap Mr Raubenheimer, and has not been truthful to the Court about it. My conclusion is in no way altered by correspondence that she received from the police/victim support, where she was described as the victim and not the aggressor, following her own complaint.

436. Mr Raubenheimer had first made a complaint of assault on him by Ms Ayres to the police. In the end, there were no criminal proceedings.

437. Moreover, in putting forward a version of facts, which attempted to provide an innocent explanation for the events of that day, I find that she has been influenced or assisted by Mr Heselden, who had, before his retirement, been a police officer.

Chapter 11: Other conflicting factual evidence on modern user of Rowden Lane

First Defendant's witnesses on modern user

438. I have set out above my assessment of the evidence of the children of Dick and Phyllis Jennings (Elm Tree Farm), and of Mr and Mrs Gibbons (The Bungalow) on Rowden Lane since the 1940s.

439. I move now to three other witnesses called by the First Defendant. They all have some association with the Gibbons family. They are Gillian Harding, Claire Harding and Stephen Pollard. It is convenient to deal with their evidence at this stage because:

(a) They all deal with modern user of Rowden Lane; and

(b) They are or have been friends or acquaintances with one or more members of the Gibbons family.

440. In my judgment, their association with the Gibbons family is not substantial, and it has not caused me to doubt their honesty, accuracy or reliability as witnesses. Indeed, I regard them all as witnesses of honesty, accuracy and truth. I accept their evidence.

Gillian Harding

441. Gillian Harding was born in Chippenham in 1953. In 1970, she married Robert ("Nobby") Harding, from whom she was divorced in 1997. Throughout her married life, she lived at 34 Lowden, not far from Rowden Lane. Her daughter is the witness Claire Harding.

442. Both Gillian and Claire were keen walkers. Between 1970 to 1997 (in the case of Gillian), and between 1983 to date (in the case of Claire, born in 1973, her child attends a local school), they walked their dogs along Rowden Lane to the large area of fields beyond the cattle grid. Both Gillian and Claire now live in Trowbridge where they run a public house.

443. Her ex-husband used to work for the Gibbons family. Although Gillian knows the Gibbons family, she has had little contact with them or the Collins family over the last 11 years. Gillian also used to ride along Rowden Lane on horseback. She, like Claire, described cars frequently parked at the eastern end of Rowden Lane by the cattle grid and the Old Piggery. Dog owners used to park there and take their dogs for walks in the fields too. Indeed, she made the point that cars parked up by the cattle grid had gone beyond the last residential properties on Rowden Lane, and were some way away from the new development by Rowden Farm. It is, therefore, likely that a

number of those vehicles had been driven there by people, who were not owners or occupiers of Rowden Lane properties, but who were exercising their dogs or had gone there for other recreational purposes.

Claire Harding

444. Gillian and Claire had always understood Rowden Lane to be public, and had never been challenged by Mr Jennings or Mrs Burridge in their use of the lane. They had no recollection of any sign with the word "Private" apart from a recent sign beyond the cattle grid governing the roadway to the new development at Rowden Farm. Gillian's evidence was that she had frequently seen cars in the lane between 1970 and 1997 parked up by the cattle grid by the Old Piggery. She also described how cars were not infrequently parked on the verges by the cattle grid.

445. Although she usually walked along Rowden Lane from her home at 34 Lowden along Rowden Lane to exercise her dogs in the fields, between 1993 and 1995 she also used to drive her car to the end of Rowden Lane to exercise her dogs. Gillian pointed out that there was a parking bay on a spur (now overgrown) just after the Old Piggery, between the Old Piggery and Hulberts Hold. This is shown on some of the maps. Gillian described how agricultural vehicles used Gypsy Lane between 1970 and the 1980s. She acknowledged that Dick Jennings could be aggressive, but she had never been challenged. The only stones or items on the verges, which she could recollect, were the mushroom shaped stones outside The Bungalow.

446. Claire's recollection was that there were always cars parked at the cattle grid, left there by dog owners exercising their dogs in the field. She too always believed the lane to have been public, and said there had been no relevant "Private" signs. She remembered no stones outside Swallow Falls, but did remember the stones outside the Jennings' farmhouse.

447. Even though Gillian did not live on Rowden Lane, she was never challenged by Dick Jennings or any of the other property owners on Rowden Lane as to her use of the lane.

448. Claire considered that there was adequate room for vehicles to pass each other on the lane and, in the week before she gave evidence in November 2008, a lorry had parked by the cattle grid and another vehicle was able to pass.

449. Although Claire Harding knew Martin Collins, one of Shirley and Tony's children, she struck me as an open, honest and reliable witness who was giving her evidence in a straightforward way.

450. These two witnesses, I am satisfied, are free from any taint of bias or favouritism. They described a fairly consistent picture of Rowden Lane being used by vehicles which were parked on verges up by the cattle grid beyond the Elmtree Farm, with dog owners exercising their dogs in the fields beyond, without challenge. This evidence covers the period between 1970 right up to date.

Stephen Pollard

451. Finally, on this question of modern user, the First Defendant relied upon the evidence of Stephen Pollard. Since 1993, he has lived nearby Rowden Lane at 29 St Margaret's Gardens. He is an aircraft maintenance engineer who works shifts, 4 days on and 4 days off. He has been a regular dog walker along Rowden Lane and in the fields beyond, between 1993 to date. He did not take his dog for a walk at the same time every day and, on his walks, he met different dog owners who had parked their car at the cattle grid end and were exercising their dogs in the field.

452. Apart from a twelve month period between January 2007(when his dog 'Moss' died) and December 2007 (when he got his new dog, 'Teddy') he walked his dogs along

Rowden Lane before getting to the fields. He marked on a plan the routes he would take on his walks.Even in the year when he had no dog, he still walked along the Lane and in the fields.

453. He was so struck by the level of vehicular traffic in Rowden Lane, that he always put his dog on a lead when walking along the Lane.

454. He described too how cars were regularly parked at the eastern end by the cattle grid. These cars had been parked by people who had driven up there with their dogs, parked, and then gone for a walk in the fields. He had never been challenged when he drove up or used Rowden Lane, nor had he ever seen anybody else being challenged. He thought that the Lane was public, and never saw any sign suggesting that it was private, apart from the new sign on the Rowden Farm side of the cattle grid.

455. He was only an acquaintance of Shirley Collins, Tony Collins and Gillian Harding.

456. He summed it up by saying that he saw cars parked up by the cattle grid about half the times he went walking there. Despite his acquaintance of Shirley and Tony Collins, and of Gillian Harding, I regard him as untainted by bias. Indeed, he personally was opposed to any development in Rowden Lane. He had signed a petition to this effect in 2002. The narrative, below which he and others signed in support of the petition, contained a statement that “Rowden Lane is a private road”. He said that he signed the petition, without reading it in detail, because:

(a) he opposed development; and

(b) he wanted to get rid of those who had the petition from his front door as soon as possible.

457. I reject the Claimants' suggestion that, in signing the petition, he was endorsing the view that the Lane was private. As far as he was concerned, the Lane was always public and, by his signature, he was joining the opposition to development and not admitting that the Lane was private.

458. It seems to me that if he were partisan, he would be against development and supportive of the Claimants' case that the Lane was private. His evidence was to the contrary.

459. Having seen him give evidence, my confidence in his honesty, accuracy and reliability as a witness is in no way dented by the fact that he signed that petition containing that reference to Rowden Lane as a private road.

460. Accordingly, he too provides cogent and compelling evidence of modern vehicular use of Rowden Lane, including verges, between 1993 to date. He also contradicted the Claimants' suggestion that the road was not wide enough to accommodate a private vehicle and agricultural vehicles moving in opposite directions.

Claimants' witnesses on modern user

461. I turn now, in the rest of this chapter, to the Claimants' additional evidence on modern user, stones and other obstructions on the verges, signs and challenges to the public using Rowden Lane. I have grouped them geographically where possible.

John Boulding

462. I regarded Mr Boulding as an honest, accurate and reliable witness.

463. He lives at 87 Rowden Hill. The main access to this property is off Rowden Lane, turning left just after the public house. He has lived at that property since 1970, apart

from one year when he was away. He always believed that Rowden Lane, from the entrance of their driveway to Rowden Manor Farm had been a private lane. He had never seen Wiltshire County Council do any work towards the keeping of the lane tidy or in good repair, and observed that the owners had kept their verges in order. Before he purchased this property, the local authority, on 26 January 1970, answered an enquiry about:

[a] *Plot of land with new dwelling house in course of erection thereon having frontage to Bath Road, Chippenham and being plot 3 (development by Mr T J Copland) as shown edged in red on the enclosed plan*.

464. The enquiry and the response were as follows:

Enquiry

Are the highways (including footpaths) known as Rowden Hill and Rowden Lane abutting on the property maintained at the public expense?

Reply:

Rowden Hill – yes.

Rowden Lane – a new street, but Rowden Lane to the access to the new plots is a highway maintained at the public expense.

465. Mr Boulding concluded that, since the lane was maintained at the public expense up to the access to his house, it was logical to assume that the rest of the lane beyond that side road, namely the section between the entrance to his property and the cattle grid, was not. This view has been supported by the absence of public maintenance, at least before 1983, on section B of the Lane, in contrast with section A.

466. It seems to me that the answer given by the local authority was very specifically tailored to the question of highway maintenance, which was directed to the plot shown on the plan attached to the enquiries. That area was entirely in section A. I do not, therefore, see the answer as necessarily stating that Section B was not a vehicular highway. In any event, at this time it is likely that the Chippenham Borough Council records would not have shown section B to be a full vehicular highway maintained at public expense, because of the records erroneously showing section B as part of RUPP 5.

467. Mr Boulding used to see cars parked on section A, and further up on Section B, when the car park in the public house was full.

468. Importantly, however, he went on to say that he had never noticed any sign with the word “Private” on it until he saw “Private” painted on the road in 2002. Examples of parking on sections A and section B are shown in the photographs at pages 599 and 600 in volume 2.

469. The evidence of Mr Boulding on this topic is supportive of the First Defendant's case, and inconsistent the case of the Claimants.

470. Mr Bould also observed that, ever since the highway authority removed posts from the verges, he had seen tyre marks on those verges.

<u>Brian Jennings</u>

471. Brian Jennings is the son of WH (’”Will “) Jennings.

472. He was born on 4 June 1939. He lived at Swallow Falls with his parents between 1955 and 1966, when he married and left home. He first moved to 2 Burleaze, and later, in 1974, he moved 8 miles away, to Melksham, where he still lives. Whilst living at

Swallow Falls, he recollected his father's concern over the upkeep of Rowden Lane, together with the maintenance of the verges head, hedges and ditches.

473. Will Jennings used to complain about the rates levied on Swallow Falls, because, apart from refuse collection, nothing was provided by the County Council. He was aware that Will had paid a contribution towards the upkeep and maintenance of the Lane, its verges, hedges and ditches and that the total cost of this was divided between the residents who live in Rowden Lane. This was confirmed by Will Jennings in his Statutory Declaration in 1970, when he sold Swallow Falls to the Fortune Family and left Rowden Lane.

474. Brian stated that he had learned from his father that the Council did not own the Lane or the verges and, therefore, was not responsible for their upkeep. Of course it will be recalled in June 1970, solicitors on behalf of Will were making enquires about Rowden Lane as a ‘new street’, and were told that the road was to be maintained by the frontagers and not the Council, because no Order had been made under the relevant legislation.

475. Of course, that letter was concerned with responsibility for *maintenance* of Rowden Lane. It was not determinative of the Lane’s status as a public vehicular highway, even if he believed that the Lane was to be maintained privately. Again, no distinction appears to have been made between sections A way and B of Rowden Lane.

476. He continued to use Rowden Lane about three times a year since 1974 to visit his aunt, Phyllis Jennings, at Elm Tree Farm. Both before and after 1974, he had no recollection of seeing any “Private” sign on Rowden Lane.

477. Brian's view was that most people visiting Rowden Lane were either visiting Rowden Farm or Elm Tree Farm. He had no recollection of seeing cars parked up at the eastern end of Rowden Lane by the cattle grid. When he lived in Burleaze, he used to

take the footpath into Rowden Lane, with his dog. His recollection was that all cars parked there belonged to residents of Rowden Lane

478. Whilst I accept that Brian Jennings is an honest witness, I regard the recollection of those, such as the Gibbons witnesses, who have had more consistent and recent experience of Rowden Lane as more accurate and reliable.

479. Like Mr Boulding, Brian Jennings does not support the Claimants' case on the presence of any "Private" sign on Rowden Lane

Residents of Burleaze: Mr Soady and Mr Parley

Mr Soady

480. Mr Soady has lived at 22 Burleaze since purchasing the property in October 1961. At that time, Rowden Lane was a dirt track. Alongside his bungalow runs the footpath which run which leads from Burleaze to Rowden Lane. He had been advised orally by his solicitors, at the time of the purchase, that Rowden Lane was private not public, and that this applied not only to vehicular but also to pedestrian use. The Claimants now concede that the Lane does carry public rights of way on foot and horseback.

481. His bungalow backed on to Rowden Lane opposite Elm Tree Farm. He said that Dick Jennings made it clear to him that he owned the entire section of Lane behind the rear of 22 Burleaze.

482. He was aware that Rowden Lane had been resurfaced on two occasions. He alleged that each time the cost had been met by the frontagers, according to what Dick Jennings told him. He said that he had seen the resurfacing work being carried out.

483. Since 1998, he had noticed parking in Rowden Lane, and occasionally he saw cars parked by the cattle grid. He confirmed that quite a lot of people walked dogs along the Lane and that possibly people who parked their cars in the Lane for that purpose. Before 1998, his recollection was that there were not that many cars which used Rowden Lane.

484. He alone suggested that Dick Jennings claimed that he owned the entire width of Rowden Lane. Other witnesses talked about owning their side of the road up to the midpoint. Moreover, this evidence is inconsistent with the account given by Mary Puntis, which I prefer, that Dick Jennings had told her that she would need Council permission to put a gate in the back of her garden in Burleaze to gain direct access onto Rowden Lane.

485. It may well be that Mr Soady has allowed the fact that the Lane had been maintained privately on occasions to cloud his recollection of what Dick Jennings said.

Mr Parley

486. Mr Parley has lived at 40 Burleaze since November 1970. His solicitor had advised him that his property enjoyed no access, vehicular or otherwise, to Rowden Lane because it was in private ownership. He had assumed that the maintenance of the Lane surface and verges had been carried out by the frontagers. During his period of occupation, he had never been aware of any local authority involvement in the maintenance of the Lane or its verges.

487. Although not mentioned in his witness statement made in 2007, his oral evidence was that he had never seen cars parked on the verges near the cattle grid. However, he accepted that there was a high wall in his garden with bushes on top (shown in the lower photograph on page 35 in volume 8) and, in cross examination, he conceded that he could only see the tops of any cars, if they were parked there. I do not regard

this as reliable evidence. However, he accepted that occasionally people parked in the entrance to the Old Piggery, possibly to walk in the fields.

488. In his oral evidence, he also mentioned the existence of two signs. One was a ‘No through road’ sign, which was present in the late 1950s and the 1960s. The second sign was a “Private Road” or “Private Lane” sign, positioned where the car park ended, on the right-hand side facing the cattle grid. He thought the latter sign was in position between 1958 and 1966, but he could give no reason why he did not mention it in his witness statement. Any such sign, had it existed, would have been relevant to his contention that Rowden Lane was private.

489. Mr Parley was born in about 1945 and, therefore, in describing the sign which he said was there between 1958 and 1966, he is recollecting events when he was aged between 13 and 21. He was 63 when he gave evidence. Moreover, his dates for the existence of a “Private” sign do not correspond with the evidence of anybody else. He described no “Private” sign in position between 1963 and 1983 when, according to the Second Claimant, such a sign was in the same position as he described. I do not accept his evidence on this point.

490. Finally, despite the advice which he said he had been given when he purchased his property, he enjoys pedestrian access to Rowden Lane via a gateway which was there when he moved in. Other owners of property backing onto Rowden Lane have done the same and, I am satisfied, some use Rowden Lane for vehicular access to the rear of their property, parking cars on the verges.

Witnesses from near Gypsy Lane: Councillor MacGregor and Mrs Menzies

Councillor MacGregor

491. Councillor MacGregor opposed the development of Rowden Lane at the planning appeal, even though the Council was in favour of it. He said he now accepted that the development would take place, but he still did not like the idea of it.

492. He has lived at 39 Rowden Hill (A4) since 1981. Gypsy Lane lies some distance to the rear of his property. At this point the A4 and Gypsy Lane form two sides of a triangle, the apex which is where the A4 and Gypsy Lane join.

493. He said that he had never seen any vehicle trying to drive along Gypsy Lane with a view to joining up with Rowden Lane. Indeed, such a course would now have been impossible, because it would have involved driving through two fields which are separated by a locked five bar field gate. In his view, Gypsy Lane and Rowden Lane had never been joined up.

494. He described how Gypsy Lane had been sparsely gravelled from Rowden Hill. He could only remember Water Board vehicles using Gypsy Lane to access a pumping station via a slip lane, rather than using the full length of Gypsy Lane, in which a cattle grid had also been installed, . Eventually the slip lane was surfaced, and became the new access to the pumping station.

495. Although not dealt with in his witness statement, he confirmed that he went walking with his dogs along a route which he highlighted on the plan JC1. This walk took him from Rowden Hill, through the Chippenham Community Hospital, across Rowden Road, into Burleaze, via the footpath adjacent to 22 Burleaze into Rowden Lane, past the cattle grid, and back up towards Gypsy Lane where he joined a footpath that led to a garden gate into the back of his property.

496. On that walk, he had not seen cars parked in Rowden Lane, nor at any time when he was walking around there. When he used to drive along Rowden Lane to Rowden Farm, again he said that he had never seen cars parked there. The only parked cars he ever saw were down by the cottages and by the public house.

497. In cross-examination, he confirmed that he had not seen any cars parked between the cottages and the cattle grid on Rowden Lane at any time since 1981, despite being shown letters dated August 2002 (from Mr Friend) and March 1993 (from Dick Jennings' planning consultant) evidencing regular parking on the Lane. Despite this, he still maintained he had never seen a car parked in the parking bay. This evidence is at odds with what I regard as the general trend of the reliable evidence on this topic. I regard his evidence as inaccurate on this issue, and do not accept it. Either he has chosen not to tell me about cars parked on the Lane or he has not frequented the Lane as often as he has suggested.

498. No one has suggested that, in recent times, anyone has driven from the end of Gypsy Lane across fields to join up with Rowden Lane at the cattle grid. Any such connecting route has long since fallen into disuse and been lost. The First Defendant's primary case is that, historically, Gypsy Lane was connected to Rowden Lane by a public cart track, forming a thoroughfare, both ends of which joined up with the A4 Bath Road.

Mrs Menzies

499. Mrs Menzies has lived at 25 Rowden Hill since November 1982. She lives closer to the junction of the A4 and Gypsy Lane than Councillor MacGregor.

500. She marked on the plan JC2 the route she followed when she walked her dogs. Her first route was along the length of Gypsy Lane, across the fields (the Cunniger and Home Down), joining up with section C then towards Rowden Manor, across fields alongside the River and back up to Gypsy Lane, rejoining Gypsy Lane to the west of

the waterworks. At other times, she would walk from Gypsy Lane across the two fields down to Section C, then to the cattle grid walking back home via the Chippenham Community Hospital. Her third walk, over a period of ten to fifteen years, was along the length of Rowden Lane and back home, after leaving her car at the home of a mechanic, who lived at the corner of Rowden Lane and the A4.

501. While walking the fields, she met many dog walkers. Her impression was that they had parked either on the spur road joining Gypsy Lane and Charter Road, to the east of Gypsy Lane or in the car park at the back of the hospital.

502. She said that she had never seen anyone parked at the eastern end of Rowden Lane by the cattle grid. Moreover, she added that she had not seen cars belonging to dog walkers when she had been walking along Rowden Lane. I do not accept this evidence, as it runs counter to the weight of the evidence on this issue.

503. When she first moved into 25 Rowden Hill, Gypsy Lane was used most days by vehicles belonging to Wessex Water Authority to gain access to the water station, and also by pedestrians and horse riders. However, since 1984, when the spur road from Charter Road was connected to Gypsy Lane in 1984, the Water Authority traffic has used that spur road. She confirmed the evidence of Councillor McGregor that cars could not now drive over the fields from Gypsy Lane to Rowden Lane, because of a stile, a narrow plank footbridge over a deep ditch and a metal gate between Cunniger and Home Down fields.

504. She also referred to correspondence with the Local Authority which revealed some confusion about the status of Gypsy Lane. It was variously described as a private street and then as public highway. In this regard, it mirrors somewhat the confusion which has existed around Rowden Lane.

<u>Other local knowledge: Councillor Maureen Lloyd and Donald Rogers</u>

505. Councillor Lloyd lived near Rowden Lane between 1951 in 1953. As far as she was concerned Rowden Lane had never been adopted, although some work had taken place at the approach of the Lane where she said this joined the public highway. It is not plain whether she was describing the junction of Sections A and B or the junction of section A with the A4.

506. In 1953, she moved away from the Bath Road area, but not very far – between one and two miles. Between 1953 and 1962 she infrequently visited a friend in Rowden Lane. Since the 1980s, she has visited Rowden Lane only once a year, but never up as far as the cattle grid. She only drove beyond the cottages to turn the coach which she driving and, on one occasion, to deliver a parcel. She had never seen cars parked on the verge beyond public house.

507. I consider that her opportunity to observe traffic and parked vehicles in Section B is and was very limited. However, she had never noticed any signposts up along Rowden Lane.

Donald Rogers

508. Donald Rogers, who now lives in Corsham, has had a more detailed and extensive involvement with the area.

509. He was born in August 1931 in Rowden Down Cottage in Rowden Down, the area which historically bordered Rowden Lane. He had always known the Lane to be private.

510. He had worked both at Rowden Farm, before and after leaving school, and also for Will Jennings.

511. He could not remember any ”Private” sign by the Rowden Arms public house, and he described no gate at the junction of Sections A and B, although, before the cattle grid was installed at the end of Section B, there had been a gate separating Sections B and C.

512. He said that Rowden Lane had been little more than a grass lane, without ditches with a dirt track along the centre. When it rained, water flowed down the centre of the Lane making it very muddy and difficult to use. He confirmed that there had never been, to his knowledge, any through vehicular route joining the end of Rowden Lane and Gypsy Lane.

513. He was unaware of the local authority carrying out any maintenance work on Rowden Lane.

514. Between 1952 and the early 1960s, he was in the Territorial Army, the local premises of which were on the A4 near to its junction with Gypsy Lane. Military exercises were carried out in the fields nearby and, at that time, Gypsy Lane was a narrow path leading from the A4 for a short distance, before turning sharply and terminating the waterworks. Before that turn to the waterworks was another area of open fields at the entrance to which he described seeing a sign, on a locked gate, which read ‘Private to Rowden farm only’.

515. He described an incident when working for Will Jennings, who at that time lived at Alma Villa. Mr Jennings had asked him to drive one of the farm vehicles up Rowden Lane. He explained that, since he was under the age to drive legally on a public road, someone else had to drive the vehicle across the A4 Bath Road, and he was then allowed to drive the vehicle along Rowden Lane because it was totally private. This would imply that even Section A of Rowden Lane was then regarded by Will Jennings

as private. However, we know from his Statutory Declaration, made in 1970, this cannot have been the case.

516. I accept that, by the 1950s, any vehicular connection between Gypsy Lane and Rowden Lane had been obliterated. As far as his evidence of Rowden Lane is concerned, it provides useful background information, but it cannot be determinative of the status of Rowden Lane.

Chapter 12: Civil Evidence Act 1995

517. Although not called as witnesses, I have read and considered the witness statements of Mrs D Baxter (whose evidence was undisputed), Mr A Hooke and Mr D Love. They were not called as witnesses, nor were their witness statements the subject of notices under the Civil Evidence Act 1995. Other witnesses covered the same points made in their statements.

518. Two witness statements which were admitted under the 1995 Act were statements by Mrs Gladys Ayres, the mother of the second Claimant and Gordon Hudson. Mrs Ayres was in hospital during the trial, and Mr Hudson had died. Plainly this evidence carries less weight than oral evidence which has been the subject of cross examination.

Gordon Hudson

519. Mr Hudson was born on 26 March 1929. He lived in the Chippenham area all his life. It was his family's building company, Bush and Hudson Ltd (started by his father and grandfather), which had acquired the land on which the Burleaze estate was built.

520. As a child, he remembered riding on a horse and cart around Rowden Lane making deliveries to Rowden Farm. At that time, the lane was a narrow gravel track. His

grandfather had an allotment in Gypsy Lane, which also was a gravelled bridleway path which ended at the allotments.

521. He described a gate at the western end of Rowden Lane, near to where it met the A4. The gate seems to have been more or less at the end of the original car park attached to the public house. He remembered a tarmac surface between the main road (A4) and the gate. After the gate, there was simply a gravel track giving access to Rowden Farm, then owned by Mr and Mrs Burridge, who maintained the gravel track. From time to time, he delivered and spread gravel along the track at Mr Burridge's request and expense.

522. In 1948, Bush and Hudson Ltd purchased the land on which Burleaze was built. In or about 1950, this company ran a new sewer across and down Rowden Lane to the Bath Road, with the permission of Mr Burridge. In the process, they slightly widened the track on Rowden Lane. Between 1955 and 1960, Mr Burridge requested his company to contribute to the cost of resurfacing the lane, but, since his company had no access to it, he declined. In summary, his evidence was that Rowden Lane was privately owned and privately maintained, without assistance from the Highway Authority.

<u>Gladys Ayres</u>

523. Gladys Ayres is the mother of the second Claimant. She stated that she and her husband purchased Brookfields believing it to be situated within a privately owned lane, and not forming part of a publicly maintained road. She understood that her family owned one half of Rowden Lane, along the Brookfields frontage, up to the midway point of the Lane.

524. There is nothing in the conveyance to confirm this, or authorising any private right of way to get from the A4 to Brookfields, or from Brookfields up to the eastern end of

Rowden Lane. Indeed the abstract of title for Brookfields revealed a search in 1958 which showed that, by an order made in April 1937, Rowden Lane was a ‘new street’.

525. Gladys Ayres also stated in her witness statement that, outside the cottages to the west of Brookfields, at Rowden Place, was a sign stating “Private lane to farms only”.

526. On the site view, my attention was drawn to a round metal pole adjacent to a hydrant sign next to 1 Rowden Place. This is, I believe, shown in the photograph at page 431 in volume 2. This is the pole to which the Second Claimant said that the “Private” sign had been affixed and to which, I assume, her mother was referring to in her witness statement.

527. Had there been such a sign in that location, as the Claimants suggested, between at least 1963 and 1982/83, one might have expected it to have been noticed by more people. The existence of such a sign was not only denied by the First Defendant’s witnesses, but also not accepted or recollected by some of the Claimants’ witnesses.

528. In her witness statement, Gladys Ayres also stated that Mr and Mrs Gibbons had told her that the verges were privately owned, as was the Lane, with each property owning up to the centre point of the Lane. Mr and Mrs Gibbons also explained, she alleged, that the cost of maintenance of the Lane was to be apportioned between the residents. She also believed that the Gibbons had placed the staddle stones outside the verge in the 1950’s. The Gibbons family evidence was that it was in 1963, having been sold to Mr Gibbons by Robert (“Nobby”) Harding for £30.00.

529. She then went on to state that, from 1963, the verge outside Brookfields was fenced off with electrical stakes and wire fencing to allow live stock to graze. This was not accepted by the Defendant’s witnesses, who made the point that the family only had a few goats, a cow and a small holding.

530. Gladys Ayres confirmed the picture of Rowden Lane as a track of hard core with grass verges on each side, improved in the early 1970s when tarmac was laid over the hard core. She further recollected the lane being resurfaced with tarmac in the early 1980s, again at the cost of the residents. Kevin Fortune also thought that Dick Jennings paid for the Lane to be resurfaced in 1989. This was not confirmed by Mary Puntis. However, a letter from the First Defendant to Kevin Fortune in December 1991 stated that it had carried out highway maintenance in 1988 and 1989. This coincided with the recollection of the Gibbons family that resurfacing was done around this time (they thought the early 1980s) by the Council, and certainly not at any cost to Mrs Gibbons.

531. She went on to state that once the second drive and hard standing were completed, in or about 1978, railway sleepers and individual kerb stones were placed along the outer line of the hard standing. The Defendant's evidence was to the effect that stones on the verges and the sleeper on the hardstanding did not appear before 1996 at the earliest.

532. Gladys Ayres was of the view that the "Private" sign disappeared in or about 1983, coincidently at the time that Mr Jennings was seeking planning consent to store caravans. She tied this in with a letter from the Second Claimant asserting that the lane was private, and that the storage of caravans should not be allowed. However, Dick Jennings had been given his first planning permission in 1981 for the storage of 25 caravans.

533. The implication appears to be that Mr Jennings was somehow responsible for the removal of the sign, since he regarded the Lane's private status as an obstacle to the grant of further planning permission. As I have already indicated, I find that there never was any sign with the word "Private" on it.

534. Moreover, Gladys Ayres saw the possible sale by the Gibbons family of land to developers under the option as the beginning of a change in their attitude towards the status of the Lane, namely from private to public. It is true that the Gibbons family had made an application before 1990 for residential development on their land adjacent to the Bungalow, but the option agreement between them and Laing Homes Limited, (now Wimpey) was entered into in July 1996.

535. Gladys also saw the removal of the staddle stones as indicative of this trend. In fact, I find that the staddle stones were removed because of the theft (reported to the police) of some of the tops of those stones. As a result, they were removed to the rear of the property in 1991, not long after Shirley and Tony Collins moved into The Bungalow.

536. The witness confirmed that the purpose of the hard standing adjacent to the new driveway was to facilitate loading from deliveries to their smallholding. Notwithstanding this purpose, she stated that they placed railway sleepers and individual kerb stones along the outer line of the hard standing.

537. I do not accept that was done as early as 1978. Nor do I accept the evidence of any regular use of the verge by grazing animals, nor or the regular or persistent use of an electric fence along the verge.

538. At no point in her statement does Mrs Ayres talk about any stones or posts being placed along the verges outside Brookfields, even although she did describe the stones outside The Bungalow. Her evidence seems to be confined simply to obstructions placed on the hard standing area adjacent to the new driveway to Brookfield installed in 1978.

539. Her statement is silent as to who painted the word “Private” on the surface of the Lane in the summer of 2002. She was unaware of any formal maintenance by the Highway Authority between 1963 and the time of her witness statement in January 2007, yet

according to the area Highway Engineer, writing in December 1991, general maintenance in the form of surfacing, in order to strengthen the lane, was carried out during 1988, followed by surface dressing and maintenance in 1989.

540. Finally, Mrs Ayres, dealing with the period between 1963 and January 2007, stated that the Lane had been used, in the earlier period of occupation, only by the occasional walker and by residents' vehicles and farm vehicles using the fields at the end. She made the point that there was no logical reason for any member of the public to use the Lane, as it lead only to residents' homes, and that there had never been any consent from residents for any member of the public to do so.

541. Given the concession that Rowden Lane is, at the very least, a bridleway to which the public has access as of right, this view seems misplaced. Moreover, I find that she has significantly understated the use of Section B of the lane, not only by vehicular traffic associated with the public house but also by those accessing the fields at the eastern end of the Lane by car for recreational purposes.

542. I do not regard the evidence of Mrs Ayres as adding significantly to the evidence of her daughter, the Second Claimant, or to that of Mr Heselden, the Third Claimant.

Chapter 13: S 31 Highways Act 1980

543. This section reads, so far as material:

Dedication of way as highway presumed after public use for 20 years

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

of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

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

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

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

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

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

The elements of statutory dedication

544. In my judgment, the correct period of 20 years for the purposes of applying section 31 of the Highways Act 1980 to Section B is 12 August 1982 to 12 August 2002, namely 20 years retrospectively from the painting of the 'Private' sign at the junction of Sections A and B. This when the public's right to use the way was brought into question. In my judgment, anything put, or done, on the verges before this time did not obstruct any part of the carriageway and was ambiguous in meaning.

545. Many of the witnesses who have given evidence on modern user have described public vehicular use during this period as of right. I accept the evidence of the First Defendant's witnesses on this public (ie beyond residents of Rowden Lane and their

visitors) vehicular user of Rowden Lane for well over twenty years before 2002, as indicated above, especially Mary Puntis, Gillian and Claire Harding, Stephen Pollard and the four 'Gibbons' witnesses. Indeed, even some of the Claimants' own witnesses - eg Kevin Fortune (who also described a lady, who after 1985 drove along along the whole of Sections A and B to park just beyond the cattle grid to walk her dogs), Mr Soady, Mr Parley, Ms Menzies - have demonstrated the public's vehicular use of the Lane over the relevant period and beyond.

546. Moreover, the increased, intensified and commercial use of Rowden Lane since the 1950s/1960s by The Bungalow, Brookfields, Swallows Falls and its paddock, Elm Tree Farm and Rowden Farm seems difficult to explain by any assumed private prescriptive easement of way acquired in their favour permitting this expanded use. If one assumes a right of way acquired by prescription in favour of these properties, this would have been originally for agricultural land. There does not appear to have been sufficient time yet (ie 20 years) for any enlarged or expanded prescriptive easement to have been acquired in their favour. One might have expected some legal action to restrain this excessive user by those whose rights were being infringed by this excessive or unpermitted user. There was none. It seems much more likely to me that this expanded use was enjoyed as a matter of public, rather than private rights.

547. In my judgment, there can be no suggestion that those making vehicular use of Rowden Lane were doing so with licence or permission from or tolerance by the landowner of the Lane. Ms Ayres accepted this herself in her second witness statement, dated 24 January 2007, where she said:

To the best of my knowledge there has never been any consent from the Claimants or any other residents of the lane, either express or implied, for members of the public to use the lane.

548. The public's vehicular use of the Lane over the relevant period was trespassory against the landowners of the subsoil of the Lane. They were using it as of right - nec vi, nec clam, nec precario and as trespassers.

549. The Claimants rely on a number of arguments on the issues of when alleged public vehicular rights over Section B were brought into question, whether they were enjoyed as of right and without interruption for the full period of 20 years and whether there is sufficient evidence that there was no intention to dedicate it as a public vehicular highway during that 20 year period. They are summarised in paragraphs 5 and 5A of the Amended Reply and Defence to Counterclaim.

550. I have already found that there was no "Private" sign in Rowden Lane at any time before 2002.

551. I have also found that there was no 'turning back' ordered by, or challenges made by, Mr or Mrs Burridge, Dick Jennings or any other relevant person alleged by the Claimants.

552. The letters written by Ms Ayres and Dick Jennings to the Department of Environment in 1983, and by Mr G. Ayres on 7 June 1988, were insufficient to bring the right into question. In my judgment, the same applies to the letter written by Kevin Fortune/Mrs Fortune to North Wiltshire District Council on 4 October 1989, and to the correspondence from Brookfields in and after August 2001.

553. What is necessary to bring the right of the public to use the way into question?

554. In Fairey v Southampton County Council [1956] 2 QB 439, at 456-457 Denning LJ, as he then was, said:

Applying those observations to this case, I think that in order for the right of the public to have been "brought into question", the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their rights to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. ... But whatever the public do, whether they oppose the landowner's action or not, their right is "brought into question" as soon as the landowner put up a notice or in some other way makes it clear to the public that he is challenging their right to use the way.

555. In my judgment, these letters all fall into the same category as the letter written to the Local Planning Authority which was held not to bring the right into question, as explained by Lord Hoffmann in paragraphs 32-38 and 42 of his speech in Godmanchester Town Council v. Environment Secretary [2007] 3 WLR 85. In that case, the House of Lords approved the observations of Denning LJ in Fairey. Lord Hoffman effectively equated the degree of openness required for 'bringing into question' with that required of evidence to show lack of intention to dedicate in the proviso to section 31. In Godmanchester, merely sending a letter to the Local Planning Authority or putting a clause in a private tenancy agreement were held to be insufficient. Lord Scott, at paragraph 70, said that the public's right might be brought into question not only by the landowner but also by a third party. However, the examples which he gave of how the public's right may be effectively called into question are open acts, such as formal court proceedings, not private acts such as letters.

556. The letters relied on by the Claimants, and set out in this judgment, did not bring home to the public using the way that the public's right to use the way was being brought into

question. They were not open acts, just private correspondence, and did not bring the public's right to use the way for vehicles into question.

557. Finally, the Claimants rely upon the proposal by the First Defendant in 1972, that Sections C of Rowden Lane (ie from the cattle grid to the commencement of the purely private track to Rowden Farm) be downgraded from a RUPP to a footpath, brought the public's right to use Section B as a PVH into question and/or was sufficient evidence of a lack of intention to dedicate Section B as a public vehicular highway within the meaning of the proviso to section 31 (1) of the Highways Act 1980.

558. The Claimants' argument here is that the proposal in 1972 to reclassify RUPP 5 (ie Section C) as a footpath was sufficient evidence to prove that there was no intention during the 20 year period to dedicate Section B as public vehicular highway.

559. It can immediately be seen that arguments over downgrading Section C does not call into question the right of the public to use Section B with vehicles at all. It relates to Section C.

560. The fact that there may have been a challenge in 1972 to Section C having a public vehicular status does not bring into question or provide sufficient evidence that there was no intention to dedicate Section B as a PVH. Vehicular use of Sections A and B were not dependent upon the public's right to use Sections C and D with vehicles.

561. I reject the suggestion that the 1972 proposal either brought into question the public's right over Sections A and/or B or provided sufficient evidence that there was no intention during that period to dedicate it as a PVH. The 1972 draft proposal did not raise the issue at all of the public's right over Section A and B and, therefore, it could not have brought home to the public the question that the Council was challenging their right to use those sections.

562. A similar argument was considered and rejected by the High Court by Pill J, as he then was, in O'Keefe v. Secretary of State for the Environment and Isle of Wight County Council [1996] J.P.L. 42, at pages 55 – 57. I see no justifiable basis for distinguishing this case from the case before me on the grounds that in O' Keefe the route in dispute had not been shown on the relevant Definitive Map. Putting details of the current state of affairs, even on a finalised published Definitive Map, did not stop time running in favour of higher rights from then on. In O'Keefe, Pill J explained the principle, at page 56, thus:

.. section 32 (4) [1949 Act] *did not provide that time might not run after the date of the map or the date of a subsequent review ...*

563. Pill J then considered the decision of Purchas LJ in R. v. Secretary of State for the Environment, ex parte Burrows [1991] 2 QB 354 in which Purchas LJ considered the purpose of the legislation dealing with Definitive Maps and their revision. Pill J continued, at 56:

[Purchas LJ's] view of the definitive map was inconsistent with the submission that each review brought into question the previous user and that it prevented subsequent user being of right ... It would be curious drafting if, nevertheless, the bringing into question mentioned in section 31 (2) [Highways Act 1980] *was conversely and as a matter of law achieved by a review of the definitive map. … Parliament … contemplated the two regimes operating together.*

564. Section 32 (4) of the 1949 Act was conclusive only in respect of rights already established at the date of the Definitive Map, and did not prevent time running in respect of rights not then in existence, but being created by the process of common law or statutory dedication.The process of continuous review under the 1981 Act expressly contemplated this possibility:

It is not disputed and I take it to be clear law that if a right of way is originally dedicated on foot it can subsequently be dedicated for use with vehicles as well. See Attorney General v. Honeywill [1972] 1 WLR 1506, at 1510 per Bristow J.

565. Moreover, the designation of a way as a footpath does not make prescriptive user with a horse or a vehicle not 'as of right'. In order for prescription or dedication to take place the user must not be in accordance with existing rights.

Vires and nuisance

566. The Claimants contend that **if** Sections A and B of Rowden Lane were only a public bridleway in the period of twenty years before the right was called into question, the First Defendant had no power to dedicate the surface as public vehicular highway since, if it did so, it would be acting in conflict with its statutory duties under s 130 Highways Act 1980 to protect the public right of way on foot and on horseback and/or it would amount to an actionable wrong against those entitled to use the public rights of bridleway or passage on foot.

567. Of course, this argument is constructed on the premise, which I reject, that Sections A and B were only public bridleway. As explained later in this judgment, I find that Sections A and B were a full (vehicular) public highway, at common law for many centuries before 2002.

568. The suggestion that Sections A and B are only a bridleway comes from the concession to this effect by the Claimants in April 2009. The Claimants have not proved that sections A and B were only a public bridleway. The Claimants' case that Sections A and B are merely a bridleway is derived from their analysis of Section C which, under section 32 of the 1949 Act, was only conclusive as to bridleway rights even as a RUPP. I deal with the Claimants' argument on this point in greater detail in chapter 16 (Definitive Map).

569. Given my findings below that Sections A and B have, for centuries, been a public vehicular highway as a result of dedication at common law, this issue does not arise. However, even if I had held that Sections A and B were merely a bridleway, it does not follow that the First Defendant, in allowing dedication of higher rights, acted unlawfully or committed actionable nuisance.

570. In Bakewell Management Limited v Brandwood [2004] 2 AC 519, Lord Scott made clear that a prescriptive right can be obtained where the prescriptive user could have been authorised by the landowner. I see no reason in principle why this should not also extend to the case of public rights of way.

571. Finally, it by no means follows that the First Defendant, in permitting dedication of public vehicular rights to occur, was guilty of any unreasonable interference with the rights of the public to pass and repass on foot or on horseback. The question whether an unreasonable interference with the rights of the public took place at all must be fact sensitive. I would find it very difficult to regard the use of by the public with vehicles of Rowden Lane as an unreasonable interference of the rights of way on foot or on horseback because:

(i) Some existing easements allow vehicular use of Rowden Lane by landowners and their invitees. Vehicular users include the visitors to the public house and caravan owners;

(ii) Sections A and B have already been used by commercial vehicles, agricultural vehicles, cars and caravans to such an extent that a passing bay was necessary;

(iii) the width and other characteristics of Sections A and B which had as their very purpose facilitating vehicular traffic rather than horses;

(iv) The existence of a cattle grid at the end of Section B severely limiting or preventing equestrian use. Moreover, there is no evidence that horse riders have ever used the route recently.

572. Accordingly, any consideration of whether there was ever an alleged nuisance along the hypothetical bridleway, by its dedication as a public vehicular highway, would have to recognise the existence of private vehicular rights which must exist if it is not public. There are pedestrian footpaths along Section A and wide verges along Section B for walkers. For these reasons, I am not persuaded that it would have amounted to a public nuisance by First Defendant if, as statutory owner of the surface in Rowden Lane, it dedicated Sections A and B as public vehicular highways in1949 or thereafter.

Conclusions on s 31 Highways Act 1980

573. The evidence of modern vehicular user from the 1960s onwards, which I have accepted, has satisfied me, on the balance of probabilities, that Section B of Rowden Lane has been actually enjoyed by the public as of right with vehicles and without interruption for a full period of 20 years and more calculated retrospectively from August 2002, the date when the right of the public to use that way with vehicles was first brought into question. This has included use by dog walkers and those using the fields for recreation, who have driven up and down Sections A and B and parked in Section B, without any permission of any owner of the soil of Rowden Lane.

574. Accordingly, Section B is a full (vehicular) highway under s 31 Highways Act 1980.

Chapter 14 : Historical evidence relating to dedication and acceptance of Rowden Lane as a PVH at common law

The First Defendant's expert

575. The First Defendant's expert on the historical materials is Alan Harbour.

576. Between September 1970 and June 2006, he was employed by the First Defendant in various positions including managing the land charges section up to 1997 and, from that date to 2006, as a Rights of Way Officer in the rights of way section. During his time as manager of the land charges section, he was responsible for keeping, updating and interpreting the highway records and researching the status of public highways when required. One of his duties as the Rights of Way Officer for the First Defendant was to research and investigate the status and extent of public rights of way.

577. I am satisfied that he has a long experience of dealing with highways of all categories and researching their extent and status. He has given evidence in many public enquiries and hearings regarding Modification Orders to effect changes to the Definitive Map of public rights of way, and given evidence at magistrates and county court cases regarding civil actions against the First Defendant. He is not a qualified lawyer, nor does he hold any academic qualification, although he is a Provisional Member of the Institute of Public Rights of Way Management. He also sits on the legal subgroup of The County Surveyors Society.

578. His knowledge and expertise, therefore, is derived from decades of working with historical documents, dealing with public and private rights of ways and drawing conclusions from them.

579. One of the cases in which he gave evidence was Robinson Webster (Holdings) Ltd -v- Agombar, [2002] 1 P. & C.R. 20, a case which took place before Etherton J (as he

then was) sitting in the Chancery Division. Mr Harbour's opinion in that case was that the way in question was, as the judge found, a full public highway. Like the case with which I am concerned, one of the documents there referred to was a map prepared pursuant to the Finance Act (1909-10) Act 1910. At paragraph 46 of his judgment, Etherton J said:

Mr Alan Harbour, the rights of way officer of Wiltshire County Council for the northern half of the County, and who was formerly the Land Charges officer of the Council, gave evidence of the painstaking detail with which the land was valued pursuant to 1910 Act. Although Mr Harbour is not qualified as a lawyer or a surveyor, he has considerable practical expertise on issues relating to public rights of way and the proof of their existence. I found his evidence helpful.

580. I would echo that assessment of Mr Harbour. Whilst he did not bring to his evidence the urbanity and eloquence of Professor Williamson, the Claimants' expert, I felt that he built up, using strong foundations, a compelling case for Rowden Lane being an ancient public vehicular highway. His conclusion that Rowden Lane was an ancient PVH across its entire width, from hedge to hedge, was not based solely upon one document or map - although he contended that a number of documents individually established the point. Rather, he contended that it was the broad picture which emerged largely consistently over time.

581. From time to time, Mr Harbour made concessions in cross-examination, and rightly so, but these did not dent my confidence in his overall accuracy and reliability. The Claimants alleged that in developing his hypothesis, which I explain below, on the Back Avon Bridge, he exhibited his willingness to espouse any point, however speculative, in support of his thesis.

582. I do not share that view. Mr Harbour was wrong, as he ultimately conceded, in suggesting that there had been two substantial bridges over the Avon accessed from Gypsy Lane, but his decision to do so in the first place did not undermine my confidence in his honesty, accuracy and reliability. Whilst he was hasty in jumping to that initial conclusion, he showed himself ready to acknowledge his error and to carry out further research into the matter. His revised conclusion is, in my judgment, is a reasonable one. The eighteenth century maps and later photographs suggest that both pedestrians and livestock could cross the river from the track off Gypsy Lane.

583. His first involvement in the case was as an employee of the First Defendant charged with the responsibility of investigating the status of Rowden Lane, long before these proceedings started. He had prepared a paper, incorporating many of the features of his expert evidence before me, in support of the proposition that Rowden Lane was a full public highway. It was, therefore, understandable that having spent that amount of time and effort in researching the point, that he was retained by the First Defendant as their expert for this case.

584. At the time of the preparation of his main report, 1 May 2008, he was employed by Bath and North East Somerset Council as the Definitive Map Officer in the rights of way section, a post which he had held since June 2006.

585. He was a reluctant expert witness, not because he felt that he was not a truly independent expert witness, but because he found giving evidence in High Court cases to be very stressful.

586. Nor was my confidence in Mr Harbour diminished by the way in which he dealt with Mr Laurence's cross examination on the question of the field books and the valuation books concerning the 1910 map. His contention, derived from that map, was that Sections A and B were shown as a public vehicular highway, and that Section C was

shown as a lesser way. The tax deduction of £125 in favour of the hereditament through which Section C ran must surely be at least consistent with the Claimants' concession that Section C was a public bridleway. Mr Harbour's main reason for believing Section C was at the time a public vehicular highway was the football field shown in the hereditament, not the £125 deduction.

587. However, I was impressed by the way in which Mr Harbour built up the case for a public vehicular highway along Rowden Lane, relying upon the historical maps and records. By contrast, Professor Williamson produced very little original material himself but rather sought to undermine Mr Harbour's opinions on each of the documents. I was impressed by the way in which Mr Harbour was able to take so much information from all this material and put it together in a coherent, logical and persuasive form.

The Claimants' expert

588. Professor Tom Williamson MA PHD has been employed as a landscape historian at the University of East Anglia for more than 20 years. He has written, co-written and edited more than 20 books and numerous articles on landscape archaeology and landscape history. He has considerable experience in interpreting documentary and cartographic evidence relating to the history of boundaries and rights of way. Like Mr Harbour, he is not a lawyer, although the nature of his work required him to have a reasonable knowledge of legal issues relating to land property and rights of way. Professor Williamson was a confident and articulate witness.

589. He was asked to give his opinion on the following issues:

(a) The accuracy, reliability and significance of the various historical and other maps, plans and other documents relied upon by the parties; and

(b) The extent to which those maps show (or fail to show) whether Rowden Lane, Chippenham, Wiltshire is or is not a public vehicular highway.

590. I did find it surprising that Professor Williamson expressed himself in a way which indicated that Section A of Rowden Lane was a public vehicular highway, yet the Claimaints' current case is that it was not a public vehicular highway but only a bridleway. On my reading of Professor Williamson's reports, I do not see there any strongly argued positive case that Sections A and B of Rowden Lane were a public highway but only on foot or on horseback, although I accept that he conceded that there *might* be a bridleway. Nor do I see in his report an analysis of how, when or under what circumstances those public rights came into existence, although he does make reference, in relation to an eighteenth century map, to a point where Rowden Lane joined the footpath from Lacock.

591. He made the point several times that Rowden Lane was no more than a private access road to Rowden Farm. This assertion has been significantly undermined by the Claimants' own case that it was a public highway, but on foot or on horseback only. Moreover it is difficult to see how his assertion about Rowden Lane being a track serving Rowden Farm survived the conveyancing documentation, which not only showed the absence of private easements over the whole of Rowden Lane in favour of Rowden Farm but also showed that, save for a brief period between 1919 and 1946 at the latest, that no part of Rowden Lane was in common ownership with Rowden Farm.

592. I must confess that I also share the First Defendant's reservations about the way in which he approached the preparation of his report. I did not regard his approach as an independent and original attempt to research available historical information and to form his own view on it first of all. Rather his approach consisted of undermining the material produced by Mr Harbour. He also seems to have taken what the Claimants

and their witnesses said at face value and then examined the material with a view to confirming that conclusion.

593. On a number of issues, I found his approach to lack proper balance. He seemed willing to adhere to his view, when new evidence suggested he should have changed it, and he also changed his opinion, when new evidence should have inclined him to confirm it.

594. For example, he relied upon Will Jennings' Statutory Declaration made 1970, which tended to suggest that Rowden Lane was private, whereas he did not rely on the 1983 letter which Dick Jennings wrote and in which he recorded the conversations with the Highway Authority, suggesting it was public. Professor Williamson admitted that he did this. However, having reached what I find is a partisan view in favour of the Claimants at the outset, he then looked at the historical evidence to support this earlier view. Again, Professor Williamson admitted that this was his approach.

595. Before delving into the detail of their evidence and the documents they discussed, it is, I think, helpful to identify their conclusions.

<u>The experts' conclusions</u>

596. In Mr Harbour's opinion, Rowden Lane is an ancient public vehicular highway, in existence before 1669. The vehicles involved in such use would have included carts, wagons, sledges and more latterly carriages. The main purpose of the historical public use would have included access to the open common land surrounding Rowden Lane prior to the inclosure of these lands. In addition, it was also quite probable that Rowden Lane was used as access to the place known as Rowden and also as an alternative route 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 bypassed.

597. As to the width of the public vehicular highway, he concluded that, certainly by 1784, the physical boundaries of the section of Rowden Lane in dispute were both well established by the planting of hedges and have remained remarkably consistent ever since over the centuries, as shown in detail on later large scale Ordinance Survey mapping. The width of the vehicular highway included, in his opinion, the verges on either side of the surfaced carriageway of Rowden Lane.

598. Professor Williamson's conclusion was that all the evidence advanced by Mr Harbour, and other materials introduced by Professor Williamson, persuaded him that Section B of Rowden Lane was formally created around 1669 as a private access road for the use of a small number of private land owners, and that it continued to be so used and regarded well into the twentieth century.

599. In summary, his conclusion was that Section B of Rowden Lane has never been a public vehicular highway.

600. Where the evidence of Mr Harbour and Professor Williamson conflicts, I prefer the evidence of Mr Harbour, except where the contrary is stated.

<u>Documentary evidence relied upon by Mr Harbour in his report and statements</u>

601. In order to give an overview of the range of the historical material relied upon by Mr Harbour and Professor Williamson, I set out below a list of the more salient documents.

1. The Mappe of Rowden Downe in the Parish of Chippenham as it is now devided for Inclosure, February 18th Anno Domi 1669;

2. A Mapp of Culver Hays and Part of Rowden Downe with the Cliffs Roads and Closes adjoyning in ye Parish of Chippenham and County of Wilts 1742;

3. Andrews and Dury's Map of Wiltshire 1773;

4. A Topographical Map of the Town and Borough of Chippenham and its Vicinity by John Powell, Land Surveyor 1784;

5. A Topographical Survey of the Great Road from London to Bath and Bristol. To which is added a correct map of the County three miles on each side of the road, planned from a scale of one inch to one mile, 1792 by Archibald Robinson;

6. A Plan of the Great Down - A Field the property of Mr J Heath 1796;

7. Ordnance Survey of one inch to one mile scale plan published at the Tower of London 12 August 1828;

8. Greenwoods Map of Wiltshire, made in the years 1819 -1829 and published 4 July1829;

9. Report on the Borough of Chippenham 1831;

10. The Chippenham and Allington Tithe Award 1848;

11. A map entitled Wiltshire by Edward Weller F.R.G.S. 1862;

12. A map produced by surveyors relating to proposed changes to the Borough boundary 30 September 1867;

13. Bacons map of Wiltshire c. 1876;

14. 1st Edition 1:2500 Ordnance Survey 1886;

15. Phillips Cycle map of Wiltshire c.1890;

16. 2nd Edition 1:2500 Ordnance Survey 1900;

17. The Finance (1909-10) Act, 1910 Plan(s), field and valuation books for Rowden Lane;

18. The Finance (1909-10) Act, 1910 Plan(s), field and valuation books for Gypsy Lane;

19. Claim map for public rights of way;

20. Urban Area Highway Record 1930;

21. Definitive Map of public rights of way 1 May 1953;

22. Chippenham Highway Record 1974;

23. Amended Highway Record 1983;

24. Original claim form or survey sheet for public rights of way No. 5, 1950;

25. Original Definitive Map Statement 1 May 1953;

26. Minutes of Chippenham Borough Council declaring Rowden Lane to be a New Street. This is not dealt with by Mr Harbour in his report, but it is a piece of historical evidence which is convenient to deal with in this series;

27. Conveyancing documentation;

28. Council Minutes in 1881 and 1896 and in the twentieth century relating to the maintenance and status of Rowden Lane;

602. Mr Harbour relies upon all the above items in support his opinion that Rowden Lane always was a public vehicular highway across its entire width. Professor Williamson examined each of those items and concluded that, neither individually nor cumulatively, do they support Mr Harbour's contention. On the contrary, he argued that they supported his conclusion that Rowden Lane had never been a public vehicular highway. It is, therefore, necessary to consider each one of these items but, in so doing, I have not overlooked Professor Williamson's comment that:

The various pieces of evidence must be considered together, and the status of the lane deduced on the balance of probabilities, rather than by considering one or more pieces as indisputably reliable in character.

History of Rowden

603. Studies by local historians in 1889 (Goldney), 1905 (Perkins) and 1984 (Baines) respectively have dealt with the history of Rowden and the Borough lands. 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. In 1434, it passed to the Hungerford family who, 10 years before, had purchased Sheldon and the Manor and Hundred of Chippenham.

604. 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. 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.

605. The Borough lands so given included:-

(a) The Great Coppice;

(b) Little Ground;

(c) Little Hanging Ground;

(d) Hither Down;

(e) Hulberts Hold;

(f) Tyning;

(g) Little Down;

(h) Little Coppice

606. The location of these grounds is shown in a plan prepared by John Perkins in 1905, at page 27 in Volume 11 of the Trial Bundle. In his 1905 publication, John Perkins wrote:-

Both the paper and the accompanying plans had been prepared at first hand from the original official records at the Borough ... and from the other local maps and plans already mentioned."

607. That 1905 sketch plan is interesting for two other reasons. The first is that it shows a "cart track" coming from the direction of Gypsy Lane (not shown on the plan) along the field Home Down. This "cart track" is alleged by Mr Harbour to represent the

unenclosed section of the thoroughfare leading to and from the A4, of which Gypsy Lane and Rowden Lane are also part. The second feature is that it showed a spur road running southwards from Rowden Lane between Little Hanging Down (today Swallow Falls) and Hither Down (today Elm Tree Farm).

608. I agree with Mr Harbour that it is fair to assume that, as far back as 1190, the access to the area of Rowden Manor House was via Gypsy or Rowden Lane.

609. The Borough lands were privately owned and were not common land. They were a source of revenue to the Borough which could let them out. The Borough lands were bounded on the north side by Rowden Lane and on the south side by a brook.

610. Interestingly, although the Borough lands were privately owned and not common ground under the gift by Queen Mary in 1554, by 1669 Hither Down, Little Hanging Down and Little Ground, lying between Rowden Lane and the Great Coppice, were treated as the equivalent of, or became, common land. These three pieces of former Borough land are plainly included in the inclosure map of 1669. The Great Coppice (which was not covered by the inclosure agreement) lay over an area of 17 acres of woodland. 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).

611. Almost inevitably, access to the Great Coppice was down Rowden Lane and, albeit maybe after 1669, along the spur road between Little Hanging Down (Swallow Falls) and Hither Down (Elmtree Farm). In argument, this was referred to as spur 2.

612. The inhabitant householders of Chippenham would have required access to the Borough lands to the south of Rowden Lane, and those with rights to the common would also need access to common land to the north of Rowden Lane. However, as

Mr Goldney's 'Records of Chippenham' show, the right to take wood from the Great Coppice was abused:-

That diverse unrulye and disorderlie people not onelie of this Town and pishe but alsoe of other pishes adjoyneing hereunto have of late tyme as it were made havock by cuttinge downe and carryeing awaye of the underwood of the same Copice to the Grete destruction of the increse and growth of the same and to the Grete prediudice at the tyme of the ffelling of the same to the psons alotted thereunto.

613. That was written in 1649. It clearly illustrates the general public coming from near and far over the Rowden Lane/Gypsy Lane thoroughfare to gain access to the wood available from the Great Coppice. The removal of so much wood would undoubtedly have required a horse and cart. It seems likely to me that access to the coppice would have been either from Gypsy Lane to Rowden Lane or from the Lane itself and then across the fields to the coppice or later via the spur road. The first representation of spur 2 on the maps is in the 18th Century, and was probably necessary once the south side of Rowden Lane was hedged off after the 1669 Inclosure Agreement.

614. Moreover the complaint about the unruly people did not speak of trespass by the unruly members of the public on Rowden Lane itself, even though their visit was felonious. The inference from this was that, although they were not entitled to take the wood, they were entitled to use Rowden Lane because it was not only a public highway at the time but also one on which carts and waggons were used by the public as of right.

615. Rowden Manor was of historical interest. It was a large property with a quadrangle inside and a moat around it. Unfortunately, the Hungerfords were Parliamentarians and the Royalists seized and sacked it. It was also the site of an ancient fort. It seems likely that the thoroughfare comprising Gypsy Lane at one end, Rowden Lane at the

other end, and the cart track between the two, were all used by soldiers (ie the public) in wagons and carts for military purposes.

The 1669 Inclosure Map

616. Rowden Down had been common land before inclosure. By an agreement between the Lord of the Manor and the principal commoners in 1669, the common land was divided up into parcels and allotted to the new landowner/tenants.

617. After 1750, it was more usual to apply for individual Acts of Parliament properly to regulate each inclosure, rather than to do so by an agreement. The common lands which are the subject of this particular agreement, have been divided up into 14 separate plots and the whole lands amounted to over 60 acres.

618. Within the inclosure was (i) land immediately south and north of what became Rowden Lane (ii) land lying between the north of Rowden Lane and the modern A4 and beyond and (iii) land between the A4 and Gypsy Lane. The land between the eastern end of Rowden Lane, where the cattle grid now stands, and the end of Gypsy Lane shown on the inclosure map (roughly corresponding to the fields known as the Cunniger and Home Down) were not subject to inclosure because they were not common land. They were land in private ownership, presumably belonging to what is now known as Rowden Farm. However, in 1669, what we now know as Rowden Farm was then known as Mounton Farm.

619. In 1669, there were gates at both ends of what became Rowden Lane, a gate at the end of Gypsy Lane where it adjoined the fields and a gate at the end of Lowden Lane. The presence of such gates was not uncommon on public highways then, especially where the highway adjoined common land.

620. Mr Harbour regarded this map as establishing, on its own, that by 1669 Rowden Lane was a public vehicular highway.

621. First, he relied on the fact that the common land was crossed or served by four routes, which he regarded as existing highways then, namely:

1. The main road from London to Bath, now the A4, shown as “the highway leading from Corsham to Chippenham”;

2. Part of the road, now known as Lowden a class 3 County road, shown as “a way to the old Inclosures and to Chippenham”;

3. Part of Gypsy Lane, then described as “a way to Rowden and some other grounds”;

4. Rowden Lane (Sections A and B), then called as “Rowden Way”.

622. Mr Harbour contended that these were all existing highways before inclosure, because they all were shown as leading to somewhere. Two led to Chippenham, and two to Rowden. All four roads were gated where they joined the common lands, including the roads Lowden, now the C366, and the A4 at its southern most point on the plan.

623. Secondly, Rowden Lane had a pre-existing name on the map, “Rowden Way”. I am persuaded that, at this time, Rowden was a distinct place, and not just a farm as it now is today. Although it became later known as Rowden Farm it was, at this time, known as “Mounton Farme”.

624. Thirdly, whilst the detailed extent of any settlement at Rowden was not known, it was a place of some historical interest because there was there (i) an old manor house, which had been burnt down in the civil war, and (ii) Rowden Fort, an ancient

monument. It was likely that both were places of public interest and business. He summarised his argument on this point by saying that Rowden Fort, the place known as Rowden and the common lands all pre-existed the Inclosure of 1669 and, therefore, so also must the accesses thereto, namely the modern day Rowden Lane and Gypsy Lane.

625. The southern side of Rowden Way on the 1669 Plan was depicted by a dotted line, not a solid line. The implication was that, in 1669, the southern side was not yet hedged. Mr Harbour did not regard this as inconsistent with it being a highway because he considered that most highways across open common land in the period would not have been hedged at all and would have consisted of nothing more than worn, rutted and often muddy tracks in open fields. He felt that the most that could be said in respect of the broken southern boundary was that it was not then fenced or hedged, and there was no requirement to enclose it in the agreement on that side.

626. Finally, Mr Harbour felt that these roads were ways which passed across the common land, by inference, available for all, ie the public, and not just commoners.

627. Professor Williamson felt that Rowden Way was created by the 1669 inclosure agreement. He assumed it replaced an earlier track or tracks across the common. He felt there was no reason to believe that Rowden Way perpetuated an existing track. He presumed that one or more of those earlier tracks connected with Section C, which he suggested was only a private way to Rowden Manor, a medieval high status private residence with a moat.

628. I see no reason to presume that the 1669 map created a new way, Rowden Way, to replace an earlier track or tracks. The fact that it had a name in 1669, Rowden Way, seems to me to be important in supporting its existence as a pre-existing established way leading to the place called Rowden. Moreover, it is likely to have existed by 1579,

the date of a survey of the Borough lands next to it, referred to in the survey as '*the gate that is the way forth off the Down to Chippenham'.*

629. Professor Williamson referred to Hulberts Hold, a piece of land immediately to the east of the Old Piggery (Rushy Ground). Hulberts Hold had been given by Queen Mary in 1554 to the Borough of Chippenham. It was, therefore, not common land but owned by the Borough, and leased to individuals. These were private freeholds producing income for the Borough. Later maps, but not the 1669 one, show that Hulberts Hold was reached by a short spur off the end of Section B. Again, Professor Williamson thought that this spur was likely to have been created in 1669, otherwise independent access to the parcel could not have been provided. However, I see no reason to assume that such a spur was first created in 1669. After all, the property had been granted to the Borough of Chippenham over 140 years before inclosure.

630. Professor Williamson concluded that Rowden Way merely constituted a private access road from Mounton Farm, Hulberts Hold and the land allotted to Mr Scott on both sides of Rowden Way to the Bath Road. Nevertheless, he accepted that inclosure agreements could create or confirm public highways, as well as merely private roads for the benefit of a small number of owners.

631. He also felt that there was at this time an incentive to keep public highways to a minimum, since the Parish had to maintain them. In addition, he did not accept Mr Harbour's view that the public had general access to the commons and lands over them. He considered that, in almost all circumstances, it was a defined group of commoners, rather than the public at large, who were entitled to use the commons and any tracks or ways over them. He regarded the fact that Rowden Way was hedged on one side only as supportive of its private status, although he accepted that early inclosures did not always follow the rule that public highways were hedged on both sides. He also felt that Gypsy Lane was unlikely to be public highway because it was

narrow. It was, of course, not then known as Gypsy Lane but was shown on the map as “a way to Rowden and some other grounds”.

632. In summary, he concluded that Sections A and B of Rowden Lane began life as a private way with limited users, and was not created as a public highway maintainable at public expense. He felt that Rowden Way could not have had the same status as the fully inclosed and unequivocally public roads shown on the 1669 map.

633. I am persuaded, on the balance of probabilities, that both Rowden Way (now Rowden Lane) and the modern Gypsy Lane both led to a place called Rowden, which was not common land. In my judgment, 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, and therefore the public had a reason to, and did, visit it.

634. I am satisfied that Rowden Lane and Gypsy Lane were used not only by commoners, but also by the public at large as if of right. Even before 1669, there were public vehicular highways running across common lands. They were not merely ways to be used by a limited class, namely commoners, as one of their rights as commoners.

635. Rowden Way served the same destination as Gypsy Lane. Gateways at the end of Rowden Way and Gypsy Lane were wide enough to accommodate horse and carts. It seems to me likely that where two ways (Rowden Lane and Gypsy Lane) lead to a defined place (and not just a house), and each way came off an unambiguously public vehicular highway (the modern A4), it is a justifiable inference, which I draw on the balance of probabilities, that both formed part of a thoroughfare. The fact that only one side was hedged is not conclusive, as Professor Williamson accepted. No distinction was made in the 1669 map between what was to become Sections A and B of Rowden Lane. Moreover, Hulberts Hold was probably accessible off Rowden Way for some 140 years before inclosure. By what right did the tenants of Hulberts Hold use

Rowden Way before 1669? They were not merely commoners, and the Borough did not own Rowden Lane. In my judgment, they were probably entitled to use it because it was a public vehicular highway.

636. I consider that the 1669 Inclosure Map is more supportive of Mr Harbour's opinion than Professor Williamson's.

Culver Hays and part of Rowden Down Map 1742

637. This map does not show Rowden Lane at all. It shows the northern section of what is today Gypsy Lane, although it was not called that then. The only notation on the map at that point is "to Rowden House".

638. Mr Harbour relies on this map to establish the following propositions:

1. Rowden Lane formed part of a through route or thoroughfare via the place Rowden, and then to Gypsy Lane.

2. The western boundary of what is now the A4, at its junction with Gypsy Lane, had no hedge pre-inclosure, as the 1742 map states "the hedge planted at ye time of inclosing". The A4 road at this point was stated to be "to Lacock and Corsham, formerly part of Rowden Down". Mr Harbour uses this as an example of an undoubted public highway which was not boundaried pre-inclosure and ran over open common ground. He said this undermined Professor Williamson's suggestion that lack of hedging implied a private, not public, way.

3. On this 1742 plan, the poor quality of a road as significant as the Bath Road was apparent. The map, at the section northward from its junction with Gypsy Lane, reads "hollow way 9 foot in breadth" with banks described as "ye Cliff of the Hill". Because this section of a main route between London and Bath was down to 9

feet in width only at that time, alternative routes, such as the thoroughfare formed by Gypsy Lane and Rowden Lane would be important, especially if they provided some form of access (particularly for livestock) to an important market town centre like Chippenham. Mr Harbour, looking forward to later maps which used the word "lane" in Rowden Lane and Gypsy Lane, pointed out that a "lane" has been judicially defined as meaning 'a minor road leading between one main road and another main road': See: Words and phrases legally defined, 2nd edition. He felt that Gypsy Lane almost certainly got its name from gypsies using their carts, wagons and caravans there.

4. By 1754, the London to Bath road was still in an awful condition, as noted in the "Gentleman's Magazine" for August 1754. Therefore, the Rowden Lane thoroughfare may well have provided an attractive alternative to "the worst public road in Europe", despite its being turnpiked for some time before 1754.

639. Professor Williamson argued that this 1742 map did not advance Mr Harbour's view at all, since it did not even show Rowden Lane. Moreover, he relied upon the fact that what became Gypsy Lane was no longer referring to a place but to a property, Rowden House. He suggested that the absence of any hedging on what became the A4 before inclosure was of little significance, since roads were almost invariably unhedged when they ran through open commons. He dismissed Mr Harbour's views about Rowden Lane providing an attractive alternative route as unsupported by any evidence. However, that part of Gypsy Lane shown on the 1742 plan was wider than the section of the Bath road described as "hollow way 9 foot in breadth" with banks described as "ye Cliff of the Hill".

640. I have not derived great assistance from this map, beyond the fact that Gypsy Lane branches out from a wide section of what became the A4 and, although by

comparison, plainly a minor road, its appearance on the map suggests that it was a road of some importance, albeit labelled “to Rowden House”.

641. I am not persuaded that this map advances the case of either party greatly although, on balance, the drawn portion of what became Gypsy Lane seems to be a route of some significance given its width as shown on that drawing.

642. Furthermore, the fact that the word “lane” did later appear in both names, Rowden Lane and Gypsy Lane, does provide some support for Mr Harbour’s contention that they formed a thoroughfare from the A4, along Gypsy Lane, across the fields to Rowden Lane and back on to the A4. I accept that the variable condition of the Bath Road at this time may well have rendered such thoroughfares an attractive alternative route.

643. Given Professor Williamson’s acceptance that the early inclosures did not always result in public roads having a hedge on both sides, I derive little assistance from the fact that only part of the Bath Road was hedged at the time of the inclosure. That hedging appears to me to be more connected with blocking off the remains of the ancient hollow way, where it joined the Bath Road on that plan. In any event, it would not have been uncommon for undoubted public highways across common lands to be unhedged on both sides pre-inclosure.

Andrews and Dury’s Map of Wiltshire 1773

644. I regard this map, despite its limitations, as supportive of Mr Harbour’s opinion. There is no key for this map, but I accept Mr Harbour’s evidence that the Andrews and Dury’s Map of Hertfordshire 1766 does have a key in which boundaried roads are defined by double solid lines. Open roads, without hedges or fences on one side or both, are shown in the key by broken lines. Lesser highways, including footpaths and bridleways, are not shown or indicated in the key.

645. The 1773 Map of Wiltshire does show Rowden Lane and Gypsy Lane as a complete through road or thoroughfare. On this map, both sides of Rowden Lane are hedged as are both sides of Gypsy Lane shown on the 1669 Map. A way is shown connecting these two lanes across the two fields, now known as Cunniger and Home Down. This stretch across the fields is hedged or has a boundary feature on the Chippenham side, but is unhedged on the Rowden Down side.

646. I find that the plan shows a thoroughfare from the Bath Road, down Gypsy Lane, across the fields and joining up eventually with Rowden Lane. A private cul-de-sac track is shown leading east from the intersection of Rowden Lane and Gypsy Lane to the farm which is referred to on the 1773 map as “Rowden Mounton”.

647. Mr Harbour pointed out roadways without boundaries on this map which were undoubtedly public highways. No doubt Professor Williamson’s reply would be that these were unhedged public highways traversing common land.

648. This 1773 plan showed no sign of turnpiking yet on the section of the Bath Road, running from the west of Chippenham past Gypsy and Rowden Lanes. This gave rise to the implication, as argued by Mr Harbour, that the Bath Road at this point had not yet been improved and that, therefore, the Rowden Lane/Gypsy Lane thoroughfare would provide a good alternative route if the main road were impassable.

649. Professor Williamson dismissed this map as a small scale commercial map which displayed the topography of the County. It did not provide the purchasers of the map with a guide to which lanes and tracks were private or public. Indeed, the professor made the point that this map even showed the private track through the “Rowden Mounton” farm.

650. I fully accept that this was a topographical map of Wiltshire. However, I am satisfied 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, Gypsy Lane and the intervening track across the field to be of a fairly uniform width. In my judgment, 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, Gypsy Lane, across the fields to connect with Rowden Lane and back on to the Bath Road.

651. I regard this map as providing support for Mr Harbour's view of the existence of a thoroughfare involving two "lanes" which were once joined. Of course, as Professor Williamson observed, the fact that the thoroughfare existed does not prove the public status of the way, since it could merely have been seen as two alternative private access roads to what became Rowden Farm. This map, in my judgment, shows them to be ways of some local significance, and more than just private tracks.

652. This map also shows, some form of track or path leading from the upper part of Gypsy Lane, generally eastwards, crossing the Avon and entering Chippenham by a back route. This is the Back Avon Bridge which was the subject of some disagreement between the experts, to which I have already referred in my assessment of the experts. For the moment, it merely suffices to note that not only did Gypsy Lane and Rowden Lane form a thoroughfare but also that, on this map, there was leading off Gypsy Lane a way which crossed the Avon and led into Chippenham.

Back Avon Bridge

653. Shortly before the trial began, Mr Harbour prepared an addendum to his witness statements. He did so based upon the inferences he drew from the 1773 map which showed a way in pecked lines between the upper end of Gypsy Lane, over the River Avon and into the back of Chipenham. This caused him to speculate that there must

have been substantial bridges where that road or track shown twice went over the River Avon before entering the Chippenham market square.

654. At that stage, he was unaware of photographs indicating that there had been only a pedestrian footbridge in place over the River Avon at that point in 1889. He had speculated that there might have been a more substantial bridge there in 1773 at the time of the map. However his own research has now unearthed Council Minutes which conclusively establish that the bridge there in 1638 was also a public pedestrian bridge, rather than a vehicular one.

655. The Andrews and Dury map of 1773 did not show footpaths, only vehicular routes. The suggestion is that the track in 1773 was a cart way shown outside the private lands and curtilage of Ivy House.

656. By 1784, what is shown is a footpath within the grounds of Ivy House, and no cart way outside Ivy House and land. There are two possibilities here. The first is that the 1773 map was wrong in showing what was, in fact, a footpath as a cartway, and also in showing it outside public grounds when, in fact, it was inside private grounds. The alternative is that the former cart way had been enclosed and downgraded to a footpath between 1773 and 1784.

657. Mr Harbour altered his opinion, having seen a Minute in 1895 referring to an "accumulation of sand, mud and obstructions from the bed of the river below the Back Avon". His revised opinion was that there were no substantial bridges which would have taken vehicular traffic, but the likelihood was that there was a shallow ford crossable by livestock and carts next to a pedestrian footbridge in this location.

658. Whilst I accept this is different from Mr Harbour's first thoughts in the matter, I reject the suggestion that the 1773 map was in error. It seems to me that there was a track there going to the back of Chippenham over the river. This plainly was so because of the footbridge. However, I am also of the view that there is credible evidence that

livestock were taken along this path and then used the ford to get into the market place. This certainly seems to be consistent with the photograph shown at page 318C in Volume 7.

659. I agree with the First Defendant's submission that this is the best fit of the evidence, but it is probably unsafe to reach any definite conclusion as to its purpose. Nevertheless, the existence of a track outside private grounds exists in 1773, going to the back of Chippenham market place, does seems to me to be probable.

660. However, Mr Harbour's change of view does not detract from my confidence in him as an independent and reliable witness. He succumbed to speculation but, when he had the advantage of seeing the photographs of the pedestrian bridge, he modified his opinion and carried on researching the matter further. He himself then unearthed the documentary evidence relating to the existence of a pedestrian bridge in 1638.

661. Gypsy Lane ceased to be used by vehicles probably by 1910 when the route was officially classified as the bridleway 2A in the 1950s Definitive Map process. Moreover, although the Chippenham Council argued that the unenclosed cart track connecting Rowden Lane and Gypsy Lane should also appear as a minor highway, path 2B, this was rejected by the Inspector at the Inquiry in 1955 into the Draft Definitive Map. Thus it was that the unenclosed track joining Rowden Lane and the end of Gypsy Lane was not classified even as a minor highway, and the last vestiges of the inter-connecting thoroughfare were lost.

662. It does not strike me, from a consideration of the 1773 map, that the purpose of the thoroughfare along Gypsy Lane and Rowden Lane was solely to provide private access to a cul-de-sac leading to the farm house.

663. None of the roads or lanes on the 1773 map is named.

A Topographical Map of the Town and Borough of Chippenham by John Powell, Land Surveyor 1784

664. In this map, Rowden Lane is called “Rowden Down Lane” and Gypsy Lane was at the time known as “Rowden Lane”.

665. Mr Harbour made a number of comments about this map:

1. By 1784, the southern boundary of Rowden Lane was hedged, and the lane had a wide central section which plainly had a worn or surface part of the road with verges of equal width either side.

2. The unenclosed section across the fields is again shown as having a worn or surfaced way across “Home Down” until its junction with the way leading to Rowden Farm which is shown as “Rowden Farm Lane”. At that junction, the road turns north unenclosed up to its connection in to the inclosed section of Gypsy Lane which is known at that time as “Rowden Lane".

3. The two enclosed sections (namely modern day Rowden Lane and Gypsy Lane) both contain the words “Rowden” and “Lane” in 1784. This indicated to Mr Harbour that the whole lane, including the unenclosed middle section connecting the two, was known as Rowden Lane at the time, forming a complete thoroughfare known as Rowden Lane.

4. The non public cul-de-sac section, Rowden Farm Lane, from the point where today the cattle grid is located, to the farm is named separately and includes the word “farm” in its name.

5. Although gates were shown at both ends of Rowden Lane, to use its modern name, these were also shown on the modern day A4 and the C366 (Lowden) in

1669. Gates were very common indeed on all classes of highways right up to the early 20th century. Section 81 of the Highways Act 1835, for the first time, stipulated a minimum width for a gate on a public cart way which was not to be less than 10 feet. In the accompanying manual, "Duties and Powers of Surveyors", it stated:

The gate must of course have been there time out of mind; a gate newly erected is a nuisance.

He argued that the gates on the highways were of great benefit to farmers and livestock drovers who could corral animals overnight on the highways, or on journeys to markets, where animals could feed on the highway verges instead of on private land. I agree with his assessment that it is easy to see how Rowden Lane would fit this purpose.

6. There was consistency of width on the used (worn) or surface part of the road on both the inclosed and unenclosed sections (the fields). They are far wider than the footpaths shown on the plan.

666. There were reasons why the unenclosed sections (ie the fields) of what Mr Harbour regarded as the thoroughfare of Rowden Lane were never inclosed. The provision of hedges and fences over long distances was expensive, and only undertaken when absolutely necessary. These fields, the Cunniger and Home Down, were never the subject of any inclosure agreement or award.

667. A public footpath from Lacock is shown joining the southern boundary of what is today Rowden Lane. This footpath is shown stopping and starting at the boundaries of modern day Rowden Lane but not crossing it. This suggests that, in 1784, what we today call Rowden Lane, must have been a public highway of some kind, otherwise the paths would be cul-de-sacs.

668. Professor Williamson stated that this was the first map to show Rowden Lane in any detail after 1669. By this time, the spur to Hulberts Hold is clearly shown and, as Mr Harbour too had pointed out, Sections A and B were gated at each end. Whilst accepting that a gate across the road is not of itself conclusive evidence that the road is private, he was of the view that, in relation to Rowden Lane, these gates were indicative of Rowden Lane's private status. They separated the private Lane from the Bath Road at one end and the private Lane from the entrance to the farm at the other end. He concluded that these gates on Rowden Lane had not been arbitrarily positioned, but marked points of discontinuity of legal status. I disagree.

669. He did not accept Mr Harbour's view that there was a demonstrable thoroughfare from Gypsy Lane, across the fields, to Rowden Lane. Indeed, he argued that there was no evidence to support it. This was in addition to his point that Sections A and B of Rowden Lane had only been created in 1669 as a private road for properties frontaging Rowden Lane. He addressed Mr Harbour's point about the thoroughfare, by stating that the simple fact that two unhedged tracks (Section C and the southern continuation of Gypsy Lane) met and joined, did not give them the status of a through road. Moreover, he pointed out that the two tracks met at a sharp "V" in such a way as to make it clear that both were leading to or from the farm. He concluded that it would have been very difficult for heavily laden carts or wagons to negotiate such a curious junction from its through route.

670. He also disputed Mr Harbour's contention that gates were common in all classes of highway up to early 20th century, making the point that on this map there were only six other examples of roads gated at their entrance or mid way along their length, and none of them was a major through route, but largely led to fields or farms.

671. In the end, he said that any argument that Rowden Lane must have been a public road open to wheeled traffic because it would have been *possible* to reach Chippenham by

making this rather awkward diversion, seemed to him to stretch the definition of a "through road". He argued that, if Mr Harbour were right in stating that two private tracks connecting with each other and other public roads must automatically become public highways, it would mean that the owner of a large country estate could only have one drive leading from an entrance lodge through park land to the mansion. If such an owner had two separate drives, leading in from different public roads, it would have made both drives public. Therefore, he emphasised that the two tracks, namely Section C and the southern continuation of Gypsy Lane across the fields, began at the boundaries of Rowden Farm and led, unhedged across its private fields, to the residence itself in a precisely analogous manner.

672. He addressed Mr Harbour's point about the cul-de-sac, which would have been formed by the footpath from Lacock, if Rowden Lane were not a public highway, by saying that it was perfectly possible that the Lane, or some section of it, could have had or acquired pedestrian rights of use, but not vehicular ones. However, he does not express any view on how those rights arose, or why they should have been confined to pedestrian rights.

673. On the contrary, if the whole of Rowden Lane were subject to public rights (as the Claimants now accept) this would remove any anomaly. Yet, it seems odd to me that Rowden Lane should have acquired public rights of way, on foot and on horseback only, at some time in the distant past, without also acquiring a public right of way for carts or wagons. Given the length, width and location of Rowden Lane, one wonders how and why any dedication and acceptance of the lane as a highway for use on foot and horseback took place, without a similar dedication for use by horse drawn carts and wagons.

674. Finally, Professor Williamson asked for the lens of commonsense to be applied to this map. He said that it just looked as if two unhedged private access tracks, approaching

the farm from different directions across its own private grounds, met and became one private track before their destination was reached.

675. My own impression from looking at this map is that Rowden Lane and Gypsy Lane (as we now know them) were roads of some importance. They were hedged on both sides, had worn or used surfaces and seemed to be important parts of the local public road network.

676. I am not persuaded that the junction of the two tracks, Section C and the southernmost continuation of Gypsy 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 Gypsy Lane, and there is no visible obstruction on the plan to stop the corner being cut at the 'V' junction.

677. On this plan, even if Mr Harbour's argument about the thoroughfare were not made out, I would still have regarded Rowden Lane as an integral part of the local public road network, and not just a private track giving access to property fronting the lane. Rowden Lane is shown much wider than footpaths on the plan and the central section of Rowden Lane, indicated by pecked lines, reveals the used (worn) or surfaced part of the road with verges of equal width on either side.

678. In any event, I am persuaded by Mr Harbour's evidence that there was indeed a thoroughfare running from the Bath Road (A4) along Gypsy Lane, over the uninclosed fields and onto Rowden Lane, and that there were sound reasons why the track running over the two fields was not hedged on both sides. The fact that it was only hedged on one side does not undermine my confidence in the correctness of Mr Harbour's conclusion that they formed part of a public thoroughfare connecting up with Gypsy Lane and Rowden Lane.

A Topographical Survey of the Great Road from London to Bath and Bristol, 1792, by Archibald Robinson

679. This is another independently surveyed plan, like Andrews and Drury, of lands three miles each side of the Great Road (A4). It shows the whole of Rowden Lane surveyed as a through route. It is not known whether this section of the Great Road, passing Rowden Lane, was improved at that stage.

680. Professor Williamson rightly indicated that the map was not intended to show anything other than topographic detail in the area around the road. It also showed the final approach to Rowden Farm, which was never suggested to be a public vehicular highway.

681. To me, the importance of the plan lies in a clearly demonstrated through route from the Bath Road (A4), along Gypsy Lane, across fields and back along Rowden Lane to the A4. This through route was of sufficient importance to be recorded on this topographical survey.

A Plan of the Great Down - A Field the property of Mr J Heath 1796

682. The significance of this plan to Mr Harbour was that it had brown colouring on it to denote the extent of the used surface (not the verges) of the public carriageways. The Bath Road (A4), Rowden Lane and a new road from Lowden were coloured brown. However an “Old Road” from Lowden bore no colouring.

683. Plainly this area of the A4 had been improved, in particular the junction of the A4 with Lowden. An old sharp dog leg had been improved by a new section of gently curving road. Mr Harbour contended that the reason why the redundant “Old Road” from Lowden was not coloured was because it was no longer a public highway. The

implication was that what was coloured brown was public highway, including Rowden Lane.

684. Mr Harbour met Professor Williamson's point that no gates are shown on Lowden (but were shown at the junction of Rowden Lane and the A4) by saying that no gates would have been expected on Lowden, because that section was newly constructed as part of the improvement. Professor Williamson argued that this plan added little information beyond showing that Rowden Lane was gated where it met the Bath Road, in contrast to Lowden Lane a short distance away. I have dealt with Mr Harbour's answers to that point. He went on to point out that the map did not have a key indicating what the brown colouring represented. He argued that it may have merely marked the extent of the roads which were actually used as carriageway, but that there was no indication that any carriageway was a public vehicular one. It was a map of a field which happened to show adjacent carriageways.

685. Professor Williamson summarised the 19th Century cartographic evidence as indicating that Sections A and B of Rowden Lane were created, at the inclosure of Rowden Down in 1669, as a private road. This provided access to the allotment of Jonathan Scott. At that time, or slightly later, and via a short spur road, it provided access to the Borough of Chippenham's property called Hulbert's Hold and, by connecting with a pre-existing and apparently private track (C), ultimately to Rowden Farm. By 1784, and very probably already in 1669, the latter was also accessed by another unhedged track, the southern extension of Gypsy Lane. The two tracks met before they reached the farm, but the sharp angle of the junction indicated to Professor Williamson that they did not together constitute an ancient "through road" for vehicles. Both were shown on other small scale 18th century maps, but there was no evidence that any of these was intended to define public rights of way or was created after systematic enquiries into such matters. Rather, they were simply included as visible features of the landscape, together with much other topographical detail.

686. In my judgment, Rowden Lane, whatever its status at this time, was shown on this map as a road of some significance with a central carriageway and land or verges on either side of it. It also bore the same colouring as the Bath Road. It seemes to me to be much more than a private drive.

687. I regard this map as supportive of Mr Harbour's opinon that Rowden Lane was then a PVH.

Ordnance Survey one inch to one mile scale plan published at the Tower of London 12.08.1828

688. The original requirement for making the one inch maps was the Government's urgent desire for a very accurate map of the country's road system which troops could use because of the threat of invasion in the Napoleonic Wars. Although on a small scale, as Mr Harbour concedes, it clearly shows that Rowden Lane formed part of a through route from and back on to the Bath Road (A4) via Gypsy Lane across both fields.

689. Whilst reminding myself of Professor's Williamson's view, that these are merely private tracks leading to private property, the map demonstrates, to my satisfaction, a through route leading from and rejoining the A4. Moreover, at this stage, the intersection of the track running southwards from Gypsy Lane with Section C does not give the impression to me that its role was to provide solely a private access to Rowden Farm.

690. Although Professor Williamson considered that this map, with its relatively small scale, did not make any attempt to distinguish public roads from private - and this is exemplified by the fact that it does show the final section comprising the private track leading to Rowden Farm - nevertheless, I am left with the impression that this thoroughfare represented more that mere private access roads to farms. To me, it seems more consistent with being part of the overall public road network.

Greenwood's Map of Wiltshire, published 4 July 1829

691. This map was again published by an independent commercial map maker. It has a very small scale of approximately three miles to one inch. Again, a complete thoroughfare is shown, although the road does not share the same colouring as what is today the A4. Nevertheless, there are many other roads on this plan which are shown similar to Rowden Lane. According to the key to this plan, the thoroughfare comprising Gypsy Lane, the track across the field and Rowden Lane is called a "cross road".

692. I shall deal with this term later but, for the moment, it is important to remember that in 1829 "cross road" did not have its modern meaning of a point at which two roads crossed. In old maps and documents, a "cross road" included a highway running between, and joining other, regional centres.

693. Professor Williamson felt that this map too made no attempt to distinguish between public roads and private roads and, like the 1828 OS Plan, both showed roads which were certainly no more than access roads to farms.

694. Notwithstanding the small scale of the map, it supports the emerging picture of an established thoroughfare leading from the A4 at Gypsy Lane and rejoining it at the junction of Rowden Lane and the Bath Road.

Report on the Borough of Chippenham 1831

695. Rowden Lane is not shown on this plan although Gypsy Lane, from its junction with the A4 is depicted on it. However, it peters out before reaching anywhere. As Professor Williamson pointed out, the key to the map did not make any reference to roads. He contended that the map simply showed enough topographic detail to allow the old and proposed boundaries of the Borough to be depicted clearly.

696. Mr Harbour stated that Gypsy Lane was shown as wide as most other roads on the plan although, somewhat inexplicably, unfenced or unhedged on its western side for the entire length connecting into the A4. However, the point that he made was that there are footpaths shown elsewhere on the plan along much narrower access tracks. Indeed one such track leads to Harden Farm and it appears to be the only form of access to it. Accordingly, whether viewed as a mere footpath to that farm, or a cart road to that farm, it was shown in pecked lines leading off a road.

697. This is a different representation from Gypsy Lane on that plan. I agree with Mr Harbour that this suggests that Rowden Lane/Gypsy Lane was regarded as being of much greater significance than a mere private farm track.

698. It is convenient to stop at this year, namely 1831, because it is the last map produced in evidence by Mr Harbour before 1835. Public highways in existence before 1835 were maintainable at public expense.

699. If it were necessary for me to express a view on the status of Rowden Lane (namely Sections A and B), before 1835, I would have said that I was satisfied, on the balance of probabilities, that Sections A and B of Rowden Lane were then public highways, not just subject to rights of way on foot or on horseback, but also with carts and wagons. In other words, it was a full public highway by 1835.

700. However, the historical evidence does not end there and my final decision must reflect the totality of the evidence put before me, and I must consider whether it contradicts or undermines my provisional conclusion on the pre 1835 documentation or, whether it confirms it. My ultimate decision will be based on all the evidence but, in case it is material to do so, I have stated what my view would have been on the basis of the pre 1835 evidence.

The Chippenham and Allington Tithe Award 1848

701. A road was not generally subject to rent charge or tithes unless an income could be raised from herbage, or grazing along its extent. Roads were usually shown on tithe maps because they often formed the boundaries of parcels or hereditaments of titheable lands. Sometimes the roads are coloured sienna or variations on yellow/light brown shades. This colouring was not confined to the carriageway itself, but usually included adjacent verges or highway waste.

702. Mr Harbour examined a copy of the tithe map which itself had been compiled from older maps and other secondary sources, and not the result of a new survey.

703. He observed that the outlines of roads were mostly drawn with solid lines representing enclosing features such as fences, walls and hedges. All the public roads on the Award Plan were shown coloured sienna for their full extent between the outlines or casings, to include all verges and highway waste. These boundaries are consistent with earlier plans, and in particular those boundaries at the enclosed sections of Rowden and Gypsy Lanes.

704. Toll Bars were now visible just south of the junction of Rowden Lane and the A4. Mr Harbour speculated that these may have been necessary at this stage because people may have been previously avoiding paying tolls by using Rowden Lane to bypass this section of the A4.

705. Mr Harbour was not able to draw any reliable conclusion from the tithe map. He thought that the best that could be said about it was that Rowden Lane and Gypsy Lane were coloured sienna, as were all the other highways shown on the plan, but that did not necessarily mean that it was shown as a public highway. The two parcels of land making up the enclosed section of Rowden Lane, parcel numbers 518 and 519, were described in the Award as “Part of the Road to Rowden Farm”. It was not

cultivated or shown subject to tithe apportionment. The parcel making up the enclosed section of Gypsy Lane was described as a "lane" and was again not cultivated or subject to tithe apportionment.

706. Mr Harbour agreed with Professor Williamson that the Tithe Award Plan could be showing either that the road(s) were considered public highway or that they were private roads with no titheable value.

707. Professor Williamson derived some support for his argument that Rowden Lane was a private vehicular road from the Tithe map. Rowden Lane was given two parcel numbers, 518 and 519, whereas the overwhelming majority of the roads were not given parcel numbers. Only a very small number of lanes, no more than five within Chippenham itself, and three within Allington, were given numbers.

708. Parcel 518 was the property of Benjamin Lifely. This parcel and his adjoining fields were tenanted by James and Joseph Austin. Parcel 519 was owned and occupied by Jacob Philips, who again owned adjoining fields. However, Professor Williamson also pointed out that some "numbered" roads were allotted a rent charge, in lieu of tithe on their potential produce, whereas others – including Rowden Lane - were not. Moreover, he indicated that what we call Rowden Lane today was not given a specific name in the 1848 map, but was simply described as "the road to Rowden Farm".

709. He suggested that the Tithe map very strongly indicated that Rowden Lane was different in status from the public highways like the Bath Road or Lowden Lane. He considered it likely that the Tithe Commissioners were informed that Rowden Lane was a privately owned access way, across which only limited numbers of property owners, rather than the public at large, enjoyed rights of access. He said this was consistent both with the evidence of the earlier large scale maps and other mid-nineteenth century evidence.

710. In particular he referred to the Abstract of Title of Trustees of Mr and Mrs Cambridge's settlement, dated 10 March 1880, which, in referring to an 1820 Indenture of Lease and Release, spoke of a conveyance of "all that Lane or Way" between the said closes called Rowden Down Lane. Moreover, he argued that if Mr Harbour were right in saying that by this time Rowden Lane had become a public highway, then the surface would presumably have vested in the Surveyor of Highways and could not have been so comprehensively conveyed.

711. In my view, this conclusion does not follow. The 1820 document could easily have been referring to the subsoil under the Lane. After all, the Claimants agree that at some stage Rowden Lane became a public highway, and Professor Williamson had already accepted, when dealing with the footpath from Lacock which crossed Rowden Lane, as shown in the 1784 Topographical Map of Chippenham by John Powell that:

It is perfectly possible that the lane, or some section of it, could have had or acquired pedestrian rights of use, but not vehicular ones.

712. In 1820, the Lane bore a name then, "Rowden Down Lane" and the word 'lane' has been judicially defined as usually meaning a minor road leading between one main road and another. Accordingly, I do not find Professor Williamson's observations on this point to be persuasive.

713. He also contended that the Tithe Award Plan showed Section C and the southern continuation of Gypsy Lane meeting at such an awkward angle that it would be difficult to negotiate with horse drawn wheeled vehicles. He drew my attention to the enactment of the Highway Act 1773 which empowered Quarter Sessions to stop up highways, much more easily than the previously cumbersome common law process. He seemed to argue that the maintenance of this junction was inconsistent with it being a public highway because, had it been so, the junction would have been altered

and smoothed using the powers under the 1773 Highways Act. In my judgment, the deviation in this case would have been minimal and totally disproportionate to the cost and effort involved in securing a highway diversion order.

714. On the Tithe Map and Award, Rowden Lane and Gypsy Lane were coloured sienna as all the other highways shown on the plan. However, that did not *necessarily* mean it was shown as a public highway. It could have been either that the roads were considered public highway, or that they were private roads within no titheable value.

715. Nevertheless, it is possible to derive some further information from the plan.The plan shows Sections A and B of Rowden Lane in the same way as it shows the Bath Road. Both Sections A and B of Rowden Lane and Bath Road are shown differently from Section C. Either Sections A and B were public with no known owner to tithe or they were private with no titheable value. However, it was known who the owners of Sections A and B were, namely Heath/Lifely and Cambridge. We also know two further things: (a) some private roads on tithe maps were titheable; and (b) the Claimants accept that Sections A and B were public highway of some sort at some time.

716. In my judgment, the 1848 map provides support for the proposition that Sections A and B of Rowden Lane were continuous with the main Bath road, and were not tithed because they were full public vehicular highway. This is consistent too with the shading shown on the OS map for 1900 and with the 1910 Finance Act map, where Rowden Lane is shown as a wide ungated lane, with a central track and verges, coloured the same way as the Bath Road but differently from Section C. This strongly suggests that it was a public vehicular highway.

Map entitled ‘Wiltshire’ by Edward Weller F.R.G.S 1862

717. This commercially produced map showed Rowden Lane and Gypsy Lane as a thoroughfare, or through route, referred to as a minor “road” in the key. The scale on this plan is approximately four miles to one inch, yet the thoroughfare is clearly shown.

Map produced by surveyors relating to a proposed change to the Borough boundary 30 September 1867

718. All the public highways (carriageways) in the borough are shown coloured yellow by the surveyor of this plan. The enclosed sections of Rowden Lane and Gypsy Lane are also shown coloured yellow, for the full extent of the enclosed sections, as all the other carriageways are shown.

719. Professor Williamson said that the purpose of this map was to define borough boundaries and not to classify local rights of way. As far as the Weller map of Wiltshire of 1862 was concerned, Professor Williamson made the point that no survey had taken place to show the legal status of the particular roads on this map.

Beacons Map of Wiltshire c1876

720. This map was produced by a commercial map maker at a scale of approximately three miles to one inch. Rowden Lane and Gypsy Lane are shown as a thoroughfare and part of the overall road network. Professor Williamson made the point that this map shows not only public vehicular highways but also private farm tracks.

Thoroughfares

721. On a number of occasions in this judgment, I have made reference to through routes and thoroughfares, stating that certain maps gave me the clear impression that

Rowden Lane and Gypsy Lane, connected by a way across the field, constituted a through route or thoroughfare leaving and rejoining the A4.

722. Mr Harbour attaches considerable importance to the notion of "thoroughfare". He is strongly of the view that the historical evidence demonstrates that Rowden Lane and Gypsy Lane formed one through route, amounting to an extremely ancient thoroughfare. He considered that this thoroughfare was in existence before the inclosure of the common lands in 1669. It not only served those common lands but also the place called Rowden.

723. He referred to an article by Colin Seymour entitled "The thoroughfare principle" contained in the Byway and Bridleway Trusts Journal (BBT 2000/1/8). The gist of the article was to confirm that ancient through routes were always considered public vehicular highways. I quote from selected extracts from that article:

The basic concept of the highway was one of endless route; a thoroughfare made up of countless ways. All ways, be they public roads or private roads, which led from village to village and did not terminate there, or which led to a great road were properly called a highway. This was the presumption that must be the starting point at any enquiry into the status of a way. If a way is a thoroughfare and does not end as a cul-de-sac it is a highway. Thus the burden of proof shifts at this point from those who seek to prove the way to those who seek to disprove its existence. From time immemorial up to the 1850s, only thoroughfares were highways. Ways which terminated at a village, a church, a common field, or a house were termed private ways. A private way and a private road were not strictly the same thing so far as the law were concerned. For, the latter could be a highway whilst the former was distinguished from a highway because it was not a thoroughfare … the difference between a highway and a private way was that the former was a thoroughfare and the latter terminated as a cul-de-sac … All highways are thoroughfares. All public roads

which were thoroughfares were highways. All private roads which were thoroughfares were highways. All occupation roads which were thoroughfares were highways. All cross roads were highways because by their very nature they were thoroughfares leading to other places and were part of the road network.

… [a statute] requiring sign posts at cross roads referred to them as 'cross highways'. Countless law reports, ancient and modern, start from the premise that if the way was a through route, linking two public roads, that way was itself a highway. The thoroughfare principle was fully understood by the courts at the time and nothing has changed since to alter the law – therefore it still holds good that: every (ancient) thoroughfare is a highway if it connects to another highway or leads to the next town.

724. Professor Williamson said that he was not at all convinced that Rowden Lane either led between two villages or connected two major highways.

725. In suggesting that Rowden Lane was regarded as a private vehicular road in the nineteenth century, Professor Williamson drew my attention to a Council Minute, dated February 1881, of a meeting of the members of Chippenham Borough Council. 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. The minute referred to a "bridge in Rowden Lane". He argued that the fact that property owners adjoining the lane were being called upon to pay for the cost of repair of a bridge in the Lane indicated that the Council, as well as the property owners, regarded Rowden Lane as private. The actual bridge in question is , I find, in Section A of Rowden Lane, opposite the public house car park.

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.

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.

728. Even twentieth century correspondence in this case has shown that the Highway Authority responsible for Rowden Lane has had to prioritise. It did not always have the funds to discharge its statutory duties. Therefore, I do not regard the request by the Highway Surveyor in 1881 for a contribution towards the repair of a bridge as constituting the "particularly important piece of evidence" in support of a private road which Professor Williamson believes it is. On the contrary, it is consistent with the First Defendant's case. In any event, it must be seen in the light of the 1896 Council Minute which suggested or implied that Rowden Lane was a public vehicular highway.

<u>1st Edition 1:2500 Ordnance Survey Map 1886</u>

729. This plan shows the first properly detailed survey of Sections A and B of Rowden Lane. The areas shown on this map with double casing lines indicate solid boundary features, such as hedges or fences on both sides. The width of Rowden Lane is again consistent with earlier plans, except that Section A appears now to be narrowed. The public house, the Rowden Arms, appears to the north of Section A. Access to the public house was off Rowden Lane,

730. Mr Harbour thought it would be unusual, if Rowden Lane were a wholly private road, for the owner or owners of Rowden Lane to permit the road to be used for access to the public house without payment of money. Mr Harbour was unaware of any such financial arrangement.

731. Mr Harbour made two further points about the way in which Rowden Lane was shown on this map. The first was that the Lane had its own parcel number and survey area. These are the conventions used by Ordnance Survey for all public roads. The second addressed Professor Williamson's point about the difficulty of negotiating the "V" junction of Section C of Rowden Lane with the northern track leading to Gypsy Lane. In referring to the acute angle formed by this intersection and the alleged impracticability for use as a through route, his view was that the track was only surveyed somewhat generally across the open fields, denoting an approximate width and alignment of the open track. He suggested that the map did not disclose exact limits, as it would naturally wander somewhat depending upon the conditions of the way.

732. I am satisfied, on the balance of probabilities, that the inference can properly be drawn that Rowden Lane at this time had been dedicated and accepted as a public highway. Indeed, it seems likely to me that by the time of this map, the public's right of access was not only on foot or on horseback but also with carts or wagons. I see no reason to limit these just to carts carrying beer barrels for the public house. Moreover, the date of this map is only five years after the Council meeting, recorded in the 1881 Minute, dealing with the repair of the bridge in Rowden Lane, virtually opposite the public house.

Phillips Cycle Map of Wiltshire c1890

733. On the key to this plan cycling roads were coloured brown. Rowden Lane was shown as another type of road shown in the key as "cross roads", as it was shown on Greenwoods Map of Wiltshire 1829. In the Planning Inspectorate's "Right of way section advice note number 4, July 1999" advice is given as to the interpretation of the term "cross road or cross roads" as follows:

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

734. However, the note went on to urge caution:

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 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 of the evidence in reaching a decision.

735. Accordingly, I have to assess each piece of evidence to see how far I can rely on it. This map continues to present a significant thoroughfare running off and to the A4 via Gypsy Lane and Rowden Lane. This thoroughfare strikes me as of greater importance than the intersection of two private tracks leading on to a private farm access. Whilst

reminding myself of the fact that the map draws no distinction between the undoubtedly private access track to Rowden Farm and Gypsy Lane/Rowden Lane route, I nevertheless regard this map as contributing to the fairly consistent picture of a public thoroughfare leading off and back on to the A4.

736. Professor Williamson drew my attention to an Inquiry in 2008, where the Inspector, Mr Grimshaw, accepted the submission that such county maps often only depicted two category of roads, turnpike roads and cross roads, where the latter designation tended to become a "catch-all" for all routes that were not turnpikes, including cul-de-sac occupation roads and other private access roads. He said that it could not therefore be safely assumed that the inclusion of the route as a cross road on these maps necessarily indicated that they had acquired public carriageway status.

737. I have reminded myself of the need to have regard to the totality of the evidence on the issue, and I am fully alive to the limitations of these small scale commercial maps and that they also show undoubtedly private ways as well as public ways. These maps therefore cannot be definitive as to status. Nevertheless, they show a consistency of treatment of the thoroughfare formed by Rowden Lane and Gypsy Lane which I find difficult to explain solely by reference to a private access way for Rowden Farm.

2nd Edition 1:2500 Ordnance Survey 1900

738. The casing lines on Rowden Lane appear to be identical on this survey to those shown on the 1st Edition OS Map 1886. The enclosed section of Rowden Lane again has a parcel number and the acreage is the same at 1.498 acres. However, Section B of Rowden Lane appears to have thicker casing lines on the south side. Mr Harbour argued that it was the practice of the Examiner to establish not only the extent of public and private roads but also the edge of the highway.

739. Certainly an Examiner was instructed to communicate with various authorities such as the proprietors or agents of estates and generally to obtain information from persons locally interested and well informed. He was also able to distinguish between turnpike and parish (usually public) roads and occupation roads (usually private vehicular routes).

740. Before 1884, only first class public roads were drawn with a thickened line. Quoting from the leading expert on the matter, Dr Yolande Hodson, Mr Harbor continued:

The overall effect of the November 1885 circular is to suggest that it should be possible to make the following identifications on the published 1:2500 plan:

(1) First class roads: all shown by the thickest shaded line. By implication, all such roads should be public.

(2) Second class roads, category 1: public, shown by a thinner shaded line than (1).

(3) Second class roads, category 2: private, shown by a thinner shaded line than (2).

(4) Public or private roads in poor repair: shown by thin lines without any shading.

741. After studying the plan, Mr Harbour said that the thickness of the shading used on Rowden Lane appeared identical to that used on the A4 (London to Bath road – the Great Road). He concluded that, since the A4 would never have been given the thinnest shading category (3), both the A4 and Rowden Lane were either category (1) or (2), both public road categories. I accept Mr Harbour's assessment of the thickness of the lines.

742. Professor Williamson was not so sure that the A4 and Rowden Lane had lines of equal thickness. Nevertheless, even if it did, he relied upon other observations made by Dr Hodson that it is not possible to make an unequivocal distinction between the 3 categories of shaded road on public plans. However, more importantly than this, he said that it simply was not the responsibility of Ordnance Survey officers to conduct a full public enquiry in to the precise legal status of roads. Undoubtedly some enquiries were made, but he argued that their main job was to show what was on the ground. The important thing, therefore, was the condition and appearance of a road rather than its legal status. At most, he concluded that the use of the shaded lane on Section B of Rowden Lane was an indication of its condition, namely it would, to the same extent as a good minor public road, take fast wheeled traffic in all seasons. He developed this by further quoting from Dr Hodson who opined that a shaded line was also applied to private roads, which were maintained up to second class standards.

743. Therefore, his view was that the depiction of roads in the OS large scale maps did not provide a reliable guide to their legal status. Depiction of Rowden Lane on the 1900 map was, he felt, merely an indication that the surveyors found this section of the Lane in reasonable repair. Nevertheless, as he observed, it is interesting that Section C of Rowden Lane, beyond the cattle grid, was not shown either as a first class or as a second class road but only as a cart track. There was, therefore, a material distinction between Sections A and B (considered together) and Section C.

744. I believe that Professor Williamson must be right in concluding that the OS maps could never be *definitive* of legal status. That simply was not their purpose. However, that does not mean that they provide me with no assistance in this case. What does emerge is that there was a material distinction between the surfaces of Sections A and B, which would take fast wheeled traffic in all seasons, and the cart track in Section C. In my judgment, Sections A and B were of a higher order than Section C. Whilst not definitive of its legal status, the condition of repair and maintenance of Sections A and

B of Rowden Lane as produced from this plan persuades me that, in terms of vehicular use, it had a status and role higher than a private drive or road.

745. In reviewing the 19th century evidence as a whole, Professor Williamson, relying heavily on the Borough Council Minute of 1881, concluded that Section B of Rowden Lane continued to be regarded as a private road, used by right by a small group of people, rather than as a public highway. I do not agree with this view.

746. In my judgment, the involvement of the Highway surveyor in 1881, the 1896 Minute (both dealt with more fully in chapter 18), the similar depiction and treatment of the A4 and Rowden Lane and the difference in the quality of maintenance between Section B and Section C shown on the 1900 map lead me to conclude that it is more likely than not that Sections A and B had in fact been dedicated by the owner of Rowden Lane to, and accepted by, the public as a public vehicular highway at this time.

The Finance (1909-10) Act 1910

747. This map is heavily relied upon by the First Defendant because it shows the disputed sections of Rowden Lane as wholly untaxed. This to be contrasted with the land to the east of the cattle grid which was taxed, but was subject to a deduction probably in relation to minor highways running over it. The First Defendant argued that the only reason why Sections A and B of Rowden Lane would be shown untaxed is because it was then a full (ie including vehicular) public highway. If it were anything less than this, it would be taxed, but subject to a deduction to reflect the minor public rights (eg Section C).

748. Moreover, this plan also showed there was, in the field called Home Down, a football ground in 1910. Given the Claimants' concession that Rowden Lane was a public highway on foot and on horseback, I find that is likely that the football ground was not just accessed by people on foot or on horseback. It seems to me likely that carts or

wagons would have been used to convey people (if only the away team) and kit to the ground. Moreover, Rowden Arms Public House, hereditament number 1206, is shown with no access to it, other than over Rowden Lane.

749. Professor Williamson, whilst accepting that the 1910 map suggested that Sections A and B of Rowden Lane were considered by the valuers to be a public vehicular carriageway, whereas Section C was not, urged me not to draw this conclusion. In particular, he pointed to the fact that Rowden Lane may have been shown untaxed and uncoloured because:

1. There was uncertainty over the ownership or occupation of Rowden Lane and therefore there was ignorance as to its true status;

2. There was uncertainty whether Section 26(1) of the 1910 Act could be complied with, namely 'each piece of land which is under separate occupation … shall be separately valued', where use of Rowden Lane was shared as were the costs of its upkeep;

3. Where a number of people had rights to use the road, and customarily did so, the valuation maps may well have treated it in the same way as a public road, even if the valuers had been fully aware that it was not;

4. Not only Rowden Lane but also the two spurs running southwards from it were shown uncoloured. The fact that these spurs were also shown uncoloured and, to Professor Williamson, appeared cul-de-sac occupation roads rather than public highways, undermined the reliance that could be placed upon uncoloured sections of the map. Mr Harbour countered this by showing, (in my view, successfully) that these spurs, namely spur 2 (between Swallow Falls and Elm Tree Farm) and spur 1 (the end of the enclosed section of Rowden Lane by the modern day cattle grid, were indeed public vehicular/cart roads by the eighteenth

century at the latest. Indeed the Tithe Award 1848 also showed spur 1 and spur 2 as untithed and also coloured in the same way as the Bath Road on the Tithe Award plan. Mr Harbour's opinion is that these spur roads, which connected with Rowden Lane, were themselves public vehicular highways and had been used as a means of public access with carts to the Coppice;

5. There was no public consultation process to enquire into the status of map roads shown on the map;

6. Running between parcels 1193 and 1306 on the 1910 map is a public footpath which, like Sections A and B of Rowden Lane, is uncoloured. At its western end, it runs unbounded through parcel 1193, where it changes and becomes coloured and included within the parcel. Professor Williamson says this is comparable to Sections A and B running into Section C on the 1910 plan. Subsequently, this footpath has been known as 'Chippenham 3' on the 1953 Definitive Map. It has never been suggested that it is anything other than a footpath and, therefore, so Professor Williamson concluded, the exclusion of a public way on the 1910 maps is perfectly consistent with that public right of way having a lower status than a public vehicular highway;

7. R v. (1) Secretary for State for the Environment (2) Hertfordshire County Council ex parte Maltbridge Island Management Company Ltd [1998] EWHC Admin 820 [1998] E.G. 134 (C.S.)demonstrated that a 1910 map could not take precedence over other evidence and, in particular, that of private documents (including deeds) which treated the way in question as a private road. In that case, despite the fact that the disputed roads were shown uncoloured in the Finance Act map, Sullivan J ruled, that it was, in fact, a private road. However, the decision to quash the Inspector's decision was based upon a review of the conflicting evidence in a case, where he considered the Tithe Award and the 1910 map to

be ‘neutral with indications pointing both ways’. In the end, Sullivan J concluded that there was insufficient evidence as a matter of law for the conclusion reached by the Inspector, but recognised that he could not substitiute his own assessment of the documentary evidence for that of the Inspector. In Maltbridge, the 1910 map showed a deduction of £10 tax in respect of a way, whereas Rowden Lane was shown wholly untaxed;

Ridley -v- Environment Secretary [2009] EWHC 171 is an example of a case of an Inspector coming to an opposite conclusion on a 1910 Finance Act map, upheld on appeal, on facts more similar to Rowden Lane;

These cases of Maltbridge Island and Ridley -v- Environment Secretary [2009] EWHC 171 are illustrations of decisions reached on different evidential material, including a 1910 map, but each case must turn on its own facts and evidence. It is for me to assess and evaluate the documentary evidence in this case, as I am entitled to do under Section 31 of the Highways Act 1980;

8. Conveyancing documentation concerning land adjacent to Rowden Lane showed that, in 1919, the eastern section of Section B (called “B2”) was conveyed to Brigadier Palmer. The Professor considered that this was not merely a conveyance of the subsoil, but also of the surface of the Lane itself, which could not have happened had it been subject to public vehicular rights. Of course, this is somewhat difficult to reconcile with the Claimants’ current case that Sections A and B *are* a public highway, albeit subject only to rights of way on foot and on horseback;

9. Brigadier Palmer, having assembled the Lackham Estate, sold it to the Right Honourable William James Baron Glanely (formerly Mr Long). In 1927, Lord Glanely sold the estate to Mr Holt MP, who subsequently auctioned the estate off in lots. The sales particulars in relation to lots 4, 5 and 6 (subsequently

purchased by David Townsend) all referred to the lots being approached "off a private road", a reference to Rowden Lane. The auction particulars contained "stipulations" the final one of which read:

> *Where any lot or lots abut on to a private road and the purchaser has been granted a right of way there over he shall contribute to the owner of such road a fair portion of the costs of maintenance thereof.*

750. Mr Townsend purchased lot 5 in 1927 and was granted a right of way over Sections A and B, "so far as the vendor can grant the same". In 1928, he purchased lots 4 and 6 without being granted a right of way over Sections A and B.

751. Professor Williamson concluded that this conveyancing material was supportive of the private status of Rowden Lane, or at least the fact that it was not subject to public vehicular rights. He added that the conveyancing documentation, as in Maltbridge, should take precedence over the 1910 map, because Rowden Lane was being treated and regarded as a private way only a short time after the 1910 Finance Act map. Even if, contrary to his view, the 1910 map could be read as supporting the existence of public vehicular rights over Sections A and B of Rowden Lane, he considered that the manner in which it had been treated in private conveyancing documents drawn up soon afterwards was of much greater value in indicating its status.

752. The Claimants sought to put before me other explanations for why sections A and B of Rowden Lane were uncoloured on this 1910 map. I reject the suggestion that it may have been because Sections A and B were a bridleway rather than a full public vehicular highway. The fact that it may be possible to point to other areas on the plan, eg Footpath 3, shown uncoloured but only a footpath, does not dent my confidence in the map on Sections A and B. The exhaustive enquiry in this case has been on the history of Sections A, B and C of Rowden Lane, not Footpath 3.

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.

754. The 1910 map is one of three pieces of evidence upon which the First Defendant places especial reliance to prove its case that Rowden Lane was a public vehicular highway. The other two are (i) the 1937 'New Street' declaration for Rowden Lane and (ii) the Definitive Map process.

755. However, the Defendant's case is that, although these are individually potent pieces of evidence, they also support the emerging and consistent picture, apparent in the historical documentation, that Rowden Lane, before and after 1669, has been regarded as a public vehicular highway.

756. The map is, therefore, of some importance. In Agombar, where the disputed stretch of road was called "the Blue Land" the Blue Land was shown with other principal roads in the area as an untaxed public road. Etherton J found that fact to be "most material evidence" in relation to the status of the Blue Land as a highway at that time for the reasons which he gave in paragraphs 46 and 47 of his judgment:

46. The next documents on which the Defendants rely are a map and schedule prepared pursuant to the Finance (1909-10) Act 1910. The 1910 Act provided for the levying of a duty on the incremental value of land, called increment value duty. The Board of Inland Revenue was to ascertain the site value of all land in the United Kingdom as at 30 April 1909. Commissioners were to undertake a provisional evaluation of the land, which they were to serve on the owner of the land. The 1910 Act provided for the owner to give notice of objection to the provisional valuation.

Valuation officers were set up throughout the country, and a Land Valuation Office was appointed to each Income Tax Parish. Between 1910 and the repeal of the Act in 1920 the whole country was surveyed in this way. Mr Alan Harbour, the Rights of Way Officer of Wiltshire County for the Northern half of the county and who was formerly the Land Charges Officer of the council, gave evidence of the painstaking detail with which the land was valued pursuant to the 1910 Act. Although Mr Harbour is not qualified as a lawyer or a surveyor, he has considerable practical experience on issues relating to public rights of way and the proof of their existence. I found his evidence helpful. He emphasised that the effect of the arrangements made under the Act was that local people with local knowledge undertook the valuation and conducted the detailed consultation with the owner of the land. He described how the valuation involved the most comprehensive record of land ever undertaken and became known as "the Second Doomsday". The 1910 Act contains specific provision for reducing the gross value of land to take account of any public rights of way or public rights of user as well as easements. Importantly, the Act contained criminal sanctions for falsification of evidence …

47. The 1910 Finance Act map and schedule are, in my judgment most material evidence in relation to the status of the Blue Land at that time. It would be in the interest of the owner of the Blue Land to acknowledge that the Blue Land was a public highway and so not taxable. On the other hand, it would have been the concern of those acting for the Commissioners to establish that the Blue Land was private land and not subject to public rights. The fact that the Blue Land was not shown as falling within the hereditament of any private individual, but is shown as part of the general road network in a survey which would have been undertaken by local officers of the Commissioners and following consultation with the owners of private hereditaments, is a most powerful indication that the Blue Land was at that time thought to be in public ownership and vested and maintainable by the District Council, which was the highway authority …

757. I respectfully adopt that as a statement of the practice and procedure for carrying out this survey, but I must make my own assessment of the value of the 1910 map concerning Rowden Lane in the context of all the evidence in the case.

758. 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. As Etherton J observed, 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. The base map used for the Finance Map was the 2nd Edition Ordnance Survey map 1900, with which I have dealt above.

759. The landowner of Rowden Farm was allocated hereditament number 1338, amounting, as shown in the valuation book, to 191 acres. However, the enclosed section of Rowden Lane, Sections A and B leading to the start of hereditament 1338 are not included in it. Sections A and B of Rowden Lane are shown uncoloured as a public road, exempt from tax assessment. If Rowden Lane had been a private drive principally for Rowden Farm in 1910, it is likely that this would have been well known in the vicinity at the time. Moreover, if Rowden Lane were owned by Rowden Farm, then one would have expected other landowners on Sections A and B to have had private easements over this land. In fact, it is the First Defendant's case that the first time after 1540 when Rowden Farm regained purported ownership or control of any part of sections A and B was in 1919, when some trustees conveyed part only of section B (B2) back into common ownership with Rowden Farm. However, this common ownership was short lived after 1919. I deal with this more fully later in this judgment, when I analyse the conveyancing history of the area.

760. As far as the enclosed section of Gypsy Lane is concerned, this too had been excluded from tax assessment because it was a full public highway. It would indeed be somewhat coincidental if Gypsy Lane were also shown wrongly as a full public highway because of confusion over ownership or occupation. In my judgment, there was no such confusion.

761. Only all purpose (vehicular) highways were excluded from tax assessment. Minor highways, including footpaths and bridleway were declared as part of the assessment, but the land showed a deduction in taxable value for any incumbrances. In relation to the unenclosed section of Rowden Lane/Gypsy Lane (ie the track over the Cunniger and Home Down) which intersected Section C of Rowden Lane, it is possible that by 1910 the original public use of the way had almost disappeared. This is not so surprising, given that the improvements on the main A4 resulted in a road in good condition available for all free of charge. Hereditament 1338 was assessed with a deduction of £175. In my judgment, this was because of the presence of minor highways over it, including Section C, which, on the Claimants' current case, was a public highway.

762. The Claimants accepted that the deduction of tax in respect of the land through which section C of Rowden Lane ran was in consideration of *some* public right of way in that area, though it cannot now be said whether that was soley in respect of section C. There was extensive cross-examination, based on detailed calculations, by Mr Laurence on behalf of the Claimants, to suggest that the deduction for tax in relation to the land to the east of the cattle grid was unrelated to, or was not wholly explicable by, Section C of Rowden Lane. Mr Laurence sought to show that there were other potential minor rights of way, other than Section C, which would explain the deduction to tax on hereditament 1338. The fact that there may have been other candidates which would have justified a deduction, does not displace my inference (given the

Claimants' admission that Section C was a bridleway) that the deduction of tax was, at least in part, in respect of section C of Rowden Lane.

763. As with so many of the maps I have so far discussed, Section C of Rowden Lane is treated differently from A and B in the 1910 Finance Act map. Section C is shown as part of hereditanent 1338 in the private ownership then of Brigadier Palmer.

764. Why then were sections A and B of Rowden Lane untaxed?

765. In my judgment, this was because the *whole* of Sections A and B of Rowden Lane, including their verges, were found to constitute a public vehicular highway, whereas the area within which Section C ran was found to be private land subject to one or more public rights of way. Moreover, the fact that section C was not distinguished from part 1338 suggests that the section had, by that date, the reputation of a road over which mainly minor rights, namely on foot or on horseback, were then enjoyed by the public. This was in contrast to the road extending along Sections A and B which, I am satisfied, were found to have the status of a full public vehicular highway.

766. Despite the submission to the contrary by the Claimants, I am satisfied that I can confidently rely upon the accuracy of the 1910 map in so far as it concerns Rowden Lane. The Lane was not shown as falling within the hereditament of any private individual, but was shown as part of the general road network in a survey conducted after consultation with all relevant parties. I agree with the First Defendant that that factor is a powerful indicator that those sections of Rowden Lane were at the time thought to be in public ownership and vested in and maintainable by the Highway Authority.

767. The final decision to which I come concerning the status today of Sections A and B is based upon the totality of the evidence, and that includes the 1910 map. Nevertheless, within the category of historical evidence, I am satisfied that the 1910

map is material evidence which is strongly supportive of the First Defendant's contention that Rowden Lane was, in 1910, considered to be a public vehicular highway. The picture which has emerged over the centuries is consistent with this, and continued to be so after 1910, for example in 1937 and in 1955.

768. In reaching this conclusion I have not overlooked the Claimants' case, or the detailed arguments in their written submissions, that the 1910 plan, in relation to Rowden Lane, was unreliable or inaccurate. I just do not accept those submissions. None of matters relied upon by Mr Laurence in his final submissions, individually or cumulatively, undermines my confidence in the 1910 map. Inevitably, with a Lane of this antiquity, and given the wide range of historical documentation with which I have had to contend, few conclusions can be reached as matters of certainty. However certainty is not necessary in this case.

769. On the subject of the 1910 map, and generally, I prefer the evidence of Mr Harbour. It is straightforward and logical, and based on his considerable professional and practical experience. For the same reasons which Etherton J gave in Agombar, I draw the independent conclusion that the treatment of Sections A and B in the 1910 Finance map is most material evidence. The Claimants themselves acknowledged that Professor Williamson was not expert on the workings of the Finance Act.

770. In conclusion, I agree with the First Defendant's submission that the treatment of Rowden Lane in the 1910 Finance Act Map is clear and cogent evidence that Sections A and B of Rowden Lane were acknowledged to be a public vehicular highway in 1910. On the balance of probabilities, I regard that evidence as correct and I accept it.

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 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 Gypsy 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 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.

Urban area highway record 1930

772. Under the Local Government Act 1929, the County Council became responsible for all rural roads and principal roads in the urban areas. Accordingly the urban authority was responsible for minor roads in urban areas. Class A, B and C roads, the principal routes, were shown coloured in that plan, but town streets were uncoloured. The plan shows some amendments made to convert a formerly unclassified road into a town street on 1 April 1952. Sections A and B of Rowden Lane are shown uncoloured on this plan, but with a status of town street.

Original Claim Map for public rights of way, prepared pursuant to the National Parks and Access to the Countryside Act 1949

773. I deal with the question of the Definitive Map process in detail elsewhere in this judgment, but it is convenient, in this review of the historical evidence, to touch on some of the maps produced on the way to its final version. The original Claim Map, Draft/Provisional and eventual Definitive Maps, showing and recording the public rights

of way in Chippenham Borough, all showed Sections A and B of Rowden Lane coloured as a full public highway or, in this map, as an uncoloured town street with lesser rights of way being claimed only over the unenclosed section, Section C, of the Lane. On the maps produced between 1949 and 1955, the enclosed section of Gypsy Lane was now shown as 'Bridleway 2A', with the unenclosed track (initially path 2B), running south from there to join up with Section C, shown as having no public right of way at all.

774. Section C of Rowden Lane was claimed as a public right of way, CRB5. On this plan, principal roads are shown coloured, and minor unclassified roads are shown uncoloured, but all are full public vehicular highways. Sections A and B of Rowden Lane were shown either as a full and unclassified county road or as a town street, with CRB5 joining it.

775. The reference to CRB (Carriage Road used mainly as a Bridleway) is to a non-statutory subset of a RUPP (Road Used as a Public Path) where the main use was a bridleway. 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.

<u>Original Claim Form or Survey Sheet for Public Right of Way 5 prepared in 1950</u>

776. What became RUPP 5 (ie Section C of Rowden Lane) was surveyed as part of the preparation of the Definitive Map. The way was only claimed from the end of the enclosed section of Rowden Lane, leading eastward, over the unenclosed section for 167 yards to a distance 100 yards west of Rowden Farm outbuildings. It was described as commencing at a gate on the eastern end (ie cattle grid) of Rowden Lane. The implication was that Rowden Lane was a full public highway connecting with it. The survey sheet showed that Section C was originally claimed as a "carriageway".

However this word was not used in the 1949 legislation, accordingly, those responsible for considering the initial surveys deleted the word “carriageway” and substituted “CRB”, namely a carriage road used mainly as a bridleway. Coincidentally, this survey reveals that there was no cattle grid in existence around the time of this survey in the early 1950s. CRB 5 was described as an open (ie not fenced) way and the surface was hardcore. The way was described as being used as the main access to Rowden Farm.

777. This information, obtained by surveys conducted by Parish or Borough Councils, was then sent to the County Council as the surveying authority for analysis and inclusion in the maps.

Original Definitive Map of public rights of way prepared pursuant to the National Parks and Access to the Countryside Act 1949, relevant date 1 May 1953 (publication of the draft map).

778. On this map, Rowden Lane is shown coloured as a full public highway (i.e. carriageway). The purpose of the Definitive Map and Statement was to identify minor highways within each county. Minor highways included footpaths, bridleways and a new species known as Road used as a Public Path (RUPP). Guidance for inspectors, approved by the Ministry of Town and Country Planning in 1950, gave the following non-statutory guidance for classifying RUPPs under the 1949 Act:

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 “C.R.F.” or “C.R.B”.

779. This was how CRBs were understood in the early 1950s. Furthermore, Butterworths, in their published guide to the 1949 Act, emphasised that RUPP was intended to include a public carriage or cart road, but not intended to include a private carriage, drive or accommodation road. In the memorandum, prepared by the Commons, Open

Spaces and Footpaths Preservation Society in collaboration with the Ramblers Association (recommended by the County Council's Association and approved by the Ministry of Town and Country Planning) the guidance was given that:

Highways which the public are entitled to use with vehicles but which, in practice, are mainly used by them as footpaths or bridleways should be marked on the map "C.R.F" or "C.R.B" with a note in the schedule also that their main use was as a footpath or as a bridleway as the case may be.

780. This notation was used in the preparation of the Definitive Statement to accompany the Definitive Map. However, the term RUPP became a source of some confusion and subsequently, under legislation in 1968, all RUPPs had to be reclassified *either* as a footpath or bridleway *or* as a Byway Open to All Traffic (B.O.A.T).

781. In this case, I am only concerned with the definition of the legal status of Sections A and B of Rowden Lane, and I am not concerned with modifying the Definitive Map or with causing any Section 36(6) list to be amended to include the entirety of the ancient thoroughfare as a public vehicular highway.

Original Definitive Map Statement 1 May 1953

782. Accompanying the Definitive Map was a Definitive Map Statement. This defined the dimensions and characteristics of the way shown on the plan. The Statement showed the straightforward transfer of the information contained in the Parish or Council Survey on to the map. The original Definitive Map Statement, in relation to RUPP 5 stated:

C.R.B. 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.

783. Subsequently, somebody has deleted the initials CRB, substituted the initials BR and converted imperial distances into metric ones. It seems likely that this was done as a result of potential modifications or reclassification of the Definitive Map and Statement conducted under the requirements of subsequent legislation in 1968.

784. Mr Harbour did not analyse any of the nineteenth or twentieth century conveyancing in detail. However, he was of the view that the status of Rowden Lane as a public vehicular carriageway was clearly established centuries before the 1800s, but that declining public use, over time, has resulted in modern doubt. He also concluded that conveyancing practice had sought to address modern doubt - but not historical fact - by ensuring that purchasers of property always had access to the land which was being purchased. He pointed out that there is no known owner of the entire linear strip of Sections A and B of Rowden Lane. He finds this unsurprising, since it was part of an ancient highway. However, had Rowden Lane been merely a private access road, it could only have been owned by the owner of the land on which Rowden Farm stands, since it would be that property's private access drive for its entire length. Other land owners adjacent to Rowden Lane between the A4 and the cattle grid would each have had to negotiate private rights of access along it to their respected property.

785. I shall deal with this later when I analyse the conveyancing history.

Chippenham highway record 1974

786. Under the Local Government Act 1972, County Councils became responsible for all roads in their county, except the trunk roads and motorways. The Act came into effect on 1 April 1974 and, thereafter, Chippenham Borough Council was no longer the highway authority for Chippenham.

787. Plainly, there was a need to transfer information and records from Chippenham Borough Council to the County Council so that the latter would know the highways to

be maintained at public expense. There is, at Appendix ARH21 to Mr Harbor's report, a copy of the 1974 Chippenham highway record. It is not known how this came to be prepared, or who prepared it – ie whether Chippenham Borough Council or Wiltshire County Council. However, whoever prepared it, the plan is wrong in so far as it showed Sections B and C of Rowden Lane to be RUPP 5. Section A of Rowden Lane was shown as a full public vehicular highway. The plan showed some improvements at the junction of Section A with the A4, when compared with the 1900 OS map.

788. There is no known road adoption agreement concerning these improvements. In the 1960s, the new Rowden Arms replaced two previous buildings on this site, namely the old Rowden Arms and the Manor House. It appears, however, that the brewery made land available for dedication to the public as a result of which Section A was widened. Of course, such additional land given to the Highway Authority for widening of Section A presupposed that Section A was already a public highway to be widened.

789. In so far as this map showed Section B to form part of RUPP 5 it is factually and legally incorrect. All the maps prepared during the Definitive Map process had shown Sections A and B of Rowden Lane as a full public highway (i.e. carriageway). In my judgment, this was a simple clerical error made when the map came to be coloured. This error caused considerable confusion until the matter was clarified in 1983.

Amended highways record 1983

790. It would appear that the trigger for the discovery of the incorrect depiction of Section B of Rowden Lane on the highways map was an imminent disciplinary hearing concerning certain council employees who were alleged to have done resurfacing work on Section B without authority. This gave rise to the question whether Section B was or was not a highway at all and, if it was, whether it was a full vehicular highway. I have dealt elsewhere in this judgment with the internal documentation and

correspondence concerning this issue, both before and after the correction of the record in 1983 to reflect the true position concerning the extent of the full public highway on Sections A and B of Rowden Lane.

791. The amended highway map showed how, in 1972, the bridge officer of the First Defendant inspected the culvert taking Lady Field Brook and accepted responsibility for it. The remaining length of Lady Field Brook, which used to run through the Rowden Arms site, was culverted for its entire length when the public house was redeveloped in the 1960s, at the same time as the improvements were undertaken to Section A of Rowden Lane.

792. Numbers 83, 85 and 87 Rowden Hill have joint access over a private access drive just beyond Section A. Slightly further on the right hand side, as one walks away from the A4, is a large housing estate currently in the course of construction. This is being built in land which was within the original curtilage of Brookfields. If the unamended 1974 map were correct, it would raise a doubt over the public's right of access to these properties by car.

793. Mr Harbour believed that Rowden Lane and Gypsy Lane formed a thoroughfare of extreme antiquity, likely to have been in existence before 1669. He opined that the concept of the "private road" is relatively modern in origin and that, in antiquity, all roads that were provided and able to be used were actually used by all for all purposes. The public/private dichotomy concerned only who was responsible for the maintenance of the road. The southern boundary hedge of Rowden Lane was planted and existed by 1784 (see Powell's map of that year), and it was planted to separate the enclosed lands from the highway. If Rowden Lane existed as a public highway before the Highways Act 1835, it became automatically a public highway maintainable at public expense, and now maintainable by the First Defendant under Section 263 of the Highways Act 1980.

794. I am satisfied that this error in the 1974 map was the result of some clerical oversight, and it was correctly amended in 1983 when the highways map showed both Sections A and B of Rowden Lane as a full (vehicular) public highway.

795. I turn now to three other pieces of historical information on which the First Defendant places reliance, in support of its case that Sections A and B of Rowden Lane are a full public vehicular highway at common law.

796. Those three pieces of historical evidence relate to:

1. Rowden Lane's status as a "New Street" in 1937 (chapter 15);

2. The Definitive Map and Statement, referred to above (chapter 16); and

3. Conveyancing history (chapter 17).

Chapter 15: Rowden Lane as a New Street

797. Section 30(1) of the Public Health Act 1925 reads:-

Where it appears to the local authority that the whole or any portion of an existing highway will be converted into a new street as a consequence of building operations which have been, or are likely to be undertaken in the vicinity, the local authority may by order declare such highway, or such portion thereof as may be specified in the order, to be a new street for the purpose of the application thereto of their byelaws with respect of new streets or of any provision in a local Act with respect of the width of new streets.

798. Chippenham Borough Council had adopted byelaws relating to new streets and buildings on 7 April 1925. Byelaws 7 and 8 stated:-

Every person who shall lay out a new street intended to be the principal approach or means of access to any building shall except as hereinafter provided lay it out for use as a carriage road.

799. There were a number of stated exceptions, none of which applied to Rowden Lane.

800. The reason why Rowden Lane was being considered as a new street was because Mr F H Gibbons had submitted plans for a bungalow to be built on Rowden Lane in 1937, showing a "road twelve feet from centre to kerb, footpath six feet wide to be made up to town council byelaws". This is the first property on the near side of Section B of Rowden Lane, as one faces the cattle grid. It is not disputed that the Council's resolution declaring Rowden Lane to be a new street did so in relation to both Sections A and B of Rowden Lane, even though Section 30 of the Public Health Act 1925 allowed a declaration to be made in relation only to a part of the road.

801. The Claimants' case is that no order was in fact made under the 1925 Act (a view confirmed by the Town Clerk in 1970) and that, even if it had been made, it could not create any new legal rights or convert a bridleway into a carriageway. The expression "new street" is not confined to public vehicular highways, and even a minor highway, eg a bridleway, could be declared a new street.

802. The First Defendant argued that Chippenham Borough Council purported to make such an order and, in so doing, it is probable that they considered at the time that Rowden Lane, between the Bath Road and the cattle grid, was a public vehicular highway. Moreover, the Defendant contended that it is improbable that the Council would have decided to impose on private land owners, undertaking residential development in Rowden Lane, the requirement in the byelaws of laying out a carriage

road to provide the principal access to those dwellings over no more than a public bridleway.

803. Was an order in fact made?

804. The procedure for making an order is set out in section 30(2) and (3) of the Public Health Act 1925. At least one month before the decision to make the order declaring a road to be a new street, the council was obliged to cause a notice of the intended order to be posted at each end of that part of the road to which its resolution related, or in some conspicuous position in the street or part affected. The notice was required to contain a statement of the intended order, and to state that any person aggrieved by that order had a right of appeal to Quarter Sessions.

805. There was no requirement in the 1925 Act, once notice had been given and the month had elapsed, for another resolution to make the order. The making of the order simply followed the expiry of the notice period.

806. The practice followed by the Council seems to have been to resolve to give notice that they will make an order declaring a particular way to be a new street after the expiration of one month and then, at least one month later, to make the relevant declaration. Minutes exist for 2 June 1936 and 28 July 1936, in relation to Lowden, and for 1 December 1936 and 5 January 1937 in relation to a portion of Greenway Lane.

807. In relation to Rowden Lane itself, the minutes of proceedings of the Chippenham Council for 2 March 1937 recorded the following resolution:

That in consequence of building operations which are likely to be undertaken, the Council shall give notice that they will make an order declaring Rowden Lane to be a new street.

808. The Minutes for 6 April 1937 noted the following resolution:

On the proposition of Mr Alderman Tuck, seconded by Alderman Stevens, it was resolved that in consequence of building operations which are likely to be undertaken there, Rowden Lane be declared to be a new street.

809. The marginal note to these Minutes stated “Rowden Lane a new street”.

810. The actual notice posted for these purposes in Rowden Lane has not survived. Nevertheless, I regard it as probable that notices were posted, given the system which had been followed in relation to the earlier lanes or roads described. It is also probable that it was this notice to which Mr Jennings referred in his letter in 1983 to Wiltshire County Council Highways Department where he said:

I remember that many years ago, perhaps 40 years ago, the council posted a notice in the lane which stated that they were taking over responsibility for the upkeep.

811. Of course 40 years before 1983 was 1943, and this is after the alleged resolution. Nevertheless, Mr Jennings was speaking in approximate terms, and this seems to be the likely event to which he was referring. The next major event which had some impact on Section A of Rowden Lane was the building of the new Rowden Arms in the 1960s. It seems to me to be unlikely that Mr Jennings was referring in his letter to any road widening, less than twenty years earlier, of Section A following Ushers Brewery’s dedication of additional land adjacent to Rowden Lane for public use. I am unaware of any other event which would have created the need for an official notice to be erected on Rowden Lane, since it is common ground that there has never been any formal resolution adopting it.

812. The Claimants advanced a number of reasons in support of their argument that no order had in fact been made. They relied upon a letter dated 25 June 1970 from the

Town Clerk, saying that he could find no record of “the order” declaring Rowden Lane to be a new street. However, as I have already indicated, the Minutes show that the Council made orders under Section 30(1) of the Public Health Act 1925 declaring existing highways to be new streets by means of its minuted resolutions to that effect.

813. The Claimants also argued that, by analogy with procedures for determining planning applications or applications for modifying the Definitive Map, a specific order was required. In my judgment, the resolutions were sufficient for the operation of Section 30 of the Public Health Act 1925. Section 30 of the 1925 Act prescribed no particular form of order for that purpose.

814. I am satisfied that the resolutions were made, that the notices had been posted and that there was no objection to the proposal. I am also satisfied, on the balance of probabilities, that the Council did make orders under Section 30 of the 1925 Act in the two stage process I have described. The second resolution, of each pair of resolutions, constituted the making of the order declaring eg Rowden Lane to be a new street.

815. It was treated as a binding and important order revealed on local land charge searches. For example, it was revealed in a search dated 9 December 1958, referred to in the abstract of the route of title relating to Brookfields, a property on Section B of Rowden Lane.

816. Accordingly, the system by which the Council set about making declarations in relation to new streets, involved a two stage process. The minuting of this process and the systematic way in which it was followed, resulting in it being shown as a local land charge, satisfy me that the Council acted in accordance with its powers under Section 30(1) of the Public Health Act 1925 in resolving to declare Rowden Lane a new street.

817. Given these facts, and the passage of time since the Minutes were recorded, I draw the inference, on the balance of probabilities, that all necessary procedures were followed and that the order was validly made.

818. In making the order, the Council had to be satisfied of 3 things, namely:

1. That the relevant section of Rowden Lane was then a highway;

2. That the effect of Mr Gibbons' proposed building works was likely to be to convert the relevant section of Rowden Lane into a new street; and

3. That their byelaws with respect to new streets were applicable to the then existing highway that was Rowden Lane, which was intended to be the principal approach or means of access to The Bungalow.

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.

820. In other words, in my judgment, the 1937 resolution is much more consistent with the First Defendant's case and seems improbable on the Claimants' case. The purpose of the byelaws was to require new streets which were intended to serve as the principal means of access to new dwellings to be laid out so as to accommodate vehicular

traffic. Whilst it may have been lawful for the council to have declared Rowden Lane a new street, if it were only a private road subject to a public bridleway, it would hardly have served the practical purpose of securing that Rowden Lane, as an existing highway, should be converted into a new street which was to be capable of serving as a principal approach and means of vehicular access to dwellings to be constructed on Rowden Lane. Moreover, if Rowden Lane were only subject to a public bridleway, it would seem unnecessary to have declared the *whole* of Section B of Rowden Lane to be a new street.

821. The probability is that the Council was satisfied that Rowden Lane fulfilled all the statutory criteria for a new street because it was accepted, as indeed the Finance Act 1910 map had already indicated, that Rowden Lane was already a public vehicular highway.

822. Even if I were wrong in concluding that a valid order had been made under the 1925 Act, declaring Rowden Lane to be a new street, what is important is that the Council purported to exercise its powers. I am satisfied that, in so doing, they considered Rowden Lane to be an existing public vehicular highway, at least to the point where the cattle grid is currently located. I consider it unlikely that the Council acted irrationally in making the declaration they did. On the contrary, they were presented with specific building plans by Mr F H Gibbons and had no doubt received professional advice not only that Rowden Lane was a highway, but also that it was a public vehicular highway so that it was appropriate for it to be laid out as a carriageway in accordance with the byelaws.

823. I agree with the First Defendant's submission that the 1937 declaration was much more supportive of the First Defendant's case than the case of the Claimants.

824. The next piece of evidence strongly relied upon by the First Defendant in support of its claim that Rowden Lane was a public vehicular highway, as a result of common law dedication and acceptance, concerns the whole history of the development and modification of the Definitive Map and Statement.

Chapter 16: The Definitive Map and Statement ("DMS")

825. In Regina (Warden and Fellows of Winchester College and another) v Hampshire County Council [2009] 1 WLR 138, at pages 141-143, Dyson LJ, as he then was, explained the statutory background to the legislation thus:

7 *Under Part IV of the National Parks and Access to the Countryside Act 1949, county councils as surveying authorities were required to maintain a DMS showing three categories of highway, namely: footpaths, where the public right of way was on foot only; bridleways, where the public right of way was on foot or horseback or leading a horse; and roads used as public paths ("RUPPs") which were defined as highways other than footpaths or bridleways used by the public mainly for the purposes for which footpaths and bridleways are so used. The 1949 Act was amended by the Countryside Act 1968 so as to require surveying authorities to reclassify each RUPP shown on their definitive maps either as a footpath or as a bridleway or as a BOAT in accordance with specified criteria. This reclassification was far from complete when the relevant provisions of the 1949 and 1968 Acts were replaced by Part III of the 1981 Act.*

8 *Section 54 of the 1981 Act required surveying authorities, as soon as reasonably practicable, to review all RUPPs remaining on their DMSs and make modification orders reclassifying each as: (a) a BOAT, if a public right of way for vehicular traffic had been shown to exist; or (b) a bridleway, if (a) did not apply and bridleway rights had not been shown not to exist; or (c) as a footpath, if neither (a) nor (b) applied. A BOAT was defined in section 66 of the 1981 Act as "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".*

9 *Section 53 of the 1981 Act contains provisions relating to orders modifying the DMS. It imposes a duty on the surveying authority to make modifications on the occurrence of certain events.*

10 *In 2000, with the reclassification of RUPPs still being far from complete, the Countryside and Rights of Way Act 2000 was enacted. Section 47(2) provided that every way which, immediately before commencement of the Act was shown in any DMS as a RUPP, should be treated instead as a "restricted byway". The 2000 Act in addition made provision for the extinguishment in 2026 of unrecorded rights of way for mechanically propelled vehicles over byways. It also inserted into the 1981 Act (as section 53B) a requirement that every surveying authority should keep a register of applications under section 53(5).*

826. In R -v- Environment Secretary ex parte Hood [1975] QB 891, Lord Denning MR, at page 897 B-D provided further background information as follows:

In order to understand the statute, one must remember the classification of highways at common law. It was threefold. First, it may be a "foot way", appropriated for the sole use by pedestrians; secondly, a "packe and prime way" (called a bridleway) which is both a horse way and foot way; third a "cartway" which comprehends the other two and is also a cart or carriageway … but, to whichever of these classes it belongs, it is still a highway, 'highway' is the genus of all public ways, as well cart, horse, and footways": see Reg. -v- Saintiff (1705) 6 Mod. Rep. 255, per Sir John Holt CJ. That classification formed the basis of statutory classification in Section 27(6) of the National Parks and Access to the Countryside Act 1949.

827. Lord Denning then went on to recite the statutory definitions in the 1949 Act of 'footpaths', 'bridleways' and 'Road Used as a Public Path' (RUPP), namely a highway other than a public path used by the public mainly for the purpose for which footpaths or bridleways are so used).

828. At page 897 E-G, he continued:

Much difficulty was caused by that last definition of "road used as a public path". Seeing that it is a highway, it must come within the third category of the common law namely, a cartway over which the public have a right, not only on foot or horse, but

also in carts. The word "mainly" is the problem. The object of the draftsman was to include cartways over which there is a "public right of cartway" but which are used nowadays mainly by people who are walking or riding horses, like the Berkshire Ridgeway or the ways over the South Downs. The draftsman intended to exclude metalled roads used by motorcars.

829. At pages 897G to 898A, Lord Denning referred to the fact that Local Authorities had used non-statutory definitions "CRF" (cartroad footpath) or "CRB" (cartroad bridleways) for the purposes of preparing their draft maps, and this had been found to be unhelpful. However, he explained that the effect of showing a way on a draft map as either a CRF or a CRB was to show a public cart road used mainly for the purposes for which footpaths and bridle ways are used. He explained that the object of the National Parks and Access to the Countryside Act 1949 was to have all our ancient highways mapped out, put on record and made conclusive, so that people could know what their rights were: See page 896 G-H.

830. At pages 896H to 897, he described the process whereby that statutory object was to be achieved:

In 1949 the local authorities were required to make enquiries and map out our countryside. First, a draft map; next a provisional map; and finally a definitive map. There were opportunities both for land owners and the public to make their representations as and when each map passed through each stage.

831. The Parish Councils and Borough Councils were required to carry out local surveys of these minor highways and record their details on a survey sheet.This material was then processed by the County Council which produced the draft, provisional and Definitive Maps and an accompanying Statement, identifying the start and finishing points of the relevant minor highways.

832. The reason why this was dealt with at such length in the trial is not because Sections A and B of Rowden Lane appeared on the Definitive Map as a footpath, bridleway or RUPP (on the contrary, Sections A and B appeared as a full public highway), but because of the treatment received by Section C in the Map.

833. Section C was described as RUPP 5 and latterly Chippenham 5. This designation in the Draft Map was challenged by Mr W Burridge, the landowner of Ivy Park House and Rowden Farm. The basis of his objection was that Section C of Rowden Lane "was not a public way". As a result of this objection, an Inquiry was held by Mr Harold Dale, an inspector appointed by the Wiltshire County Council to hold inquiries into objections lodged in respect of the Draft Map. The hearings were held at Chippenham Town Council Offices on Wednesday and Friday 16 and 18 March 1955.

834. He recommended no modification to the Draft Map in relation to RUPP 5, as there was evidence of considerable use by the public, and no evidence of public right being denied. The County Council accepted Mr Dale's recommendation and, as there was no further objection, the route and description became definitive.

835. The date of the Definitive Map was 1 May 1953, and the entire process had started shortly after 4 April 1950, when Chippenham Borough Council had instructed the Borough Engineer to prepare the plan showing the public rights of way in the Borough for the purposes of the Definitive Map process. In relation to Rowden Lane, the plans prepared for this process provide contemporary evidence that Sections A and B were full vehicular highways, and not a private road subject only to a public bridleway in 1950. Had the Borough Engineer considered that Sections A and B of Rowden Lane were a private road only subject to a public bridleway, he would have shown a public path (footpath/bridle way) over it.

836. On the contrary, he treated Sections A and B of Rowden Lane as if it were a full public vehicular highway because:

(a) Sections A and B have yellow colouring on them which is similar to the yellow colouring used by him to show the other public vehicular highways in the area at the time;

(b) He did not show Sections A and B as bridleway or having any of the lesser public rights of way over it coloured green or purple. The enclosed section of Gypsy Lane was shown in purple as bridleway 2A; and

(c) If Sections A and B of Rowden Lane were not a full public vehicular highway, it would make nonsense of his identification of Section C as a RUPP of the CRB variety. This is because if Sections A and B were purely private subject only to public bridleway rights, Section C (a public cartway/carriageway used mainly as a bridle way) would have been landlocked.

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.

838. The Claimants have argued that the First Defendant is reading too much into Mr Dale's refusal to modify the draft map, as Mr Burridge had requested. They contended that his conclusion that there was "evidence of considerable use by the public and no evidence of public right being denied" should not be taken as his confirmation that Section C enjoyed public vehicular rights albeit mainly used as a bridle way.

839. The First Defendant maintains that Mr Dale should be taken to have directed himself properly both in law and on the evidence before him. Mr Harbour wrote that Mr Dale was a barrister, but I have had no other confirmation of his professional background.

Moreover, in making his decisions on a number of objections to the Draft Map, of which Section C was only one, he had available to him guidance for Inspectors approved by the Ministry of Town and Country Planning in 1950. It echoed the observations of Lord Denning above in saying:

Highways which the public are entitled to use with vehicles but which in practice are mainly used by the footways or bridleways should be marked on the map as "CRF or CRB".

840. I agree with the First Defendant's submission that it was significant that a decision was taken, in the light of that guidance, to label it a RUPP/CRB. If the Borough Engineer and Inspector Dale not been satisfied on the available evidence that Section C of Rowden Lane was a cartway at common law, over which the public had a right to pass with vehicles as well as on horseback or on foot, the CRB designation would have been considered inappropriate.

841. The fact that the Act made the designation of a way as a RUPP conclusive only as to the existence of public rights of footpath and bridleway over it, and not as to its status as a public vehicular highway, does not rob the categorisation of Section C as RUPP5/CRB of its powerful evidential significance. The process of drafting, amending and finally publishing the Definitive Map was important because it was not only informed by ministerial guidance, in addition to the statutory definition, but also by the input of the Borough Engineer and local information.

842. I think it is unlikely that Mr Dale would have focussed his mind merely upon whether there had been public user as a footpath or a bridleway. He would have had regard to the guidance and statutory definition in deciding that no modification should be made to the Draft Map, which had shown Section C as a RUPP/CRB. Had the evidence not supported that conclusion, it was likely that he would have said so and recommended

the downgrading of the RUPP to a bridleway. In my judgment, his failure to recommend any downgrading is persuasive evidence that the considerable public user to which he made reference extended not only to use by horse and on foot but also to vehicular use.

843. The First Defendant does not rely upon the confirmation of Section C as a map as providing conclusive evidence that it was a public vehicular highway, as the Act deems it to be in the context of footpath and bridleway rights. That is merely the statutory effect of designation as a "RUPP".

844. I accept the First Defendant'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 Gypsy Lane was shown as bridleway 2A. Vehicular access was therefore not possible from Gypsy Lane in 1950. In fact, it is probable that Gypsy Lane had been closed to vehicles since about 1910, before the date of the Finance Act map.

845. I am satisfied, on the balance of probabilities, that the Inspector's finding in 1955 in relation to Section C, with its implied acceptance of the existence of public cartway rights, is persuasive documentary evidence that by 1955 the public vehicular user of Rowden Lane in vehicles was sufficient to establish it as a public vehicular highway.

846. As Lord Denning pointed out in Hood, the term “road used as a public path” had caused much difficulty. This was addressed later in the Countryside Act 1968.

847. Under the 1949 Act, a review of the Definitive Map was required every 5 years. In practice, the interval was greater than that. In a review, the existing rights of way could be modified and new rights of way added. The first review of the Map carried out by the Council took place on 1 September 1958. No changes were proposed for Rowden Lane or CRB 5, and they stayed the same.

848. Section 9 of the Countryside Act 1968 required a special review of every road used as a public path (RUPP). They had to be reclassified as either a “byway open to all traffic” (BOAT) or as a bridleway or as a footpath.

849. In October 1968, Chippenham Council, when asked for its suggestion as to the reclassification of CRB 5 suggested “private road to Rowden Farm – to remain classified as bridleway”. In 1972, the Defendant proposed reclassifying it as a footpath. It was this proposed reclassification which was relied on by the Claimants as stopping time running and/or negativing an intention to dedicate as a PVH under s 31 Highways Act 1980, as indicated in chapter 13.

850. The test for reclassification under the 1968 Act, and at the time of the subsequent Inquiry in 1978, required a consideration of three questions:

(1) Whether any vehicular rights had been shown to exist along Chippenham 5;

(2) The suitability of Chippenham 5 for vehicular traffic;

(3) Whether extinguishing public vehicular rights over Chippenham 5 would cause undue hardship to the public.

851. If either of (2) or (3) was not satisfied, then vehicular rights could be extinguished by reclassification to a route less than BOAT, eg footpath or bridleway: See Schedule 3 paragraph 10 of the Countryside Act 1968 (subsequently repealed by Section 54 of the Wildlife and Countryside Act 1981).

852. The 1972 proposal by the Council to classify CRB 5 as a footpath was opposed. As a result, another Inspector held an inquiry to review the proposal to reclassify RUPP 5 as a footpath. In the end, Chippenham 5 was changed from RUPP/CRB to "bridleway". This took effect in 1990 when a statutory order was made, although this reclassification did not extinguish previous public vehicular rights: R v. Secretary of State for the Environment, ex parte Riley 59 P. & C.R. 1

853. However, this statutory process did not necessarily operate as evidence of a finding that public vehicular rights did not exist along Chippenham 5. It would still have been permissible to reclassify RUPP 5 as a bridleway, even if it had enjoyed public vehicular rights, if it was unsuitable for vehicular traffic or if the extinction of public vehicular rights would not cause any undue hardship to the public. The objectors to the reclassification said it should be reclassified as a bridleway not a footpath.

854. By 1978 Chippenham 5 had ceased to provide a vehicular route of any obvious utility to the public, and this alone may have justified the reclassification. I agree with the First Defendant that there is no necessary inconsistency with the suggestion that Section C of Rowden Lane had enjoyed public vehicular rights and the subsequent order reclassifying it as a bridleway.

855. However, it is important to note that, on the map produced for the 1968 Act reclassification of RUPPs *both Sections A and B of Rowden Lane are shown as a public vehicular highway*. These sections were coloured sienna, in the same way as the A4 was coloured. Sections A and B were not shown as having any lesser public

rights of way than the A4. Moreover, the reclassification process did not deal with Section B of Rowden Lane, merely Section C. It would have been necessary to consider Section B had any one claimed that only a lesser right of way existed over Section B by that date. The fact that Section B did not feature in the 1968 Act process provides further support for my finding that the 1974 highway handover map was in error in showing Section B as forming part of RUPP 5.

856. The special review of RUPPs required by the Countryside Act 1968 was eventually abandoned, but the result was preserved and the recommendation implemented in 1990 when Chippenham 5 changed from a RUPP to a bridleway, as a result of an order made under Section 55 of the Wildlife and Countryside Act 1981. Anyone looking at the Definitive Map today would see the map drawn up in the 1950s, which would have to be read subject to subsequent orders which are not shown physically on the map. Thus the Definitive Map and Statement which shows path 5 as a RUPP has to be read subject to that 1990 order. Today path 5 is a bridleway and the enclosed section of Gypsy Lane remains a bridleway.

857. Mr Laurence QC argued that:

1. The First Defendant could not derive any support for its case that Mr Dale regarded Section C as a public vehicular carriageway at the time of his Inquiry in 1955 since, as a matter of law, Mr Dale was neither bound nor entitled to consider whether vehicular rights had been established on the balance of probabilities. He argued that he merely had to be satisfied that the public vehicular rights were reasonably alleged to exist.

2. Even if Mr Dale was bound or entitled to consider whether public vehicular rights had been established on a balance of probabilities, the words which he used

suggested that he did not do so and that he merely concentrated upon whether the public footpath and bridleway rights had been proved to exist.

3. Even if Mr Dale had satisfied himself in 1955 that RUPP 5 was subject to public vehicular rights then anything decided by the Defendant was always subject to review under the review provisions of Section 33 of the 1949 Act. When, in 1972, the First Defendant proposed to reclassify RUPP 5 as a footpath, they presumably did so because they believed that Mr Dale had been mistaken. He argued that in designating RUPP 5 as a footpath on the Draft Revised Definitive Map, the First Defendant would have had to have in its possession evidence which justified its belief that RUPP 5 true status was no more than a footpath.

4. Even if the First Defendant had no grounds for believing that RUPP 5 was only a footpath, it has since 1990 been a bridleway. There was no evidence to suggest that that designation was accorded to the path on hardship or suitability grounds under paragraph 10(b) or (c) of Schedule 3 of the 1968 Act. In other words, there was no evidence that anybody proved before Mr Liddell Hann (the 1978 Inspector) that vehicular rights subsisted (paragraph 10(a) of Schedule 3) but that he then proceeded to downgrade the way to bridleway on hardship or suitability grounds. In fact, the only contest was between footpath and bridleway and the designation chosen was bridleway.

5. The designation as bridleway is without prejudice to the possibility of it being a higher right (Section 56(1)(b) of the 1981 Act) but that does not of course prove that there are such rights.

858. In summary, Mr Laurence submitted that nothing in the Definitive Map process has the effect of advancing the First Defendant's case in any way. The most that could be said is that in the 1950s the First Defendant considered the allegation of public rights for

vehicles for RUPP 5 to be reasonable, but that in 1972 it considered that the true status of RUPP 5 was that of public footpath. In any event, the conclusive status, since the publication of the First Defendant in map and statement, has always been that of bridleway: See Section 32(4)(b) of the 1949 Act).

859. I do not accept these submissions by Mr Laurence.

860. First and foremost, it must be remembered that all maps produced in the Definitive Map process showed Sections A and B of Rowden Lane with the same character as the A4, namely as a public vehicular highway.

861. The whole of the discussion on the Definitive Map in relation to Section C is, from the First Defendant's point of view, to show that Section C enjoyed public vehicular rights because, if it did, this would be consistent with Sections A and B, a public vehicular highway, which connected with it. Moreover, if Section C had enjoyed public vehicular rights in 1950, it would be improbable that Sections A and B of Rowden Lane only had bridleway rights or otherwise vehicles could not have got on to Section C from Rowden Lane or from Gypsy Lane at that time. The Claimants are anxious to establish that there never were public vehicular rights over Section C, because their case is that Sections A and B only ever were subject to bridleway rights.

862. I find it is more likely than not that Mr Dale, the Inspector in 1955, did conclude on the balance of probabilities that public vehicular rights had been proved to exist over RUPP5.

863. I reject Mr Laurence's submission that Mr Dale confirmed Section C status as a RUPP merely on being satisfied that public vehicular rights were *reasonably alleged* to have existed, so long as he was satisfied on the balance of probabilities that public footpath or bridleway rights had been established.

864. In my judgment, this ignores the job that Mr Dale had to do. He was considering a number of objections to the Draft Definitive Map. It was his task to hear the evidence and to advise what, if any, modifications to the particulars contained in the Draft Map and Statement appeared to requisite. The way in dispute was something which had been put on the Draft Map as a RUPP, not merely as a footpath or bridle way. The challenge was that no public rights existed. In refusing any modification, he said that there was "evidence of considerable user by the public and no evidence of public right being denied".

865. I see no reason why an Inspector considering objections to a RUPP classification on a Draft Definitive Map should not have directed himself as to the definition of a RUPP. If he thought that the evidence of public user only demonstrated a footpath or bridleway, he would have recommended a modification. He had the advantage of knowing it was a new category created by a new statute, and he also had all the ministerial and other guidance that went with it. In confirming Chippenham 5 as a RUPP Mr Dale, in my view, was satisfied on a balance of probabilities that CRB 5:

(a) was a highway;

(b) although it was a highway, it was not merely a bridleway or footpath, because if it was just a bridleway, it would be a "public path" and fall outside the definition of a RUPP; and

(c) it was used mainly for the purposes for which footpaths and bridleways are so used.

866. I regard Mr Laurence's argument as to the differential standards of proof required for confirmation of a RUPP as unrealistic and somewhat strained.

867. As was pointed out in Todd v. Secretary of State for the Environment,Food and Rural Affairs [2004]1 WLR 2471 at page 2486H:-

There is no reason to suppose that the surveying authority or minister should have applied other than the normal standard of proof in determining the matters referred to them by Section 29 when objections to the draft are being resolved.

868. I see no reason why the inspector should not also have had to be satisfied on the balance of probabilities of the existence of public vehicular rights before confirming a way as a RUPP. In my judgment, the fact that a RUPP designation on a Definitive Map was only conclusive as to the existence of bridleway rights does not detract from the need for proof, on the balance of probabilities of public vehicular rights, however ancient, since this does this form part of the definition of a RUPP.

869. Of course, the fact that a RUPP designation was not conclusive as to the existence of public vehicular rights meant that the issue could be raised in legal proceedings such as these. However it must be remembered that there was no challenge to Mr Dale's finding by an appeal either to Quarter Sessions or by way of further challenge to the public's right to use Chippenham 5 with vehicles to the civil courts before this litigation. I agree with the First Defendant's submission that, the fact that there might have been a challenge, does not impugn the evidential value of the process and findings of Mr Dale in 1955.

870. The fact that the First Defendant suggested downgrading RUPP 5 to a footpath in 1972 does not imply that the First Defendant had positive evidence that it only was a footpath. By 1972, the cattle grid had been installed at the end of Section B making it practically impossible for horses to go over it, and Section C was also later crossed by a footpath. Given that there was a need to reclassify all RUPPs, one can see why footpath was thought to be a possible designation.

871. However, when the matter was investigated at the Inquiry in 1978 it was known that a RUPP could not be reclassified as a footpath, unless there was positive evidence proving that point: See Hood. Had there been established public vehicular rights then it might have been reclassified as a Byway Open to All Traffic (BOAT), unless considerations of suitability or hardship permitted downgrading to a bridleway.

872. I do not accept that the reason why RUPP 5 was reclassified as a bridleway was because the Inspector was necessarily satisfied that there were no public vehicular rights. It could have been because the Chippenham 5 was unsuitable for vehicular traffic or because extinguishing public vehicular rights would not cause undue hardship to the public. Nor do I accept that there was a recognition, in 1972 or 1978, that the wrong decision had been made in 1955. By 1972 it seems likely the evidence given at the 1955 inquiry had been lost, and so any such comparison would inevitably have been impossible or unlikely. I deal below, when considering the evidence of Barbara Burke, with the limited documentary evidence relating to these Inquiries which has survived.

873. Finally, Mr Laurence submitted that Mr Dale could not have concluded that Section C was correctly classified as RUPP 5, unless he was satisfied that there was even more use of Section C on foot or horseback than by vehicles. This argument was rejected in Masters -v- The Secretary of State for the Environment, Transport and the Regions [2001] 1 QB 151, where the Court of Appeal said in relation to comparable provisions in relation to a BOAT, that the interpretation of a BOAT did not require current levels of vehicular use to be measured. Neither a RUPP nor a BOAT required user by vehicles *at the time the designation was made*. It merely required that public vehicular rights *had already been established*. Accordingly, evidence that vehicular use had ceased or of a change in the balance of current user was not a reason for deleting an existing right of way falling within the statutory definition of a BOAT.

874. In my judgment, Mr Laurence's careful and detailed submissions do not undermine the persuasive evidential value of the statutory process under the 1949 Act and Mr Dale's findings in 1955 in support of the contention that Section C had public vehicular rights which connected up with equivalent rights on Sections A and B.

875. In any event, it should not be forgotten that Sections A and B of Rowden Lane were themselves shown the same way as the A4, namely as a full (vehicular) public highway.

Barbara Burke

876. Barbara Burke is employed as senior rights of way officer by the First Defendant. One of her jobs is dealing with the review of the Definitive Map and Statements. She has been dealing with public rights of way in Wiltshire since April 1979. I regarded her as an honest, accurate and reliable witness.

877. She produced in evidence much of the documentation relevant to the Definitive Map and Statement, the relevant date of which was 1 May 1953. The date of the first review under the 1949 Act had a relevant date of 1 September 1958. The date of the second review under the 1949 Act in the special review (to reclassify RUPPs) under the 1968 Act had a relevant date of 31 May 1972. However, there was no final version of the second special review which began in 1972 because, in September 1983, the Defendant was directed to abandon that review subject to the determination of the Secretary of State's objections and representations in respect of local enquiries had already been held. In 1985, the First Defendant received a direction to modify the map and finally an order giving effect to this was made on 22 May 1990 by which the designation of CRB 5 as a RUPP was changed to bridleway. Under the reclassification of RUPPs, the original survey form recommended a change to bridleway. However, the draft revision map and statement showed a proposal as a

footpath. However that was no more than a proposal and had no legal effect on the Definitive Map.

878. The documentation which she has produced provides background to the two Inquiries held in 1955 and 1978.

879. In 1955, Mr Burridge (of Ivy Park House, but also owner of Rowden Farm) raised two objections. First of all, he objected to the track (path 2B) which joined the southern end of Gypsy Lane (bridleway 2A) to its intersection with Rowden Lane, CRB 5. The grounds of his objection related to the entire path 2B. He argued that this was only an accommodation road to Rowden Farm through farm gates with no styles. The adjoining and parallel path number 1 was not objected to. This modification was opposed by the Council which did not agree with that objection. They argued that it was a public right of way and had been used as such without restriction for many years. This submission was supported by the Ramblers Association which argued in fact that footpath 2B showed more sign of use than path 1. In the end, Mr Dale recommended that footpath 2B be deleted. A manuscript note reads "2B delete accom. road alternative to the east".

880. Mr Burridge made a similar objection to CRB 5. Again he objected to the whole way being on the map alleging that it was only an accommodation road to Rowden Farm through farm gates with no styles attached. A manuscript note under 'Recommendation' read "to stay in". The Council had again disagreed with Mr Burridge's objection, stating that CRB 5 had been a public right of way used without restriction for many years. They noted that it linked in with Lacock path number 9.

881. Accordingly, it does seem that the issue of public/private status and the suggestion that it was merely an accommodation road were before the Inspector.

882. It seems to me that this supports the conclusion that the Inspector was satisfied that CRB5 was properly designated, having had his attention drawn both to the fact that it was a road and it was a road subject to public right of way. In my view, he regarded it as a way which had established public vehicular rights but was mainly used as a bridleway.

883. Unfortunately no evidence which was before the inspector has survived, nor has his reasoned report. A succinct report and objections is attached to Barbara Burke's statement as BB4. This identified the relevant path subject to the objection as:

CRB No 5 from Rowden Lane SE along the entrance road to Rowden Farm to the Lacock boundary, 100 yards W of Rowden Farm Buildings.

884. No modification of that was recommended and the reason given was "evidence of considerable user by the public and no evidence of public right being denied".

885. As far as the 1978 inquiry is concerned, again there is no detailed material as to the Inspector's reasoning. However, as Annex BB9 to Barbara Burke's statement reveals, he was fully aware of the three tests for reclassification laid down in paragraph 10 of part 3 of the third schedule to the Countryside Act 1968. The example there shown indicates that he, albeit not in relation to CRB 5, went through them all individually. It seems to me this supports the conclusion that he may well have upheld the reclassification of CRB 5 as a bridleway not because he considered that vehicular rights had not been established, but because matters such as suitability or hardship justified the downgrading. Finally, there was an attempt also at that same Inquiry to downgrade the status of Gypsy Lane from its pre-existing status as a bridleway to a footpath. This too was unsuccessful.

Chapter 17: Conveyancing history

886. The First Defendant's contention is that a detailed scrutiny of the historical conveyancing documentation concerning the transfers of land abutting or fronting Rowden Lane suggests that the Lane was treated as a public vehicular highway. In essence, this is not only because of the absence of easements over Rowden Lane which might have been expected if there were no public vehicular rights, but also because Rowden Farm never owned, at least for centuries, any part of Rowden Lane. For a few years between 1919 and 1946 the owner of Rowden Farm, Brigadier General Palmer, owned both Rowden Farm and some of Rowden Lane, where it runs between Elmtree Farm and the Old Piggery on one side and the Burleaze estate on the other up to the cattle grid. This section has been referred to as Section B2 of Rowden Lane. The remaining section to the west has been referred to as B1.

887. The First Defendant therefore alleges that this undermines the contention that Rowden Lane was a private road serving Rowden Farm. From at least 1820, Sections A and B1 of Rowden Lane, or the subsoil thereof, had been in different ownership from Section B2. The last reference to ownership of Sections A and B1 of Rowden Lane itself was in 1820 and is referred to in an abstract of title of the Cambridge Trustees in 1880.

888. The only reference to a transfer of Section B2 of Rowden Lane, after that same 1820 document, was its transfer in 1880, along with modern day Burleaze estate and Rushy Ground, to Richard Rich. When the Rowden Farm estate itself was sold by Mr Long to Brigadier General Palmer in 1904, the land sold did not include Section A and B of Rowden Lane, nor was any right of way granted over it in favour of Rowden farm. This should be contrasted with Gypsy Lane, which again was not included in the sale, but over which the vendor sold a right of way "so far as the vendor is able to grant the same".

889. In April 1919, land owned by Richard Rich was sold to Brigadier Palmer, together with Section B2 (plot 237) of Rowden Lane (referred to as "part of the lane leading from the Bath Road to Rowden Farm which lies between plots 239 [Burleaze] and 234 [Rushy Ground]"). However the inclusion of Section B2 (plot 237) was made expressly subject to "existing rights of way over the said lane" although it does not specify what those rights are. I deal with these transactions in greater detail below.

890. The conveyancing documentation occupies the whole of volumes 4 and 5 of the trial bundle. It contains numerous conveyances, abstracts of title and manuscript indentures which are often difficult to read. In the course of the case, counsel have taken me to numerous conveyances relating to different parts of land bordering Rowden Lane to see whether the conveyancing document was consistent or inconsistent with the existence of a public vehicular highway. I have attempted, in the table below, to identify the modern names of all the relevant properties involved in the transactions, their old or former names, the successive owners of each plot and the date of significant transfers. It does not purport to be an exhaustive analysis of this documentation.

Modern Name	**Old Name(s)**	**Successive Owner**	**Date of Acquisition**
Alma Villa	Little Ground	William Caudle W H Jennings	
Brookfields	Little Ground Little Hanging Ground Brickyard Ground	Goddards Trustees Richard Rich GL Palmer Baron Glanely Herbert Holt David Townsend WH Jennings William Hunt Stanley Coleman Mr Clark Mr Ayres 2nd and 3rd Claimants	 1881 1919 1928 1944 1945 1963

Swallow Falls	Hither or Middle Down	Cambridge Trustees Richard Rich G Palmer Baron Glanely Herbert Holt David Townsend WH Jennings Mrs Fortune (First Claimant)	 1881 1919 1928 1945 1970
Elm Tree Farm	Rushy Ground	Cambridge Trustees to David Townsend as above RF Jennings	 1945
Old Piggery	Rushy Ground	Cambridge Trustees to David Townsend as above Gibbons/Collins	 1945
The Bungalow	Great Hanging Down	Mr Frith (and others) Mr Nicholls Mr Young (Executor) Mr Colborne Mr Gibbons Mrs Collins	 1886 1937
Burleaze Housing Estate	Scotts Further Down	Cambridge Trustees Richard Rich (also Rushy Ground) G Palmer Baron Glanely David Townsend Frederick William Hudson Burleaze Housing Estate – various owners	 1880 1919 1927 1945 1960s
Rowden Farm	Great Down/Home Down The Breech or Cow Leaze Little Coppice The Great Coppice Little Down Rowden Farm and lands	Walter Long G Palmer Baron Glanely Herbert Holt Reverend Hungerford Mr Hawker Mr and Mrs Burridge Burridge Children	 1904 1946 Late 1980s

891. The earliest references in the trial bundle to the ownership of Rowden Lane are found in a Deed of Release made in 1820, whereby the Heath or Lifely family became owner of the western end of Rowden Lane and the Cambridge family became the owner of the eastern end. By the time of the Tithe Map in 1848, the same division of ownership

of Rowden Lane was maintained, although the western end was now owned by Benjamin Lifely.

892. In June 1868, the modern equivalent of The Bungalow was conveyed from Mr Frith and others to Mr Nicholls. Rowden Lane was not shown on the plan as part of the property conveyed. In 1881, the modern equivalent of Brookfield and Swallow Falls were conveyed from Goddard's Trustees to Richard Rich. The description of the land conveyed excluded Rowden Lane. Neither the 1868 conveyance nor the 1881 conveyance granted any right of way over Rowden Lane.

893. In 1881, there was an auction of plots of land, some of which were on Sections A and B1. Again, Rowden Lane was not shown as part of the property conveyed and no right of way was granted. Interestingly, lots 2 (Rowden Arms) and 4 (Rowden Place cottages) had a public water supply laid on in Rowden Lane by the Chippenham Local Board. These lots were on both sides of Rowden Lane.

894. Turning to Section B2 (ie that section of Rowden Lane running between the modern Burleaze estate on the one side and Elmtree Farm and the Old Piggery on the other side), a conveyance in March 1880 by the Cambridge Trustees to Richard Rich of the modern day Burleaze estate and Elm Tree Farm/the Old Piggery also conveyed Section B2 of Rowden Lane. However this did not answer the question how anyone got from the Bath Road along Sections A and B1 of Rowden Lane in the absence of any private easement, if Rowden Lane were not a public vehicular highway. Even this 1880 conveyance of Rowden Lane, in my judgment, is not inconsistent with the existence of a public vehicular highway over the entirety of Rowden Lane, since the conveyance could have related solely to the subsoil.

895. In 1904, there was a sale of the Rowden Farm estate by Mr Long to Brigadier General Palmer. Gypsy Lane was not included in the sale, but the vendor was selling a right of

way over it “so far as the vendor is able to grant the same”. The land sold did not include Sections A and B of Rowden Lane but there was no sale of any right of way over it of any description included in the sale of the Rowden Farm estate. This is a point of obvious importance. If Rowden Lane were regarded by the vendor or purchaser as a private road with no public vehicular rights, the sale would surely have included a right of way either by reference to a deed or an assertion of a prescriptive right, using the same formula deployed in respect of Gypsy Lane. Plainly, the way in which the right of way, if any, over Gypsy Lane indicated that there was considerable uncertainty about the legal basis of it. However there was a complete absence of any reference to a right of way over Rowden Lane.In my judgment, this is powerful evidence that both the vendor and purchaser of Rowden Farm estate, Mr Long and Brigadier General Palmer, believed that Rowden Lane was a public vehicular highway, not dependent upon private rights. Were it otherwise, the absence of any right of way in favour of Rowden Farm, would have resulted in it being landlocked. Moreover, the sale plan suggests that Sections A and B of Rowden Lane are physically the same and continuous with the main Bath highway.

896. In 1919 Brigadier Palmer, who had already purchased the Rowden Farm estate, also acquired the land which had formerly been owned by Richard Rich following his death. This, together with other property, became known as the Lackham Estate. Just as Richard Rich had conveyed to him Section B2 of Rowden Lane, it was also conveyed to Brigadier Palmer, but referred to as “part of the lane leading from the Bath Road to Rowden Farm”. However, the inclusion of Section B2 (plot 237) was made expressly subject to “existing rights of way over the said lane”, although it did not specify what those rights were.

897. These references to the transfer of Section B2 of Rowden Lane are not inconsistent with the existence of public highway rights, since it could be reference to private ownership of the subsoil rather than the surface. The existing rights of way over the

Lane to which the transfer of Section B2 was subject, in my judgment, included the public's right to pass and re-pass over the lane on foot, on horseback and in carts and vehicles.

898. The land conveyed in 1919 did not include Section B1, nor the central spur running southwards between the 2 plots numbered 236 and 234, nor was any right of way granted over those sections. To me, this seems to demonstrate that those sections were a public vehicular highway, because if they were not, both Rushy Ground and the modern day Burleaze would be landlocked, just like Rowden Farm.

899. In 1927, the Lackham Estate was broken up and sold by auction. Rowden Lane ran between lots 4, 5 and 6. The sales particulars referred to Rowden Lane as a private road, although it was not owned by the Lackham Estate.

900. In 1927, the modern day Burleaze was sold to David Townsend. The conveyance had guarded against the possibility that Rowden Lane was private by granting a right of way "so far as the vendor can grant the same". No attempt was made to convey any part of Rowden Lane itself. In the following year, 1928, the whole of the southern portion of Rowden Lane, including Rushy Ground, was sold by Herbert Holt to David Townsend. Again there was no attempt to grant rights of way of any kind, and the land was sold separately from Rowden Lane itself. The verges were treated as being part of the road. The southern stretch included the land currently owned by the Claimants, Elmtree Farm and the Old Piggery.

901. When the land comprising The Bungalow and its adjacent field were sold to Mr Gibbons in 1937 there was no attempt made to grant rights of way of any kind over Rowden Lane. The inference is that everybody believed that it was a public vehicular highway. This may not be so surprising, since it was around this time that the

Chippenham Borough Council was still in the process of declaring Rowden Lane a new street.

902. Following the death of David Townsend, his personal representative sold what was originally Brookfields and Swallow Falls to W H Jennings, Elmtree Farm to R F Jennings and The Piggery to Mr Gibbons. Again there was no attempt to create rights of way of any kind over Rowden Lane in favour of these properties.

903. In 1945, land comprising the modern day Burleaze was also sold by the executors of David Townsend to Mr Hudson, together with rights over Rowden Lane "so far as the vendor can grant the same". There appears to have been a practice of passing title to land or rights in relation to Section B2 of Rowden Lane whenever Burleaze was sold: See the conveyances of 1880, 1919, 1927 and this conveyance of 1945. When Mr and Mrs Burridge bought Rowden Farm in 1946 rights of way over Rowden Lane and Gypsy Lane were granted by the vendor, even though Sections A and B were not part of the land sold with Rowden Farm, "so far as the vendor can grant the same".

904. When Mr Ayres acquired Brookfields in 1963, no rights were granted in favour of it over Rowden Lane, although the abstract of title disclosed the new street declaration of 1937. Unfortunately, there were inconsistent replies to enquiries given by the Chippenham Borough Town Clerk in 1970 when he said both that Rowden Lane was a new street maintainable at public expense and later saying it was not maintainable at public expense.

905. By the time that the Fortune family bought Swallow Falls in 1970, having no doubt learnt that there was an issue about whether Rowden Lane was considered as maintainable by the Town Clerk, the solicitors acting for the Fortune family quite properly wanted to make sure that they had a right of way to get to the property they were buying. This explains why Will Jennings gave the statutory declaration which he

did. Of course, there had been no express grant of way over Rowden Lane when Will Jennings purchased the field and Swallow Falls in 1944. I am satisfied that he was content to buy then, without any express private right of way, because he believed (and no doubt his solicitor too, from the new street declaration of 1937, which was a local land charge) that Sections A and B of Rowden Lane were a public vehicular highway.

906. Finally, as I have mentioned elsewhere in this judgment, the access deed between Langcote and Ms Ayres in 1977 (and also reflected in the registered title of what is now Brookfields), Rowden Lane was described as a highway, and Langcote was granting Ms Ayres a private right *to* the highway and not *over* it.

907. From this extensive review of the very detailed and voluminous conveyancing documentation, I draw the following conclusions, on the balance of probabilities:

(1) Transfers of the ownership of Sections A and B1 of Rowden Lane had ceased by the second half of the nineteenth century.

(2) Whilst B2 was the subject of a conveyance in 1919, when it was transferred to Brigadier General Palmer, although even then the transfer was expressed to be "subject to existing rights". However when Brigadier General Palmer's successors sold the land to the north of Section B2, the modern day Burleaze, in 1927 it did not include any transfer of Rowden Lane, and the same applied when land to the south (the modern day Elmtree Farm and The Old Piggery) was sold in 1928 by Herbert Holt to Mr Townsend. However, B2 was sold by Baron Glanely to Herbert Holt in 1927, when he sold him he land to the south of Rowden Lane, as well as purporting to grant him a right of way over the whole of Rowden Lane.

(3) There was a separation therefore between the land fronting Rowden Lane and the Lane and verge itself. This was despite the fact that, at some point in time, land on both sides of the lane were owned by the same person simultaneously eg Brigadier General Palmer and David Townsend.

(4) Even if it was, as Mr Laurence argued, inconsistent to include Rowden Lane as a parcel of land being conveyed if its status was a public vehicular highway, there would be no such inconsistency if only the subsoil were being transferred. The failure from 1886 onwards, in relation to Sections A and B1, and from 1919 onwards in relation to Section B2, to transfer Rowden Lane is indicative that the parties did then regard it as a public vehicular highway. In my judgment, the true owners of Rowden Lane had long since lost interest in it and had recognised it had become dedicated fully to the public

(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.

(6) After 1927, land on either side of Sections A and B was sold on the basis that Rowden Lane was a public vehicular highway (inferred from the failure to grant a private right of way over it). This happened in 1904, 1919, 1928, 1937, 1945, 1963 and 1967 (the highway access deed for Brookfields). Amongst these transactions, it is particularly significant to note that when Brigadier Palmer in

1919 had assembled the Lackham Estate, he had purchased Rowden Farm but never acquired ownership or express right of way over Sections A and B1 of Rowden Lane. This would have rendered the very valuable Rowden Farm landlocked, unless Rowden Lane were a public vehicular highway.

(7) The twentieth century conveyances, and the qualified rights of way which were granted, seem to me to be probably due to the natural caution or anxiety of conveyancers to ensure that their client had access to the property which they were buying. This has gone as far as requiring a grant by the vendor, who did not own Rowden Lane, of a purported right of way over the Lane as far as the vendor could grant it. This happened in the 1927 and 1945 conveyances of the modern Burleaze area, the 1946 sale of Rowden Farm and the sale of Swallow Falls in 1970. Indeed the statutory declaration in 1970 by W H Jennings illustrates the point quite graphically.

In 1945 he bought land on the southern side of Rowden Lane which encompasses the historical Brookfields and Swallow Falls. His property has received no right of way over Rowden Lane, although one infers the new street declaration would have been registered as a local land charge in 1937. Yet, when it came to selling Swallow Falls to the Fortune family, especially given the mixed signals coming from Chippenham Town Clerk as to whether Rowden Lane was publically maintainable or not, the purchasers insisted upon the grant of a right of way to the extent that he, W H Jennings, could grant the same. Hence the statutory declaration deposed to the many years which he had used Rowden Lane without objection.

I agree that these recent conveyancing techniques have little probative value and owe more to the natural caution of modern conveyancers than to a demonstration of established rights.

(8) Although Section B2 of Rowden Lane was conveyed to Brigadier Palmer in 1919, at a time when he already owned Rowden Farm and therefore there was a common owner of the two, by 1946 at the very latest, Section B2 of Rowden Lane had again been lost by Rowden Farm. This meant that when Mr and Mrs Burridge bought Rowden Farm in 1946 the best that they could get was a grant by the vendor, Mr Hawker, of rights over Rowden Lane "to the extent that the vendor could grant the same". This all seems very uncertain, if one assumes that Rowden Lane was not subject to public vehicular rights. It certainly demonstrates the weakness of the suggestion that Rowden Lane existed primarily as a private road owned by and serving Rowden Farm.

(9) In my judgment, the conveyancing material is consistent with the earlier historical material in supporting the suggestion that Sections A and B of Rowden Lane were public vehicular highways and, as a result, it was unnecessary to keep including it in private conveyances for that reason. Moreover, no land owner has ever granted an express easement qua owner for Sections A and B 1 of Rowden Lane, which one might have expected to have seen if the land had not already been dedicated to the public as a public vehicular highway.

908. The Claimants' case now is not to assert that Rowden Lane is wholly private. They accept that Rowden Lane is a public highway, but subject only to public rights on foot and on horseback. However, the Claimants still allege that they are owners of the subsoil up to the midway point of Rowden Lane along the frontage of their properties and also own the verges. I deal with this issue later.

909. In my judgment, Rowden Lane, which has been so significantly lacking in an obvious owner, is much more consistent with a public vehicular highway of some antiquity than with a private vehicular road subject only to public rights of footpath or bridleway.

Chapter 18: Maintenance of Rowden Lane

910. Highways are maintainable at public expense if they were created before 1835 or, if created thereafter, have been expressly adopted by the Highway Authority as maintainable at public expense.

911. Both parties have placed before me evidence that Rowden Lane and its verges have been maintained or repaired *both* at public expense and at private expense.

912. Both parties accept that the question whether the lane has been maintained or repaired at public expense is relevant. If it has been so maintained, then in the absence of a satisfactory explanation this would be evidence that it is a public way. However, if public maintenance has not taken place or has only taken place infrequently or irregularly that does not mean that the road is not a public highway. As the correspondence in this case, written at different times by the Council or highway authority has indicated, a lack of maintenance could be attributable to oversight, lack of funds, lack of need or an ignorance of the legal position.

913. In my review of the historical documentation in this case, I have made reference to the similarity in the ways in which Rowden Lane and the Bath Road have been depicted on maps, implying similar levels of status or maintenance.

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 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 1900 OS map.

915. The most likely explanation for this level of maintenance of Sections A and B, higher than Section C, is that the maintenance was being carried out at public expense and to a standard consistent with a public vehicular highway. Equally, this level of public maintenance and expenditure seems excessive if the public only had a right of way on foot or on horseback.

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 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.

917. Professor Williamson did not, however, deal satisfactorily with the Minute of the same Corporation, dated 1 September 1896, which clearly shows that the Corporation did not regard itself as the private land owner of any part of Sections A and B of Rowden Lane, and that it did not regard Rowden Lane as private. This follows from the fact that the lease granted a right of way in favour of a proposed infectious hospital over part of Hulberts Hold to Rowden Lane, *but no further*. In my judgment, this is because it was known that Rowden Lane was a public vehicular highway. One could reasonably expect that there would be a need for wagons or carts to transport the infirm to the infectious hospital.

918. The 1896 minute supports the existence of a public vehicular highway at Section B of Rowden Lane. The 1896 minute read:

The ground space occupied by the Building of the said hospital to be 30 feet long and 15 feet in width with a right of way thereto from Rowden Lane in common with the council and their tenants …

919. I accept that residents of Rowden Lane have, from time to time, paid for repair work to the surface of Rowden Lane and have maintained the verges. However the fact that local residents may have carried out some maintenance does not preclude the finding of public highway, nor does it necessarily indicate a private status. As was pointed out in Ward and Ward -v- Durham County Council 1994 70 PCR 585 at 590:

Many householders clear and maintain the verge or other land adjoining their homes, even though the public has rights thereover.

920. I reject Mr Laurence's contention that, in relation to the 1881 minutes, the highway surveyor was acting as a co-ordinator out of public spiritedness for the repair of the private road. I regard this as an improbable analysis. In my judgment, it is much more likely that a highway engineer would concern himself with public highways, in accordance with his statutory duty, rather than get involved in purely private matters. The 1881 and 1896 minutes both provide strong evidence that Sections A and B of Rowden Lane were regarded as a public vehicular highway maintainable at public expense in the nineteenth century.

921. Turning to the twentieth century, there is also evidence of public maintenance of Rowden Lane. Professor Williamson, in his report, referred to the first 70 metres or so (Section A of Rowden Lane) as being maintained as a public road for some time. Moreover, the culvert running under Section A (C4/65) has been publicly maintained since at least 1972.

922. As far as the maintenance of Section B is concerned I have set out in great detail, elsewhere in this judgment, the correspondence from 1983 onwards which is supportive of the Highway Authority carrying out maintenance works on Rowden Lane.

923. The aerial photographs analysed by Gary Vaughan show that Sections A and B of Rowden Lane had been maintained at the same level since 1946 at the latest, this is the date of the earliest available aerial photograph. Between 1946 and 1964 there was a seamless gravel surface all the way from the A4 to the cattle grid. By 1973, the entire carriageway configuration was very similar to that which existed in 2006. Since the delivery of my draft judgment to the parties, the Claimants have supplied me with additional photographs taken in 1988. These show the surface of Section B to be of a lower quality than Section A. However, this may be explained by roadworks which may have been carried out on Rowden Lane in 1988: see the letter dated 3 December 1991, from the Area Highway Engineer to Mr Fortune at paragraph 235 above.

924. I am satisfied, therefore, that the Highway Authority has maintained Sections A and B of Rowden Lane in the nineteenth and twentieth centuries. I do not doubt that frontagers in Rowden Lane have, from time to time, carried out ad hoc repairs and surfacing. However, I am satisfied that this is more to do with the Highway Authority having to prioritise its work and the allocation of its resources which may have left the resident feeling that they had to carry out repair work themselves. That there was some frustration by the residents over this, and some restriction on the public monies available, is shown by a letter by Dick Jennings in March 1983 where he recorded the Highway Engineer as saying that there had been a shortage of funds.

925. There are two further Minutes of meetings of Chippenham Borough Council which tend to suggest that the Council regarded Rowden Lane as something more than a mere bridleway or footpath.

926. On 30 November 1954, there was a recommendation that no objection be raised to the placing by the Southern Electricity Board of overhead electricity lines at Rowden Lane. As I have already indicated, there was no evidence of any private way agreement having been granted by any owner of the Lane.

927. On 18 April 1961 the Council resolved that an additional street light be installed in Rowden Lane between the public house and the junction with Rowden Hill. Whilst it may be argued that these add little to the First Defendant's case because, on any view now, Rowden Lane is a public highway, they seem to me to be more consistent with a Council being concerned with a highway of higher status than mere footpath or bridleway.

928. Accordingly, I conclude that, on the balance of probabilities, the highway authority did carry out works of maintenance on Sections A and B of Rowden Lane although they did not regard Rowden Lane as a priority which explains why private residents themselves had to carry out ad hoc repairs.

Chapter 19: Reputation

929. Given the mass of documentary evidence in this case, it may be thought that evidence of reputation, or the way in which people have spoken or written in the past about Sections A and B of Rowden Lane, can be of little assistance to me.

930. However, it seems to me that the Fortune family has conducted itself in a way which, in substance, suggested that they considered Sections A and B of Rowden Lane, and the verges, to form part of a public vehicular highway. Correspondence by the Fortune family with the Planning Authorities in 1980, 1988 and 1991 are consistent with their treating Rowden Lane and its verges as a public vehicular highway. In March 1993, the Highway Authority was taking steps to abate nuisance on the verges adjoining Swallow Falls and, in so doing, asserted that the verges were "highway verges". This

was never contradicted by the Fortune family. I accept that Kevin Fortune wrote letters expressing doubts about Rowden Lane, but these seem to me to be more concerned with his desire to have it brought up to the standards of a modern highway. On balance, I regard the correspondence from the Fortune family as more indicative of their view that Sections A and B (and their verges) formed a public vehicular highway than the contrary.

931. In relation to Brookfields, the Access Agreement between Langcote and the Second Claimant, also referred to it the registered title, seems to have proceeded on the basis that Rowden Lane was highway, and, inferentially, a full vehicular highway. However, against this must be set the correspondence from Mr Ayres and Ms. Ayres, where the Lane was alleged to be private, albeit without any concession of any public rights, even on foot or horseback.

932. Finally, whilst it is not simply a matter of counting the numbers for and against any particular propostion, the fact remains that there is little visible support for the Claimants from those whose properties adjoin Section B of Rowden Lane. The Claimants' case is not supported by the vast majority of other owners of developed curtilages which either adjoin or depend upon Section B of Rowden Lane for their vehicular access. If Rowden Lane were bereft of public vehicular rights, one might have expected them to have asserted their private rights by now.

Chapter 20: Creation of a Highway at Common Law

933. Section 32 of the Highways Act 1980

Evidence of dedication of way as a highway

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall

take into consideration any map, plan, or history of the locality or other relevant document which is tended in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

934. The principle underlying the creation of highways was summarised by Etherton J, as he then was, in Robinson Webster (Holdings) Ltd v. Agombar [2001] EWHC; [2002] 1 P. & C.R. 20, at paragraph 30 where he said :

30. At common law a highway may be created by dedication, express or presumed, by the owner of the land of a right of passage over it to the public at large and the acceptance of that right by the public. Long user by the public as of right is evidence of proof of dedication by the owner and acceptance by the public.

935. This is a case of presumed dedication, as explained by Lord Blackburn in Mann v Brodie (1884-85) L.R. 10 App Cas 378 at 386 as follows:

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

936. Section C of Rowden Lane is shown as a bridleway on the Definitive Map and Statement (DMS), and this is conclusive in law as to its status as a bridleway. After what I regard as a significant change in the emphasis of the Claimants' case, the Claimants now accept that Sections A and B of Rowden Lane is a public highway, but

only subject to public rights on foot and on horseback, consistent with the conclusive status of Section C as a bridleway.

937. This concession by the Claimant is not related to any particular time when they accept that the public rights began, or indeed how they began. The resolution under the Public Health Act 1925 by Chippenham Borough Council and the map prepared under the Finance Act 1910 clearly demonstrate that Rowden Lane was subject to public rights of some kind before 1910. Clearly the origins of the public rights are so far back in time that no living person can give evidence of when even the limited public rights conceded by the Claimants began.

938. I am satisfied, and indeed is not in dispute between the parties, that public rights of way on foot and on horseback have been demonstrated to have existed before 1910. If the public used Rowden Lane for a purpose on foot and on horseback before 1910, as I find they did, why would they not also, as a matter of common sense, have used Rowden Lane in vehicles, wagons or carts drawn by a horse, as well on foot or on horseback?

939. Although the Claimants' pleaded case left open the possibility of arguing that Section B of Rowden Lane was subject to limited public rights on foot and on horseback, but definitely not in vehicles, the main thrust of their case was originally that Section B was entirely private for the whole of its length and width. However, until November 2008, the Claimants had admitted that the whole of Section A was a public vehicular highway.

940. Thus the evidence prepared by Professor Williamson and Mr Harbour was focussed on Section B of Rowden Lane only and not Section A. Their reports quite clearly show that the central issue on which they were giving their opinion was whether section B was wholly private or public.

941. Mr Vaughan's evidence too was confined to a consideration of Section B of Rowden Lane, because that was the only area then in dispute. Indeed Professor Williamson's report effectively admitted that Section A appeared to be a public vehicular highway.

942. The Claimants' main case now is that Sections A and B are only a public bridleway, and have been a bridleway since 1949 at the latest. However, what the Claimants' expert evidence has not focussed on, given that the Claimants now concede that Sections A and B are subject to public bridleway rights, is why, how or when the public acquired these limited rights of on foot and on horseback but yet did not also acquire vehicular rights at the same time.

943. Whilst I understand that the First Defendant claims that public vehicular rights were established even before 1669, it is plain to me their case at common law was not confined to the period to 1669 but was based upon the totality of the evidence, documentary and modern user, which was put in front of me. The First Defendant invites me to conclude that it is more probable than not, in the light of all the available documentary and user evidence, that Sections A and B of Rowden Lane have long been a public vehicular highway as a result of dedication and acceptance in common law.

944. For what purposes did the public use Rowden Lane on foot and on horseback for so long and in such circumstance as to constitute Rowden Lane a public highway in common law?

945. 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. There must have been sufficient purpose for the public to use Rowden Lane for it to acquire the limited highway rights which even the Claimants concede. It was the First Defendant's case that it is improbable that the public would have had a reason to use

Rowden Lane on foot or on horseback, but not with carts or other vehicles. The location of a cattle grid at the end of section B of Rowden Lane in the 1960s, with no gate at the side to bypass it, must have significantly reduced, if not extinguished, the attractions of Sections A and B of Rowden Lane for horses and riders. The decline in the public's use of Sections A and B on horseback has been more than matched by the increase in the public's use of sections A and B with vehicles. As early as 1784, (see Powell's map of that year), a public footpath from Lacock is shown joining section B of Rowden Lane. I consider it probable that the public's right of way, at least on foot, over Rowden Lane existed before 1784. In fact, for reasons I give elsewhere in this judgment, I am satisfied that they existed before 1669.

946. Who are the public for the purposes of dedication and acceptance of common law?

947. In Jennings v Stephens [1936] 1 Ch 469, at 476, Lord Wright MR said:

"The public" is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in any particular matter, professional, political, social, artistic, or local.

948. Accordingly, use as of right by the inhabitants of the locality is sufficient. The public undoubtedly used Rowden Lane as of right, otherwise it would not have become a public highway, even on foot or on horseback. Given the existence of these public rights, together with the conveyancing history of Rowden Lane and the lack of express private easements over it, it is unlikely that the Lane merely served as a private drive to Rowden Manor. There is no evidence that Rowden Farm was in common ownership with any parts of Sections A and B of Rowden Lane between 1540 (when it was seized

by the Crown) and 1919. Moreover, neither Section A nor B of Rowden Lane, nor the enclosed section of Gypsy Lane, was in common ownership with Rowden Farm when it was sold off in 1904.

949. For the public to have acquired rights of way over Rowden Lane, even on foot or on horseback, it means that the user was trespassory, and not by force, secretly or with permission (*nec vi, nec clam, nec precario).*

Conclusions on dedication and acceptance at common law

950. On the totality of the historic and modern evidence placed before me in this case, I am satisfied, on the balance of probabilities, that Sections A and B of Rowden Lane have in fact been full public vehicular highways for centuries before 2002.

951. Whilst that is the view to which I have come on the totality of the evidence, there are also specific dates or periods which also demonstrate (if such demonstration be necessary), on the balance of probabilities, the status of sections A and B of Rowden Lane as a full (vehicular) public highway by that time.

952. Whilst in no way detracting from my conclusion reached on the totality of the evidence, the material before me, considered in the light of Section 32 of the Highways Act 1980, has satisfied me that Sections A and B of Rowden Lane were a full public vehicular highway in each of the following periods:

(a) between 1540 and 1669;

(b) between 1669 and 1881;

(c) between 1881 and 1955.

953. In summary, the following matters, in particular lead me to conclude, on the totality of the evidence and on the balance of probabilities, that Sections A and B of Rowden Lane were a full (vehicular) public highway well before 2002.

(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 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 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 Gypsy 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, ie “Rowden Way”;

(vii) Rowden Lane and Gypsy 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 Gypsy 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 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 Gypsy 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 and1890 demonstrated a 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 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 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 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 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.

(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 Gypsy 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 ‘Gypsy’ Lane. This clearly implied the use of that lane with carts and wagons by travelling gypsies. That use could not have been with the permission of Rowden Farm, since Gypsy Lane was not owned by Rowden Farm. The fact

that Gypsy 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 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.

(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 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 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.

954. On the totality of the evidence, therefore, I find that Sections A and B of Rowden Lane were a full (vehicular) public highway for centuries before 2002.

Chapter 21: Width of the public vehicular highway

Introduction

955. In paragraph 56 of the Claimants' skeleton argument, dated 3 November 2008, the following was written:

"The broad issues in the claim are:

(1) Whether the Lane is a public vehicular highway or a private road (over which there may or may not be rights of way on foot and on horseback);

(2) If it is a full vehicular right of way, its width, and in particular whether it encompasses the grass verges on its southern side".

956. The Claimants' case at one stage was that Section A of Rowden Lane *was* a public vehicular highway and that all of Section B (including the verges) were private. It is now the Claimants' case that Rowden Lane, in its entirety, is only a bridleway but there is no concession that any bridleway extends across the entire lane including the verges.

957. The way in which the Claimants originally put their case, with its emphasis on the private nature of Rowden Lane, and their subsequent changes to it, has caused some time to be spent in the trial on the topic of who owns the carriageway and verges of Rowden Lane. The ownership of the subsoil is now conceded to be largely academic. The central issue is the nature and extent of the public rights over the carriageway and verges, irrespective of the owner of the subsoil. Nevertheless, out of deference to the arguments which have been advanced before me, I shall consider the issue of the ownership of the subsoil.

958. Counsel for the Claimants accept that is unnecessary for the public to drive vehicles over every part (ie laterally) of the verges in order for the verges to be dedicated, along with the metalled carriageways, as part of the vehicular highway. Nevertheless, they submit that there is no invariable presumption that a highway includes the verges adjoining it: See:Belmore -v- Kent CC [1901] 1 Ch 873. This case established the proposition that, where there are unenclosed spaces by the sides of a metalled highway, there is no invariable presumption that the highway extends to the fence on either side. The nature of the district, the width and level of the margins, and the regularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication.

959. Mr Laurence QC and Ms Clark (in footnote 287 in their amended submissions in reply, dated 1 September 2009) submitted that I am not concerned to determine the extent of the land over which the public *bridleway* and *private* vehicular rights exist. But the Claimants do not suggest that these rights are confined to the central carriageway. They accepted that if, as I have found, the First Defendant 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. However, they submitted that the claim to a vehicular highway over Rowden Lane, between points M and CG, *based on modern user* can plainly not extend from hedge to hedge given the evidence of stones on the verges.

960. Accordingly, I propose to deal first of all with the question of the ownership of the subsoil under the carriageway and the verges, and then with the extent of any public rights over the verge.

Ownership of the subsoil of Rowden Lane

961. In Micklethwait v. Newley Bridge Company (1886) 33 ChD 133, Cotton LJ, at page 145 said

In my opinion the rule of construction is well settled, that where there is a conveyance of land, even though it is described by reference to a plan, and by colour, and by quantity, if it said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances and/or enough in the expressions of the instrument to show that this is not the intention of the parties.

962. We know that, in 1820, Sections A and B1 of Rowden Lane (and the land either side, including what Mr Laurence has described as 3(a) - essentially Brookfields and Swallow Falls) was in common ownership: See the 1880 Abstract of Title of the Cambridge Trustees. It is also clear from the 1848 Tithe Map that Benjamin Lifely owned Sections A and B1 of Rowden Lane (parcel 518) and some land either side of it, although all this was tenanted by James and Joseph Austin. In 1881 plot 3(a) was also conveyed to Richard Rich.

963. In 1868, there was a conveyance by Mr Frith to Mr Nicholls of land to the north of Rowden Lane which included today's curtilage of The Bungalow. We do not have this conveyance, only the plan to the conveyance. However, the area shown as conveyed excluded Rowden Lane. It is regrettable that we do not have the conveyance from Mr Frith to Mr Nicholls. Mr Frith was not a sole vendor because the back sheet refers to 'James Frith and others'. Whether these were Trustees or personal representatives of Benjamin Lifely, one just does not know. However, it is interesting to observe that in the sale of plot 3(a) to Richard Rich in 1881, one of the trustee vendors was "Alfred *Lifely* Goddard"

964. We also learn from the 1880 conveyance that plots 3(b) and 3(c) (as described by Mr Laurence - essentially Burleaze and Rushy Ground) together with Section B 2 of Rowden Lane in between were conveyed together to Richard Rich by the Cambridge Trustees in 1880. Accordingly, by 1881 when plot 3(a) was sold to Mr Rich, he owned all the land to the south of Sections A and B of Rowden Lane.

965. The 1881 conveyance to Richard Rich of plot 3(a) conveyed the land

Together also with all buildings erections fixtures walls party walls roads commons hedges ditches fences ways waters water courses liberties privileges easements advantages and appurtenances whatsoever to the said pieces or parcels of land

hereditaments and premises or any part thereof appurtaining or with the same or any part thereof now or heretofore demised occupied or enjoyed or reputed or known as part or parcel thereof or appurtinent thereto

966. Subject to my observations below, I am inclined to agree with Mr Laurence that there seems to be nothing in the 1881 documentation before me to displace the presumption that the vendors to Mr Rich of parcel 3(a) also owned up to the midpoint of Rowden Lane along the frontage of plot 3(a), and therefore conveyed it to him under the above clause. It matters not whether the road is public or private, when it comes to applying the presumption. I do not consider that the presumption has been rebutted by the 1910 map, as the First Defendant submitted, merely because the map and assessment declared no owner of Rowden Lane.

967. The same may also apply to the land acquired by Mr William Nicholls in 1868 to the north of Rowden Lane.

968. However, in the absence of the full deed or conveyance dealing with the first sale of the land in common ownership, presumably in 1868, I feel it is unsafe to be more emphatic, especially since it is unnecessary for me to reach a conclusion on the ownership of any area of the subsoil if, as I have found, the surface of the Lane, including the verges, is vested in the First Defendant as Highway Authority. However, it may well be that the common owner at some stage conveyed, or can be presumed to have conveyed, to Mr Frith the northern half of Rowden Lane and to the Goddard Trustees the southern half.

969. Mr Laurence then charted the ownership of plot 3(a) (comprising modern day Brookfields and Swallow Falls) down to today. I agree with Mr Laurence and Ms Clark that, if Mr Rich acquired one half of Rowden Lane in 1881, then the Claimants would own the subsoil under their respective verges to the midpoint of Rowden Lane.

However, I emphasise that this would be confined solely to the subsoil.The surface is vested, hedge to hedge, in the First Defendant as Highway Authority.

Does the public vehicular highway extend over the verges?

970. The historical maps show that persons using the metalled surface of the carriageway have never been prevented from using the verges.

971. Where a landowner encloses land by the side of a public highway and within a few feet of the metalled portion then a presumption arises that whatever he has left between the metalled surface and his own fence is dedicated to the public: Copestake v West Sussex County Council [1911] Ch 331, at 338.

972. The hedge to hedge presumption applies where "the hedge was planted against the highway": Hale v Norfolk County Council [2001] 2 WLR 1481, at paragraphs 32-33, per Chadwick LJ. In Rowden Lane, the southern hedge postdated the highway and can be inferred to have been planted to separate the highway from from the adjoining land. The 1669 Inclosure Map shows that the southern side of Rowden Lane was not then enclosed, although 'Rowden Way' already existed. The subsequent planting of a hedge along that southern boundary established a field boundary against the road. I am satisfied that the landowner intended to fence here against the highway.

973. Goodmayes Estates Limited v. First National Commercial Bank and Essex County Council [2004] EWHC 1859 (Ch) was also a case where the status of the verges was in dispute. In considering whether or not the 'hedge to hedge' presumption should apply, the learned judge, Richard Sheldon QC sitting as a judge of the Chancery Division, found that the verges were included in the public highway. He described the road and verges in question as follows, at paragraphs 23 to 28:

The [roads] are of some antiquity appearing on a map dated 1777 and they had by then existed for some considerable time. The identifiable boundary features on the site which exist today would all appear to post date the highway ... the district is characterised by roads with verges running between hedges ... the centre of the hedges lie some way back from the metalled area ... the line of the hedges on the site and in the neighbourhood is regular. They run in lines broadly adjacent to the roads. The regularity of the lines of the hedges is also apparent in the aerial photographs ... the margins are what may be described [as] of ordinary width common to many country lanes ... the margins vary a little in width ... nothing specific is known of the circumstances in which the hedges or other boundary features were erected or established ... Applying the principles in Hale, the foregoing features tend to suggest that the fence to fence presumption should apply and the boundary line should be drawn along the centre of the hedge.

974. Whilst I must consider the individual facts and circumstances of the case before me, in order to consider whether the presumption should be applied, there are many similarities between Goodmayes and the instant case.

975. Is it appropriate to apply the hedge to hedge presumption in this case?

976. The boundary features shown in the 1886, 1900 and 1924 Ordnance Survey maps show a high degree of correlation with those seen by Mr Vaughan when he inspected the site in 2007. These boundary features include walls and hedges enclosing the verges and separating them from the adjoining property. The strong hedges and banks, which enclose the verges and separate them and the carriageway from the adjoining plots, have been in the same position for centuries. Where hedges have been removed, they have been replaced by walls or fences typically running along the historic line of the old hedges. Such ditches as are present are consistent with these hedges and wall lines.

977. Rowden Lane is of a fairly consistent width between the hedges and walls, about 11.3 to 13.25 metres. The roadside verges, although varying themselves a little in width, are within what I would regard as the normal range of width for verges adjoining a lane.

978. The aerial photographs too show a relatively unchanging picture over time from 1946 onwards. The maps too seem to show little variability in the extent of the Lane. Ditches are shown coloured blue on plan 4077 revision A attached to this judgment.

979. These factors alone persuade me that it is right to apply the hedge to hedge presumption to Rowden Lane.

980. Moreover, the conduct of the parties also supports the view that the verges form part of the highway

981. The conveyance to the Fortune family of Swallow Falls in 1970 showed the parcel of land conveyed and described as separate from Rowden Lane. The land conveyed ended at the boundary hedge. The 1988 Planning application submitted in respect of Swallow Falls also showed the land owned by the Fortune family ending at the boundary hedge.

982. The 1963 conveyance of Brookfields to Mr Ayres described the land which was being purchased as land which "adjoins Rowden Lane".The plan attached to the conveyance showed no part of the verge included in the legal title expressly conveyed. The Langcote Access Deed in 1977 granted to the Ayres family, in respect of Brookfields, a right of way *to* the highway of Rowden Lane, not *over* it. Moreover, the registered title of the Second and Third Claimants excluded the verges, and claimed no extra rights in respect of it.

983. Accordingly, even if the claimants all own the subsoil from their boundary hedges up to the midpoint of Rowden Lane, the surface of the verges have been treated as part of

the road. I am satisfied that it is the centre line of the hedges rather than the edge of the metalled surface which demarcates the boundaries between wholly private land and the land over which the public have rights. In other words, I find it entirely appropriate to apply the hedge to hedge presumption.

984. This is also consistent with a number of other matters. First, apart from the encroachment by the First Claimant or Kevin Fortune over the verge in front of Swallow Falls, there has been no attempt to enclose the verges or to build on them. Secondly, the letter of the 16 March 1993 from the Highways Authority to Swallow Falls required them to remove the builders' rubble on the 'highway verges'. Thirdly, the construction of the passing bay outside Swallow Falls in 1992 is much more consistent with its being installed on a highway than on a private land. If the latter had been case, one might have expected much greater opposition to it from the Fortune family. Fourthly, the fact that Mr Heselden considered it so important to cover up the passing bay is also a powerful indication of its outward and visible sign as part of the public highway. Fifthly, the presence of telephone poles, electricity and water installations within the verges of Rowden Lane are all indicative of the fact that they were installed in the highway under statutory powers rather than on private land which would have required wayleave agreements. There are no relevant wayleave agreements.

985. The route of the utilities in Rowden Lane is also shown on plan 4077 revision A and indicates, in particular, the water and electricity installations in the verge. More particularly, there is an electricity pole and inspection cover over a public sewer in the verge outside Swallow Falls. Indeed, it was this specific cover which was the subject of a complaint by the First Claimant to the Defendant on 8 May 1982. Outside Brookfields, there is an inspection cover in the verge.

986. Moreover, I am satisfied, on the balance of probabilities, that for centuries the public has used the verges in carts and wagons to pass and repass and, since the 1950s, in

vehicles to park and to pass each other, as an integral part of the vehicular carriageway. Rowden Lane is, and has been regularly, used also by substantial agricultural vehicles and by wide caravans. Nevertheless, I am satisfied that the verges, including those by the cattle grid, facilitate such wide vehicles to pass parked vehicles or cars travelling in the opposite direction. Therefore, the necessity of using the verges to enable opposing traffic to pass each other safely is obvious. The verges in Section B are not separated from the carriageway by any kerbstones.

987. There is no evidence that any obstacles were placed on the verges (now footpaths) of Section A. I do not regard the placing of any obstacles, stones or any other material from time to time on the verges in Section B as rebutting the presumption that the highway extends from hedge to hedge. Some were easily moveable, for example those outside Elm Tree Farm House, as described by Mary Puntis. Items placed on the verges before 2002 were decorative or protective in purpose or ambiguous in meaning. They did not negative dedication as a public vehicular highway over the verges.

988. Accordingly, I am satisfied, on the balance of probabilities, that, for centuries at common law , and since before 1982 under section 31 of the Highways Act 1980, the length of Sections A and B of Rowden Lane comprise a full (vehicular) highway from hedge to hedge, namely across the width of the Lane and its verges.

Chapter 22: Have Public Vehicular Rights Been Extinguished by NERC 2006?

Legislative Background to NERC 2006

989. Albeit at the risk of repetition of certain matters already dealt with earlier in this judgment concerning a Definitive Map and Statement ("DMS"), I gratefully adopt the description of the legislative background to NERC 2006, set out paragraphs 7-13 of the judgment of Dyson LJ in Regina (Warden and Fellows of Winchester College and

another) v Hampshire County Council [2009] 1 WLR 138, at pages 141-143, where he said:

7 *Under Part IV of the National Parks and Access to the Countryside Act 1949, county councils as surveying authorities were required to maintain a DMS showing three categories of highway, namely: footpaths, where the public right of way was on foot only; bridleways, where the public right of way was on foot or horseback or leading a horse; and roads used as public paths ("RUPPs") which were defined as highways other than footpaths or bridleways used by the public mainly for the purposes for which footpaths and bridleways are so used. The 1949 Act was amended by the Countryside Act 1968 so as to require surveying authorities to reclassify each RUPP shown on their definitive maps either as a footpath or as a bridleway or as a BOAT in accordance with specified criteria. This reclassification was far from complete when the relevant provisions of the 1949 and 1968 Acts were replaced by Part III of the 1981 Act.*

8 *Section 54 of the 1981 Act required surveying authorities, as soon as reasonably practicable, to review all RUPPs remaining on their DMSs and make modification orders reclassifying each as: (a) a BOAT, if a public right of way for vehicular traffic had been shown to exist; or (b) a bridleway, if (a) did not apply and bridleway rights had not been shown not to exist; or (c) as a footpath, if neither (a) nor (b) applied. A BOAT was defined in section 66 of the 1981 Act as "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used.*

9 *Section 53 of the 1981 Act contains provisions relating to orders modifying the DMS. It imposes a duty on the surveying authority to make modifications on the occurrence of certain events.*

10 *In 2000, with the reclassification of RUPPs still being far from complete, the Countryside and Rights of Way Act 2000 was enacted. Section 47(2) provided that every way which, immediately before commencement of the Act was shown in any DMS as a RUPP, should be treated instead as a "restricted byway". The 2000 Act in addition made provision for the extinguishment in 2026 of unrecorded rights of way for mechanically propelled vehicles over byways. It also inserted into the 1981 Act (as section 53B) a requirement that every surveying authority should keep a register of applications under section 53(5).*

11 *The reclassification provisions of the 2000 Act reflected the growing public concern that unmade minor vehicular ways in the countryside, green lanes, enjoyed by walkers and those on horseback, were being damaged by off-road vehicles and motorcycles. That concern was recognised in a consultation document published by DEFRA in 2003. In a foreword the Rural Affairs Minister, Alun Michael, said:*

"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 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 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.

12 *In due course the 2006 Act was enacted, and it provided for the extinguishment of all existing public rights of way for mechanically propelled vehicles over ways which, immediately before commencement, either were not shown on the DMS at all or were so shown but only as a footpath, bridleway or restricted byway.*

13 *Sections 47 to 50 of the 2000 Act (including in particular the provision reclassifying RUPPs as restricted byways) were brought into force on 2 May 2006, and section 67 of the 2006 Act (together with other provisions in Part 6 of that Act) was brought into force on the same day but immediately after the commencement of sections 47 to 50 of the 2000 Act.*

990. The Winchester College case was concerned with Section 67 NERC 2006, as is the case before me. It was a case, like many others cited in this judgment, in which Mr Laurence QC and Mr Mould QC were on opposite sides, as they are in the instant case. They therefore have a detailed knowledge of that case.

991. Mr Laurence and Ms Clark relied on it heavily in support of their submission that any public vehicular rights were extinguished on 2 May 2006, whereas Mr Mould QC and Mr Burns contended it had no application to the instant case or, at the very least, is distinguishable from the instant case.

992. It is therefore necessary for me to set out Sections 66 and 67 NERC 2006, which came into force on 2 May 2006.

993. Sections 66 and 67 NERC 2006

Part 6

Rights of Way

Rights of way and mechanically propelled vehicles

66 Restriction on creation of new public rights of way

(1) No public right of way for mechanically propelled vehicles is created after commencement unless it is—

(a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or

(b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.

(2) For the purposes of the creation after commencement of any other public right of way, use (whenever occurring) of a way by mechanically propelled vehicles is to be disregarded.

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).

(2) Subsection (1) does not apply to an existing public right of way if—

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,

(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),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.

(3) Subsection (1) does not apply to an existing public right of way over a way if—

(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,

(b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles—

(i) was reasonably necessary to enable that person to obtain access to the land, or

(ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

(4) "The relevant date" means—

(a) in relation to England, 20th January 2005;

(b) in relation to Wales, 19th May 2005.

(5) Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies—

(a) was reasonably necessary to enable a person with an interest in land to obtain access to the land, or

(b) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only,

the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.

(6) For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.

(7) For the purposes of subsections (3)(c)(i) and (5)(a), it is irrelevant whether the person was, immediately before commencement, in fact—

(a) exercising the existing public right of way, or

(b) able to exercise it.

(8) Nothing in this section applies in relation to an area in London to which Part 3 of the Wildlife and Countryside Act 1981 (c 69) does not apply.

(9) Any provision made by virtue of section 48(9) of the Countryside and Rights of Way Act 2000 (c 37) has effect subject to this section.

994. It is common ground that Rowden Lane was not shown in a Definitive Map and Statement on 2 May 2006. It is conceded, therefore, that any existing public right of way for mechanically propelled vehicles over Rowden Lane was extinguished, unless the First Defendant can establish, and successfully rely upon, any of the provisions in Section 67(2) - (8) NERC 2006. The First Defendant's case is that public vehicular rights over Rowden Lane were not extinguished, because of Section 67(2)(a) and 67(2)(b) NERC 2006.

Burden of Proof

995. Because of the late amendment by the Claimants to rely upon NERC 2006, the First Defendant was not in a position to deploy its evidence in support of any Section 67(2)(a) exception above. Accordingly, that issue is one which has been adjourned pending the outcome of this trial. If Rowden Lane had been held not to be a PVH, or if the exception under Section 67(2)(b) were established, it would or may not be necessary to determine the further issue of whether the First Defendant could also prove, on the balance of probabilities, an exception under Section 67(2)(a) NERC. Accordingly, in the instant trial, the First Defendant has only relied upon Section 67(2)(b) NERC 2006 to show that public vehicular rights over Rowden Lane were not extinguished on 2 May 2006.

996. It is common ground between the parties that the burden of proving that public vehicular right has not been extinguished lies upon the First Defendant. In other words, public vehicular highway rights have been extinguished, since they were not shown on a Definitive Map and Statement at 2 May 2006, unless they are preserved by Section 67 (2) NERC 2006.

997. Accordingly, the question to be resolved, at this stage, is whether the First Defendant can satisfy me, on the balance of probabilities, that:

Immediately before [2 May 2006] … it (an existing public right of way for mechanically propelled vehicles) … 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).

Section 36 Highways Act 1980

998. I set out below the text of this Section, emphasising Section 36(6) and 36 (7).

Part IV

Maintenance of Highways

Highways maintainable at public expense

36 Highways maintainable at public expense

(1) All such highways as immediately before the commencement of this Act were highways maintainable at the public expense for the purposes of the Highways Act 1959 continue to be so maintainable (subject to this section and to any order of a magistrates' court under section 47 below) for the purposes of this Act.

(2) Without prejudice to any other enactment (whether contained in this Act or not) whereby a highway may become for the purposes of this Act a highway maintainable at the public expense, and subject to this section and section 232(7) below, and to any order of a magistrates' court under section 47 below, the following highways (not falling within subsection (1) above) shall for the purposes of this Act be highways maintainable at the public expense:—

(a) a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority;

(b) a highway constructed by a council within their own area under [Part II of the Housing Act 1985], other than one in respect of which the local highway authority are satisfied that it has not been properly constructed, and a highway constructed by a council outside their own area under [the said Part II], being, in the latter case, a highway the liability to maintain which is, by virtue of [the said Part II], vested in the council who are the local highway authority for the area in which the highway is situated;

(c) a highway that is a trunk road or a special road; . . .

(d) a highway, being a footpath[, bridleway or restricted byway], created in consequence of a public path creation order or a public path diversion order or in consequence of an order made by the Minister of Transport or the Secretary of State

under [section 247 of the Town and Country Planning Act 1990 or by a competent authority under section 257 of that Act], or dedicated in pursuance of a public path creation agreement;

[(e) a highway, being a footpath[, bridleway or restricted byway], created in consequence of a rail crossing diversion order, or of an order made under section 14 or 16 of the Harbours Act 1964, or of an order made under section 1 or 3 of the Transport and Works Act 1992];

[(f) a highway, being a footpath, a bridleway, a restricted byway or a way over which the public have a right of way for vehicular and all other kinds of traffic, created in consequence of a special diversion order or an SSSI diversion order.]

(3) Paragraph (c) of subsection (2) above is not to be construed as referring to a part of a trunk road or special road consisting of a bridge or other part which a person is liable to maintain under a charter or special enactment, or by reason of tenure, enclosure or prescription.

[(3A) Paragraph (e) of subsection (2) above shall not apply to a footpath[, bridleway or restricted byway], or to any part of a footpath[, bridleway or restricted byway], which by virtue of an order of a kind referred to in that subsection is maintainable otherwise than at the public expense.]

(4) Subject to subsection (5) below, where there occurs any event on the occurrence of which, under any rule of law relating to the duty of maintaining a highway by reason of tenure, enclosure or prescription, a highway would, but for the enactment which abrogated the former rule of law under which a duty of maintaining highways fell on the inhabitants at large (section 38(1) of the Highways Act 1959) or any other enactment, become, or cease to be, maintainable by the inhabitants at large of any area, the highway shall become, or cease to be, a highway which for the purposes of this Act is a highway maintainable at the public expense.

(5) A highway shall not by virtue of subsection (4) above become a highway which for the purposes of this Act is a highway maintainable at the public expense unless either—

(a) it was a highway before 31st August 1835; or

(b) it became a highway after that date and has at some time been maintainable by the inhabitants at large of any area or a highway maintainable at the public expense;

and a highway shall not by virtue of that subsection cease to be a highway maintainable at the public expense if it is a highway which under any rule of law would become a highway maintainable by reason of enclosure but is prevented from becoming such a highway by section 51 below.

(6) 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 highways maintainable at the public expense.

(7) 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 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. *(my emphasis)*

999. Section 36 of the Highways Act 1980 deals with highways maintainable at public expense.

1000. In summary, highways created before 1835 were highways maintainable by the inhabitants at large of a Parish. The Highway Act 1835 modified the position by providing that no road 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 that Act. Repair of highways created before 1835 remained the responsibility of the inhabitants at large, until the enactment of the Highways Act 1959 which provided that no duty with respect to the maintenance of highways was to lie on the inhabitants at large of any area and, in the main, became maintainable at public expense.

1001. The Highways Act 1980 provided that all highways which, immediately before its commencement, were highways maintainable at the public expense for the purposes of the Highways Act 1959 continued to be so maintainable for the purposes of the Highways Act 1980: See Halsbury's Laws of England, Volume 21 (Highways) (2004 Reissue) paragraphs 249 and 251.

1002. Footpaths, whether created before or after 1835, remained the responsibility of the inhabitants at large until December 1949, when the National Parks and Access to the Countryside Act 1949 applied certain provisions of the Highways Act 1835 to newly created public paths: Halsbury , quoted above.

1003. The relevant provisions of Section 36, for the purposes of the submissions made to me were Section 36(6) and (7) which, at the risk of repetition read:

> (6) *The council of every county … shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.*

(*7*) *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 … , the county council shall 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.*

1004. It is common ground that Rowden Lane has never been formally adopted as a highway under any statutory procedure.

1005. The Claimants have contended that none of the lists put forward by the First Defendant as a 'section 36 (6) list' met the actual requirements of section 36(6) and (7) of the Highways Act 1980 and, as a result, the First Defendant cannot bring itself within the exception provided by section 67(2 (b) of NERC 2006. Therefore, any vehicular rights which the public enjoyed over Rowden Lane were extinguished on 2 May 2006.

<u>The 1974 Highways Map for Chippenham</u>

1006. Under the Local Government Act 1929, a county council became responsible for all rural roads and *principal* roads in the urban areas. The Local Government Act 1972 abrogated the distinction between urban and rural highway authorities, and gave responsibility for the remaining roads in urban areas to the county council.

1007. Before 1 April 1974, the Highways Authority for Rowden Lane was Chippenham Borough Council. The 1972 Act transferred the responsibility to the First Defendant, to which Chippenham Borough Council passed its highway records.

1008. Mr Harbour, as Appendix ARH 21 to his report, produced the Chippenham Highway Record Map dated 1974. Unfortunately, it has not been possible to identify the process by which this map was produced.

1009. That map plainly is in error, in my judgment, in that it shows the entirety of Section B of Rowden Lane as part of RUPP 5, when it is plain from all the maps produced, as part of the Definitive Map and Statement process, that RUPP 5 only began at the cattle grid, at the eastern end of Rowden Lane, and then led south east along the entrance road to Rowden Farm to the Lacock parish boundary, some 109 metres west of Rowden Farm Buildings. RUPP 5 was approximately 167 yards (182m) long and of an average width of 10 feet (3m).

1010. The first 70 metres of Rowden Lane on that plan, Section A, was shown coloured orange, representing a full public highway, and indicated that improvements had been made on that Section. Section B of Rowden Lane, in ARH 21, was in the same green colouring as that shown for RUPP 5 *beyond* the cattle grid towards Rowden Farm. Section B must have been coloured green in error.

1011. There is another issue with the coloured plan at ARH 21 in that it shows Footpath 4 (for Chippenham) as stopping either side of Rowden Lane, and not continuing across the Lane. Moreover, the green colouring over Section B appears only over the metalled surface of the Lane, and not the verges. This would therefore create a break in the continuity of Footpath 4 which, on ARH 21, was not shown as running over the verges, but only the metalled surface, of Rowden Lane.

1012. On the evidence, the precise basis on which the new urban area highway records were drawn up is not clear. However, I have no doubt that an error was made in respect of the standing of Section B of Rowden Lane shown on the 1974 Chippenham Highway Record. Section B was shown in green as part of RUPP 5, when it never had

that status on the Definitive Map and Statement, or on any of the plans prepared as part of the Definitive Map process.

1013. The highway records were amended in 1983 (ARH 22), to show the entirety of Sections A and B coloured orange. It would appear that the highway record was amended, in the light of information concerning the maintenance of the whole length of Rowden Lane before 1983, by the County Surveyor, as shown in memoranda set out below.

1014. This erroneous map was, I am satisfied, the source of some confusion and error in correspondence passing between representatives of the Claimants and some Local Authorities in the 1980s, which I set out below.

Correspondence concerning the status of Section B of Rowden Lane in 1983

1015. A memorandum, dated10 February 1983, from the County Surveyor read:

"*Path No. 5 Chippenham*

As a result of some recent internal disciplinary issues I had cause to investigate the rights of way over Rowden Lane, Chippenham, which, as you know, is part of an unclassified road and part of Road Used as a Public Path No. 5.

Without going into detail the internal issue evolved around workmen carrying out works to the surface without permission. The purpose of this memorandum is to enquire whether or not your records are accurate insofar as they only show the unclassified road continuing as far as Ordinance Survey Grid Line 91 – the edge of that particular Ordinance Survey print. In practice and in accordance to my records (and indeed as shown on the Definitive Map) the unclassified road continues further at least up to the cattle grid which is situated at approximately Ordinance Survey Reference 911½ 723½. Certainly, so far as my Area Highway Engineer is concerned, the County Road

extends further than that shown on your records and works have been done to it as a road in the past

1016. That memorandum was sent by the County Surveyor to the County Secretary and Solicitor, who replied on 23 February 1983:

"*Path No. 5 Chippenham*

My highway records for the Borough of Chippenham are those which were handed over by the former Chippenham Borough Council at the time of local government reorganisation in 1974. I have had no reason to doubt their accuracy.

Should you consider the length of unclassified road to extend further than shown on highway maps in my Registry Sub-Section would you kindly supply a plan showing the length of highway which is involved in order that my records may be amended."

1017. The County Surveyor replied on 15 March 1983:

"Path No. 5 Chippenham

I refer to your memorandum of 23 February 1983 and I now enclose for your records an Ordinance Survey Sheet showing the extent of the unclassified road in Rowden Lane, Chippenham, and the extent of right of way No. 5."

1018. The County Secretary and Solicitor responded on18 March 1983:

"I refer to your memorandum dated 15 March, 1983.

In order to ensure that my highway records are absolutely correct would you confirm that the highway limits extend to the ditches and/or hedges on either side? ie to the curtilages of the properties fronting Rowden Lane. The extract from the OS maps is returned herein."

1019. The County Surveyor, on 29 March 1983, wrote:

"Rowden Lane, Chippenham

I refer to your memorandum of 18 March 1983.

I am sorry I have no legal record of the width of this right of way but would assume that it is between the boundaries shown by the Ordinance Survey on the attached print. You will appreciate that my records are correct as to length only."

1020. The Ordinance Survey map referred to in these memoranda (Volume 6, page 20) shows the unclassified road running between the A4 and the cattle grid, and RUPP 5 only beginning at the cattle grid.

1021. In a memorandum, dated 29 March 1983, from A.H.E. (presumably Area Highway Engineer) to the County Surveyor, the engineer wrote:

"Rowden Lane, Chippenham

With reference to your memo dated 10 March 1983, I consider that it would be prudent to place the road on my list of roads requiring surfacing during the year 1983/84, should funds be available and to give it reasonably high priority although I would not consider the surface to be of a problem to vehicles at the present time, having regard to the unclassified nature of the road."

1022. On 8 July 1983, R.F ("Dick") Jennings wrote to the County Surveyor. The letter was probably typed and drafted by his daughter, Mary Puntis. It read:

"I am considering a small parcel of land adjacent to Rowden Lane and would be grateful if you could provide the following information:

a) Is Rowden Lane a Public Highway which is controlled by Wilts County Highways Department?

b) *If it is, what distance from its junction with the A4 is deemed to be controlled by the Highways Department, and when did it become a "Public Highway" …"*

1023. On 19 July 1983, Mr Jones replied, on behalf of the County Surveyor:

"Rowden Lane, Chippenham

I refer to your letter of 8 July, 1983, regarding the above.

In answer to your questions, according to my records, the length of Rowden Lane which is maintained by the County Council as an unclassified County Road, extends from its junction with road A4 for a length of approximately 550 yards to a point east of Elm Tree Farm. Beyond this point it becomes an unmade track and, although it is still a public highway, its present status is that of 'road used as a public path'. However, under the Special and Second Review of the definitive map, this length of track which leads to the Lacock Parish boundary will become bridleway and will be shown as such when the definitive map of rights of way is eventually published.

I am sorry I have no record of when the road became a public highway but I trust the above information will be of help to you."

1024. I have mentioned above that the errors in the 1974 Chippenham map gave rise to some confusing correspondence in the 1980s. An example of this occurred in July 1982 in letters, set out below, passing between the solicitors for a prospective purchaser of a property on Burleaze, the rear of which bordered on Rowden Lane and its verge.

1025. On 6 July 1982, A C Dann and Sons, solicitors, wrote to North Wiltshire District Council (a successor to Chippenham Borough Council) as follows:

"<u>Re, Rowden Lane, Chippenham, Wilts</u>

We are acting on behalf of a client who is purchasing a property in Burleaze, which has a rear boundary onto Rowden Lane, with a pedestrian access onto it.

We should be glad if you could kindly inform us whether or not Rowden Lane has been taken over by the local authority, or whether it is still a private road. If it has not been taken over, we should be glad to know whether there is any likelihood of there being any road changes in respect of the taking over in the future."

1026. The solicitor to North Wiltshire District Council referred the letter to the County Secretary and Solicitor of the first Defendant, who replied on 19 July 1982:

"I refer to your letter of 6 July addressed to the North Wiltshire District Council.

The track to which I believe you are referring, lying to the rear of Burleaze, is at present classified as a Road Used as a Public Path (RUPP). However, following an enquiry into the status of the path in 1978, the track has been reclassified as a bridleway, and this reclassification will be included in the next review of the Rights of Way Map.

In the case of RUPPs and bridleways, the County Council has a responsibility for keeping such paths freely available for use by pedestrians, horse riders and pedal cyclists."

1027. This exchange of correspondence took place some six or seven months before the error in the 1974 Chippenham Highways Map was discovered in February 1983, and subsequently corrected. Mr Harbour, in his correspondence in 1989 and later, quoted earlier in this judgment, explained more fully how and when this error was discovered.

How were the Highways recorded ?

1028. Between 1 April 1974 and 1994, the First Defendant's records of highways maintainable or maintained at public expense were held in different ways. Some consisted of plans or maps, while others comprised lists of highways.

1029. Rowden Lane was shown in a book of maps, kept up to date by the First Defendant, called the "Burgundy Books", the title being derived from the colour of their hard covers. These books comprised pages and pages of Ordnance Survey maps, measuring, in my estimation, approximately 2-3 feet wide and 2 feet from top to bottom. There was a key to those highway records which is shown at page 28 of Bundle 14.

1030. The legend to that key showed different colours for different rights of way eg 'Highway (Classified roads)', 'Public Highway (Unclassified roads and paths)', 'Byway Open To All Traffic (B.O.A.T.)', 'Restricted Byway', 'Bridleway', 'Public Footpath', 'Cycleway', 'Highway Rights Stopped Up' and finally, identified by a light brown band, 'Highway Maintainable At Public Expense According To Type Of Use Customarily Made Of It'.

1031. Owing to its length, Rowden Lane was shown on two of these maps, coloured as a Public Highway (unclassified road and paths).

1032. I infer that the highway records for what had been Chippenham Borough Council, and latterly North Wiltshire District Council, came to the First Defendant as Highway Authority in the forms of coloured maps showing the different forms of highway, as opposed to a printed or printable list of maintainable highways. I draw this inference from the way in which Rowden Lane had been shown in the 1974 Chippenham map, and how it was corrected in 1983, by reference to coloured Ordinance Survey maps.

1033. In 1994, the First Defendant decided to create a computerised highway database ("Exor"). This task was dealt with by Jan Kuipers who, since 1991, has been the Highways Systems Manager for the First Defendant.

1034. The process whereby the then existing records were put onto the Exor database was described by Mr Kuipers. I accept his evidence of this process, as I do all his evidence. In particular, I accept that this was done by examining the highway records showing roads which were publicly maintained. A data entry for each stretch of maintainable or maintained road was put on the database.

1035. The data relating to Rowden Lane was placed on the database on 10 November 1994, as shown on the database template (entry record) for Rowden Lane, at page 784D in Bundle 2. The supporting plan is at page 784E in the same bundle. On 16 October 1995 (2/784F), an inventory of the street assets (gulleys, lamp-posts etc) on Rowden Lane was carried out by employees of the First Defendant and kept on the database, cross-referenced to Rowden Lane's unique computer reference number.

1036. The information on the database included, for each road, its numerical road type, its name or description, its database unique reference, operational area, road number, section number, whether maintainable or maintained at public expense ('A') or not ('U'), classification according to a Code of Practice, urban speed limit of 40mph or less and its eastern and northern coordinates for its start and finish points.

1037. Selected information on the database could be extracted and placed into required column headings on spreadsheets. It would then be possible to select any column, and sort its contents alphabetically to produce, for example, an alphabetical list of streets on the database. An example of a spreadsheet, in alphabetical order, showing Rowden Lane is at page 784C in Volume 2 of the trial bundle (without column headings). An example of a spreadsheet, not in alphabetical order, is shown (with column headings), at pages 237, 238 and following in Trial Bundle 10.

1038. A print out in this format, comprising about 11,000 'Adopted' roads (but not 19 rogue or unadopted roads) is referred to as a print out of the Exor database. A road was given the 'A' designation, whether formally adopted or not, provided it was maintained by the First Defendant. It therefore included ancient, ie pre-1835, highways.

1039. In summary, the relevant data for Rowden Lane was derived from the maps in the Burgundy Books and placed into the Exor database. I shall return later to the question of, and to the Claimants' submissions on, what was, or should have been, recorded in the Burgundy Books and the Exor before they could in law constitute a proper Section 36(6) list.

1040. Once saved in an electronic database, it became possible to make the information available for inspection by the public on the internet. The First Defendant did so, again using a spreadsheet, giving details of roads, (see, for example, Rowden Lane at 2/784H) form showing road classification, road number, road description, length and start and finish co-ordinates. All this was available for inspection on the First Defendant's website (http://www.wiltshire.gov.uk/road-adoption-disclaimer.htm) by those who accessed the site on and after 23 January 2006. This has been referred to as the Website list.

Candidates for a section 36(6) list?

1041. Three possible 'candidates' for a qualifying Section 36 (6) Highways Act 1980 list are:

a) The Burgundy Books; and/or

b) The Exor database; and/or

c) The First Defendant's website

1042. Although the Exor database was set up in 1994, and the website was available to the public on or after 23 January 2006, the maps in the highway record (the Burgundy

Books) are and were kept up to date. More particularly, they were kept up to date as at 1 May 2006.

1043. Having identified the candidates for a Section 36 (6) list, it is necessary to consider each one in greater detail to see whether it can or does satisfy the requirements of NERC. However, in order to identify the complicated issues with which I must deal, I set out below extracts from the final version of the pleadings as a convenient introduction to the topic.

1044. By its most recent pleading on the topic, 4 May 2009, the First Defendant has alleged that its Section 67 NERC and 36(6) 'list' was deposited and kept in its Exor computer records at its offices in Trowbridge.

<u>The pleaded issues on the section 36 (6) list</u>

1045. Paragraph 12 of the Re-Re-Amended Particulars of Claim is in the following terms:

12 (1) In order to establish the exception contained in subsection 67(2)(b) of the 2006 Act, D1 must show that Rowden Lane:

> *'immediately before commencement … was not shown in a definitive map and statement but was shown in a list to be kept under Section 36 (6) of the Highways Act 1980 …*

(2) To do that D1 must show that on 1/05/2006:

(i) there was a list in writing which D1 or its predecessor had made under Section 36 (6) of the 1980 Act (or earlier legislation) and thereafter kept corrected up to date;

(ii) that list had been deposited at the offices of the council and was physically available for public inspection there;

(iii) that list contained wording identifying it as a list made and kept corrected up to date under Section 36 (6) of the 1980 Act;

(iv) that list contained details of all the publicly-maintainable streets within D1's area and not just the streets which were in fact publicly maintained;

(v) that list contained details of all the publicly-maintainable streets within D1's area including publicly-maintainable footpaths, bridleways, byways open to all traffic and restricted byways.

(3) None of the "lists" contended for by D1 as being "a list required to be kept under Section 36 (6) of the 1980 Act" within the meaning of Section 67(2)(b) of the 2006 Act, complied with the requirements in paragraph (2) above (or any of them) on 1/05/2006 (or on any other date).

(4) The Claimants aver that D1 has accordingly failed to establish the said exception.

1046. In its Defence (dated 4 May 2009) to paragraph 11 of the Re-Amended Particulars of Claim, in which the Claimants had asserted without particularisation that any PVH had been extinguished by virtue of Section 67 NERC, the First Defendant put its case in the following terms:

5. Further or in the alternative, section 67(1) of the 2006 Act does not apply to the said public right of way by virtue of section 67(2)(b) of the 2006 Act, it being the fact that on 1 May 2006 the said public right of way 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, that is to say, a list of highways maintainable at public expense.

6. *In the present case, on 1 May 2006, the First Defendant kept the said list on deposit in computer records which it held as Highway Authority for the County of Wiltshire at its offices at Trowbridge. The list was open to inspection by the public in terms which substantially accorded with the requirements of Section 36 (7) of the Highways Act 1980. The list was made in writing within the meaning of Section 320 of the Highways Act 1980 and Section 5 of and Schedule 1 to the Interpretation Act 1978.*

7. *On 1 May 2006 the material section of Rowden Lane was shown in the said list as a highway maintainable at public expense.*

8. *It is denied that the First Defendant must show the things stated in paragraph 11 (2) of the Re-Amended Particulars of Claim in order to establish that Section 67 (1) of the 2006 Act does not apply to extinguish the public right of way for mechanically propelled vehicles over the material section of Rowden Lane. In particular, for Section 67(2)(b) of the 2006 Act have the effect of saving the said public right of way, it is necessary only to establish that on 1 May 2006 –*

   (i) the section of Rowden Lane over which the said public right of way was then enjoyed was not shown in a definitive map and statement; and

   (ii) the said section of Rowden Lane was shown in a list kept by the First Defendant under Section 36 (6) of the Highways Act 1980.

   Each of those requirements was satisfied in the present case.

9. *It is immaterial to the determination of the present case whether or not a list required to be kept under Section 36(6) of the Highways Act 1980 should or should not (as is the judgment of the First Defendant) include publicly maintainable footpaths, bridleways, byways open to all traffic and restricted byways. The material facts for the determination of the present case are those stated in paragraphs 5-8 above.*

10. The First Defendant is satisfied that as at 1 May 2006 the said list was a list of streets within its area which were then maintainable at public expense and that the list was substantially in accordance with the requirements of Section 36 of the Highways Act 1980. Further and in any event, as at 1 May 2006, the said list correctly included the section of Rowden Lane over which there was the said public right of way for mechanically propelled vehicles."

1047. The Claimants filed a Reply (dated 15 May 2009) to the First Defendant's pleading of 4 May 2009. In it, the Claimants alleged that any section 36(6) list had to be in visible form on a page, that the First Defendant's list was of maintain**ed**, not maintain**able** streets, that it did not contain minor publicly maintainable highways, that it contained no wording identifying it as a section 36(6) list. Moreover, the Reply repeated and adopted the matters set out in paragraph 12 of its Re-Re-Amended Particulars of Claim, which I have set out fully above.

1048. Accordingly, the Claimants' contention is that, on 1 May 2006, there was not in existence any list within the meaning of Section 67 (2)(b) of the 2006 Act and/or of Section 36(6) of the 1980 Act. This argument was developed at greater length in the closing submissions of the parties.

<u>The written submissions on the issues</u>

1049. Whilst the burden of proving the exception created by Section 67(2)(b) rests upon the First Defendant, and not the Claimants, it is helpful at this stage to summarise the Claimants' contentions on this issue. The Claimants' submissions are contained in:

(a) Paragraphs 84-90 of the First Claimant's revised skeleton argument, dated 3 November 2008;

(b) The First Claimant's written submissions on what the First Defendant must establish in order to rely upon Section 67(2)(b) of any NERC 2006 (together with

draft new paragraph 12 for the Re-Re-Amended Particulars of Claim) dated 21 April 2009;

(c) The Claimants' first and second supplementary skeleton argument on Section 36(6) and NERC 2006, both dated 23 April 2009;

(d) Paragraphs 208 and 209 of the Claimants' first closing written submissions, dated 19 June 2009; and

(e) Footnotes 289-318 in the Claimants' written submissions, dated 1 September 2009, in reply to the First Defendant's closing submissions dated 21 July 2009; and

(f) Footnote 32 in the Claimants' Response (dated 18 September 2009) to the First Defendant's submissions (dated 11 September 2009) in response to Claimant's submissions in reply

1050. The First Defendant dealt with these issues in:

(a) Paragraphs 226-230 of Mr Burns undated skeleton argument in November 2008;

(b) First Defendant's skeleton argument for a telephone case management conference on 24 April 2009;

(c) Paragraphs 572-606 in the First Defendant's closing submissions dated 21 July 2009;

(d) In paragraph 30 of the First Defendant's submissions (dated 11 September 2009) in response to the Claimants' submissions in reply.

1051. The Claimants' core submission is that even if Rowden Lane were found to be a public vehicular highway, the public's right to use mechanically propelled vehicles on Rowden Lane ceased on 2 May 2006, because Rowden Lane was not on a 'list' in writing which conformed to Section 67(2)(b) NERC 2006 and 36(6) of the Highways Act 1980.

1052. Such was the importance of this issue to the parties that counsel asked me to resolve it, even if I reached the conclusion that there was no public vehicular highway on sections M-H-CG on Rowden Lane.

The scheme of Part 6 (Rights of Way) NERC 2006

1053. The use of mechanically propelled vehicles over public rights of way in the countryside was causing concern. Whilst nothing could be done to extinguish existing vehicular rights already recorded on a Definitive Map and Statement, NERC sought to address the issue by preventing any future vehicular rights being established by mere usage, and by eliminating any existing vehicular rights which had not been recorded on the Definitive Map and Statement.

1054. Therefore, one purpose of Part 6 NERC was to limit those vehicular rights which could be recorded on English and Welsh Local Authorities' Definitive Maps and Statements showing public rights of way. Section 66 halted the implied creation of rights of way (by user over 20 years) in the future for mechanically propelled vehicles. Instead, the public's rights of way for mechanically propelled vehicles could be created after 2 May 2006 only if they were expressly provided for in an enactment or if they related to a road intended to be used by mechanically propelled vehicles and constructed for that purpose under an enactment.

1055. Having limited the creation of any *new* implied rights of way for mechanically propelled vehicles, all *existing* public rights of way for mechanically propelled vehicles were extinguished on 2 May 2006 unless, immediately before that date, those particular rights were shown on a Definitive Map and Statement.

1056. This represented something of a legislative sledge hammer to crack a relatively small nut. Section 67 NERC extinguished *all* motor vehicular rights (as Mr Laurence said, even over the M4), unless those rights were recorded on a Definitive Map and

Statement. However, the real aim of this section was to extinguish vehicular rights over unrecorded Byways Open to All Traffic (BOAT).

1057. Section 66(1) of the Wildlife and Countryside Act 1981 defines a Byway Open To All Traffic as:

"A highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public *mainly for the purposes for which footpaths and bridleways are so used"***.** (My emphasis)

1058. A byway open to all traffic, a bridleway, a footpath and a restricted byway have all been referred to as 'minor highways' in the course of this trial. The scheme of the Act is to extinguish public rights of way for mechanically propelled vehicles over any highway, including the M4, unless it is recorded on a Definitive Map and Statement. However one would not record the M4 on a Definitive Map and Statement, because the M4 is *mainly* used for vehicular purposes. The Act therefore starts from the premise of extinguishing public rights of way for mechanically propelled vehicles over ways which would not be recorded on the Definitive Map and Statement in the first place.

1059. The only public vehicular rights which could have been so recorded were minor vehicular highways not *mainly* used for vehicular traffic (otherwise known as Byways Open To All Traffic). Since the ordinary road network (and the M4) *are mainly* used for vehicular traffic (and would therefore not be recorded on the Definitive Map and Statement), a curious paradox was created whereby <u>all</u> public vehicular rights were extinguished if they were not shown on the Definitive Map and Statement, *even though they would not be eligible to be so shown.*

1060. Having extinguished the vast majority of public vehicular rights on the national road network in s67(1), section 67(2) sets out the exceptions to this extinguishment, and puts the burden of establishing one of those exceptions on the person asserting the existence of public vehicular rights.

1061. Five exceptions were created by s67(2). Perhaps the most intriguing is s67(2)(e) which preserves a public right of way for mechanically propelled vehicles, if it was created by virtue of use by such vehicles during a period ending before 1 December 1930.

1062. Why was this exception created? It first became an offence to drive a mechanically propelled vehicle "off-road" on 1 December 1930. Therefore, the combined effect of this exception and s67(1) is to ensure that, in general, no past use by mechanically propelled vehicles may give rise to a public right of way for mechanically propelled vehicles, unless it was a lawful use before 1 December 1930.

"For this exception to apply, the right of way for mechanically propelled vehicles must have been created by inference of dedication at common law, through use by mechanically propelled vehicles before 1 December 1930…. This means that evidence of use before that date must be sufficient to show that a claim for dedication under the strict common law tests would have succeeded at that time."

See paragraphs 35 to 38 in Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways… Version 5 – May 2008,published by the Department for Environment, Food and Rural Affairs (DEFRA).

1063. This exception reversed the decision by the House of Lords in Bakewell Management Ltd v Brandwood [2004] 2 AC 519 which decided that a right of way might arise where mechanically propelled vehicles have used a route for the 20 year period, even where

that use was illegal. Section 67(2)(e) NERC has preserved from extinguishment only public vehicular rights, created by lawful vehicular use before 1 December 1930.

1064. The other exceptions to extinguishment should also be briefly considered.

1065. Section 67(2)(c) and (d) preserved from extinguishment an unrecorded public right of way for mechanically propelled vehicles in existence on 1 May 2006, if it was created expressly by an enactment, instrument or otherwise or if it was created by the construction of a road intended to be used by such vehicles under statutory powers. These two exceptions mirrored s66 NERC, which confined the creation, on or after 2 May 2006, of any new public rights of way for mechanically propelled vehicles to those created by an enactment, instrument or otherwise or constructed under statutory powers as a road intended to be used by such vehicles.

1066. The final two categories of unrecorded rights of way for mechanically propelled vehicles preserved by s67(2) from extinction on 2 May 2006 were ways:

(a) whose main lawful use by the public, during the period of 5 years ending with the commencement, was use for mechanically propelled vehicles; or

(b) not shown on a Definitive Map and Statement, but shown in a list required to be kept under Section 36(6) of the Highways Act 1980 (list of highways maintainable at public expense).

1067. There is an obvious difference between Section 67(2)(a) and (b).

1068. 67(2)(a) saves from extinguishment a way mainly used lawfully by mechanically propelled vehicles. This will preserve the ordinary road network, which would not usually qualify for entry on a Definitive Map and Statement because it was *mainly* used

by mechanically propelled vehicles. Although one might expect many such ways to have been created expressly by an enactment or instrument or constructed under statutory powers as a road, s67(2)(a) will also capture public vehicular highways created by implied dedication and acceptance still being used mainly and lawfully by vehicles in the 5 year period before 2 May 2006.

1069. Section 67(2)(b) does not contain any requirement as to how long a way had been used, or what its main use was. This subsection preserves from extinguishment unrecorded public rights of way for mechanically propelled vehicles *merely* by being present on a list required to be kept of highways maintainable at public expense.

1070. Whereas a way recorded on a Definitive Statement is a record of public rights (eg byway open to all traffic, bridleway, footpath etc), a s36(6) list is concerned with highways (which need not be highways over which exist rights of ways for mechanically propelled vehicles) which simply are maintainable at the public expense. Furthermore, the s36(6) list relates to *maintenance* of the highway (including footpaths), and not to a record of public rights of way for mechanically propelled vehicles.

1071. In my judgment, the exception in Section 67(2)(b) serves at least two very useful purposes. First, it avoids the question of whether the use of a highway was *mainly* vehicular, a difficult factual assessment, where the burden of proof lies on the person seeking to argue that the unrecorded right has not been extinguished. S67(2)(b) would therefore be useful in a case where the evidence was equivocal as to the main lawful use in the 5 years preceding 2 May 2006.

1072. This exception has little connection with the extinguishment of public rights of way for mechanically propelled vehicles over minor vehicular highways. However, its second

useful function is that it is a *public record*, albeit created for an entirely different statutory purpose. If the purpose of section 66 NERC 2006 is to extinguish all unrecorded public rights of way for mechanically propelled vehicles, which could have been shown on a Definitive Map and Statement available for public inspection, then an acceptable alternative was the presence of that same way in an accessible public record, albeit created for a different statutory purpose, namely a list of highways maintainable at public expense.

1073. This analysis of the role and purpose of ss66 and 67 NERC leads me to conclude that s67(2) NERC should not be given a restrictive interpretation. On the contrary, Parliament having extinguished certain public vehicular rights of way merely because they were not shown on a Definitive Map, on which many of them simply could not have been recorded, a purposive interpretation should be given to the exceptions, especially when the burden of proof is cast upon the person seeking to establish that a particular unrecorded vehicular right of way has not been extinguished. Moreover, it seems to me appropriate that, if NERC starts from the premise of abolishing such a wide category of vehicular highways (and beyond the mischief at which the Act was directed, namely unrecorded BOATs), the exceptions to this extinguishment should not, in the absence of clear and compelling language to the contrary, be construed narrowly.

1074. Nevertheless, given the blanket extinguishment of so many public motor vehicular rights of way, and the limited number of exceptions, it is important, to know with some degree of clarity, whether a vehicular right of way has been extinguished or not.

1075. Although decided on subsections 67(3) and (6) NERC, the decision of the Court of Appeal in R (on the application of Warden and Fellows of Winchester College and another) -v- Hampshire County Council cited above, emphasised the need for certainty

in this area. It is also a case on which Mr Laurence and Ms Clark place considerable reliance.

1076. Even if the NERC did extinguish a particular unrecorded public vehicular right of way, it did not leave stranded those who lived on that road or way. The rights of frontagers and visitors were protected by the conferment of a statutory easement under s67(5) NERC, if no other exception or extinguishment applied. This statutory easement would exist even if a frontager had no existing private easement, whether by prescription or otherwise.

Winchester College case

1077. This case did not involve any of the exceptions set out in section 67(2) of NERC 2006. Rather, it concerned subsections 67(3) and (6). These provisions save from extinguishment an existing public right of way for mechanically propelled vehicles if:

(a) before 20 January 2005, an application was made under Section 53(5) of the Wildliife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,

(b) before 2 May 2006, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application.

1078. Section 67(6) reads:

For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.

Paragraph 1 of Schedule 14 to that Act provided:

"An application shall be made in the prescribed form and shall be accompanied by:

(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and

(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

1079. The *Winchester College* case involved two distinct applications to upgrade to a byway open to all traffic (i) a bridleway (the Tilbury Application) and (ii) an existing RUPP (the Fosberry Application).

1080. In both cases the Local Authority upgraded the bridleway and the RUPP on the Definitive Map by modifying them so as to show them as Byways Open to All Traffic. The landowners sought judicial review of that decision. The two factual matters which lay at the heart of the judicial review were:-

(1) In relation to both applications, although the prescribed form had been completed the supporting evidence had only been listed, and copies of the maps, documents and statements had not accompanied the completed application form;

(2) In relation to the Fosberry Application alone, there were defects in the Certificate of Service purportedly given by Mr Fosberry, pursuant to paragraph 2(3) of Schedule 14 to the 1981 Act. This essentially required the applicant to file a certificate stating that notice of the application had been served on every owner and occupier of any land to which the application related. However, the Applicant merely fixed a notice on the site and sent photos of it by email to the authority. The case proceeded on the basis that the Authority must have known that the requirements of paragraph 2 had not been complied with, and was aware that

the notice had not been served on the registered owners, merely displayed on site. The local authority had power to order, but had not in fact ordered, that the notice could be served by addressing it to the owner of the land and affixing it to some conspicuous object or objects on the land.

1081. Mr Laurence, who acted for the landowner, argued in relation to both applications that no qualifying application had been made under Section 67(3) and (6), because the prescribed form had not been accompanied by the supporting documentation, maps and statements. At first instance, the judge had drawn a distinction between the actual application form itself and the supporting evidence, finding that only the former had to be present for an application to be made. In the Court of Appeal, it was held that, for the purposes of Section 67(3) of NERC, an application under Section 53(5) of the 1981 Act was not made in accordance with paragraph 1 of Schedule 14 to the 1981 Act, unless it satisfied all three requirements of paragraph 1, namely that it had been (i) made in the prescribed form (ii) accompanied by a map drawn to the prescribed scale and showing the way(s) to which the application related; and (iii) accompanied by copies of any documentary evidence (including statements of witnesses) which the applicant wished to adduce in support of the application.

1082. In summary, the Court of Appeal held that because no qualifying application had been made in accordance with section 67(6) NERC, the extinctive provisions of section 67(1) applied.

1083. In relation to the Fosberry application, Mr Laurence also argued that the Council had no jurisdiction to make a decision on his application under section 53(5), if any of the paragraph 2 requirements of schedule 14 had, to the Council's knowledge not been complied with. This was because, in such a case, the resulting paragraph 2(3) certificate would be invalid.

1084. At first instance, the judge held that the failure to comply with the statutory procedural requirements at paragraph 2(2) did not render the Council's decision on the applications invalid. The purpose of the requirement was to ensure that each landowner and occupier affected by an application was made aware of it. In fact, all landowners and occupiers affected by the Fosberry application had received notice of it in good time to enable them to consider the application and make representations to the Council in respect of it. Accordingly, the Council was entitled to waive the formal requirements and to determine the application as it did. This decision was upheld in the Court of Appeal.

1085. The reasoning of the Court of Appeal in relation to these two different outcomes is important. Indeed, Mr Laurence and Ms Clark rely upon the reasoning of the Court of Appeal on the 'qualifying application' point. Therefore, I must look closely at that decision.

1086. In essence, Mr Laurence submitted that just as there was no 'qualifying application' in the *Winchester College* case, there was in the instant case no 'qualifying section 36(6) list'.

1087. In relation to the 'qualifying application' point, Dyson LJ, with whom the other members of the court agreed, said the following:-

> **[37]** But the question that arises in relation to s 67(6) is not whether the council had jurisdiction to waive breaches of the requirements of para 1. It is whether the applications were made in accordance with para 1. For present purposes, the question of whether the applications were made in accordance with para 1 is only relevant to whether extinguishment by sub-s (1) is disapplied by sub-s (3). It has nothing to do with the wider question of whether, absent the 2006 Act, the council would be entitled to treat a non-compliant application as if it complied by waiving what the judge referred to as breaches of 'procedural' requirements.
>
> **[38]** In any event, I accept the submission of Mr Laurence that the purpose of s 67(6) is to define the moment at which a qualifying application is made because timing is critical for the purpose of determining whether sub-s (1) is disapplied. The moment identified by Parliament as the relevant moment is when an application is made in accordance with para 1. A purported subsequent waiver of the obligation to

accompany the application with copies of documentary evidence cannot operate to alter the date when the non-qualifying application was made or to treat such an application which was made on a particular date as having been made in accordance with para 1 when it was not. All a waiver can do, with effect from the date of the waiver, is to permit the decision-maker to treat itself as free to determine the application even though it was not made in accordance with para 1.

[39] The main emphasis of the judgment and Mr Mould's oral submissions was on the argument that the failures to accompany the applications with copies of the documentary evidence were breaches of procedural requirements which did not affect the council's jurisdiction to waive the breaches and determine the applications. For the reasons that I have given, this argument is irrelevant to the s 67(6) question.

[40] But at [37] the judge also said that 'an application does not fail to constitute an application' because it is not accompanied by a map and copies of the evidence that the applicant wishes to adduce. I take this to mean that an application which is invalid because it is not so accompanied is nevertheless made in accordance with para 1. That is to say, it is so made if it is made in the form set out in Sch 7 to the 1993 regulations or 'in a form substantially to the like effect' (reg 8(1)) and it refers to new evidence which is not irrelevant (see [43] of the judgment).

[41] In his skeleton argument, Mr Mould submits that an application under s 53(5) is *made* when it is made in the prescribed form and identifies the route to which the application relates. He says that it is immaterial to the question whether an application has been *made* that it is accompanied by copies of all, some or none of the documentary evidence relied on by the applicant as the evidential basis for the application.

[42] I cannot accept that an application which is not accompanied by a map (sub-para (a)) or by copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application (sub-para (b)) is made in accordance with para 1 of Sch 14. An application is not so made unless it is made in accordance with all three requirements of the paragraph. There is no warrant for saying that an application which is in accordance with the first requirement of the paragraph, but not the second or third, is made in accordance with the paragraph.

[43] Section 67(6) could have said that, for the purposes of s 67(3), an application under s 53(5) is made when it is made in the form prescribed by reg 8 of the 1993 regulations. Mr Mould's argument proceeds as if it did. The judge's approach is the same, although he adds that it is implicit in the function of s 53(5) that, in order to be made in accordance with para 1 of Sch 14, an application must also refer to new evidence that is not irrelevant.

[44] Mr Litton adopts a yet different approach. He submits that an application is made in accordance with para 1 if it is made in the prescribed form (or a form to substantially like effect) and the requirements of para 1(a) are satisfied. He says, however, that it is not necessary for the making of an application that the requirements of para 1(b) be met. He seeks to justify the different treatment of the two subparagraphs of para 1 by saying that this is required by a purposive construction. He submits that the requirement that the application should be accompanied by a map showing the public right of way to which the application relates is important: it is necessary to identify clearly the rights of way in respect of which the rights are being claimed. On the other hand, a strict insistence that an application should be accompanied by copy documents serves no real purpose and confers no obvious advantage over providing a list of the documents in support of

the claim, particularly where the authority is already in possession of, or has access to, such documents.

[45] I can see that the distinction Mr Litton seeks to draw may be relevant to the question whether a failure to comply with para 1 should be waived in the particular circumstances of the case. But I do not see how the distinction can be relevant to determining whether an application has been made in accordance with para 1. As a matter of construction, it seems to me that, in order to be made in accordance with the paragraph, an application must be accompanied by both a map and copies of documentary evidence or neither. It is impossible to spell out of para 1 that an application may be made in accordance with it if it is accompanied by one but not the other.

[46] In my judgment, as a matter of ordinary language an application is not made in accordance with para 1 unless it satisfies all three requirements of the paragraph. Moreover, there are two particular indications that an application is only made in accordance with para 1 of Sch 14 if it is made in accordance with all the requirements of the paragraph. First, para 1 is headed 'Form of applications'. The word 'form' in the heading is clearly not a reference only to the prescribed form. It is a summary of the content of the whole paragraph. It is a reference to how an application should be made. It must be made in a certain form (or a form substantially to the like effect with such insertions or omissions as are necessary in any particular case). It must also be accompanied by certain documents. The requirement to accompany is one of the rules as to how an application is to be made.

[47] Secondly, Sch 7 to the 1993 regulations shows that the prescribed form itself requires the route to be shown on the map 'accompanying this application' and the applicant to 'attach' copies of the following documentary evidence (including statements of witnesses) in support of the application. This language reflects the content of sub-paras (a) and (b) of para 1. It is artificial to say that, in order to be made in accordance with para 1, an application must be made in the prescribed form or a form to substantially like effect; but that it need not be accompanied by a map or have attached to it the documentary evidence and witness statements to be adduced even though these are referred to in the body of the prescribed form itself. The language of the form shows that an application is only made in accordance with para 1 if it is made in the prescribed form and is accompanied by a map and the documentary evidence and witness statements to be adduced.

[48] It is submitted by Mr Mould and Mr Litton that a strict interpretation of para 1 leads to absurdity and cannot have been intended by Parliament. For example, the application may list a number of documents, but by oversight may be accompanied by only some of them. The absurdity may be sharpened by the fact that the authority has the originals in its possession or has access to them.

[49] I acknowledge that matters of this kind are relevant to the question whether the consequences of the failure to make the application in accordance with para 1 are such that the failure can and should be waived in the particular circumstances of the case. But in relation to the specific s 67(6) question, I do not see how they are relevant to whether the application, when it was made, was made in accordance with para 1. In relation to that question, Parliament stipulated that an application is made when it is made in accordance with all the requirements of the paragraph.

[50] It is also necessary to consider the case where an application is not accompanied by the copy documents because the applicant is unable to obtain them. Mr Laurence concedes that it would be absurd to hold that an application is not made in accordance with para 1 where copy documents do not accompany it

because the applicant cannot obtain them. In order to avoid such absurdity, he submits that the obligation should be construed as being to accompany the application with copies of all the documents which the applicant wishes to adduce in support of his application, save for any which it is impossible for him to obtain. Such a construction is justified on the basis that 'unless the contrary intention appears, an enactment by implication imports the principle of the maxim *lex non cogit ad impossibilia* (law does not compel the impossible)': see Section 346 of *Bennion on Statutory Interpretation* (4th edn, 2002).

[51] I accept this submission. Mr Mould submits that this exception is not expressed in the legislation and is uncertain as to its extent and application. He says that it is unclear how, as regards any given application, the question whether it is impossible for the applicant to supply a copy of a document is to be judged and by whom such judgment is to be made. The court should be slow to adopt so arbitrary and uncertain an approach.

[52] But it is intrinsic to the maxim of construction that it arises by implication. Further, in my view the difficulties identified by Mr Mould are overstated. It should not be difficult for a surveying authority (or if necessary the court) to verify the explanation given by the applicant for his failure to copy a particular document. I do, however, acknowledge that to this limited extent there is an element of uncertainty in the application of para 1 if, for the purposes of s 67(3), it is strictly construed in the way that I have described.

[53] Uncertainty cannot be avoided on the approach advocated by Mr Mould and Mr Litton either. This is because, on that approach, the question whether an application is a qualifying application where there is a failure to comply with para 1(a) and/or (b) depends on whether the authority is entitled to waive the non-compliance. That in turn depends on an assessment of the consequences of the non-compliance for the authority in the particular circumstances of the case. The consequences for authority A which has copies of the missing documents are obviously different from the consequences for authority B which has no copies of the documents. Predicting the assessment is far from certain.

[54] In his analysis of the first issue, the judge did not address the effect of s 67(6) at all. Nor do the submissions of Mr Mould and Mr Litton. In my judgment, s 67(6) requires that, for the purposes of s 67(3), the application must be made strictly in accordance with para 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things (de minimis non curat lex). Indeed this principle is explicitly recognised in reg 8(1) of the 1993 regulations. Thus minor departures from para 1 will not invalidate an application. But neither the Tilbury application nor the Fosberry application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances, I consider that neither application was made in accordance with para 1.

[55] I wish to emphasise that I am not saying that, in a case which does not turn on the application of s 67(6), it is not open to authorities in any particular case to decide to waive a failure to comply with para 1(b) of Sch 14 and proceed to make a determination under para 3; or to treat a non-compliant application as the 'trigger' for a decision under s 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in sub-s (3).

...

Conclusion on the first issue

[59] It follows that neither the Tilbury application nor the Fosberry application was a qualifying application. The Tilbury application was made before 20 January 2005 and was not a s 53(5) application for the purposes of s 67(3)(a). The result is that for that reason his application did not save the rights for mechanically propelled vehicles over Chilcomb Bridleway 3 from extinguishment by s 67(1). The Fosberry application was made after 20 January 2005 and before the commencement date of 2 May 2006. If the rights for mechanically propelled vehicles to which that application was relevant were to be saved from extinguishment, this could only be if a determination was made before 2 May 2006 under para 3 of Sch 14 'in respect of [an application made under s 53(5)]': see s 67(3)(b). The reference to 'such an application' in s 67(3)(b) is to an application made under s 53(5) for the purposes of s 67(3)(a). For this reason, the relevant rights in that case (over Twyford RUPP 16) were not saved from extinguishment by s 67(1) either. I would, therefore, decide the first issue in favour of the claimants in respect of both applications.

1088. As far as the second issue in the *Winchester College* case was concerned (namely, the incorrect Certificate of Service) Dyson LJ said this:

[63] The council was required by para 3(1), as soon as reasonably practicable after receiving a certificate under para 2(3), to decide whether or not to make the order to which the application related. Mr Laurence submits that, because to the knowledge of the council, Mr Fosberry had provided his certificate under para 2(3) without complying with the requirements of para 2(2), the council's decision in this case could not be a determination under para 3. It follows that the requirements of s 67(3)(b) were not satisfied.

[64] The judge rejected this argument. He found that, when Mr Fosberry provided his certificate, the council must have known that the requirements of para 2 were not being complied with. It was aware that notice had not been served on Mr and Mrs Wood or Humphrey Farms Ltd and these were the registered owners. Mr Fosberry's certificate stated that notices had been displayed on the site, but no direction had been given by the council pursuant to para 2(2) that notice could be served by addressing it to the owner by the description 'owner' of the land and affixing it to some conspicuous object or objects on the land.

[65] The judge held at [58] that these failures to comply with the statutory procedural requirements of para 2(2) did not render the council's decision on the applications invalid. The purpose of the requirements is to ensure that each landowner and occupier affected by an application is made aware of it. All landowners and occupiers affected by the Fosberry application received notice of it in good time to enable them to consider the application and make representations to the council in respect of it. The council was entitled to waive the formal requirements and to determine the application as it did.

[66] Mr Laurence submits that the council had no jurisdiction to make a decision pursuant to an application made under s 53(5) if any of the para 2 requirements had to its knowledge not been complied with. That is because in any such case, the resulting para 2(3) certificate would be invalid.

[67] In my view, the judge was right on this issue. As Mr Mould submits, the correct approach is to apply ordinary public law principles. In so far as there is shown to have been a failure to comply with the procedural requirements of para 2, it is necessary to ask whether and, if so, to what extent any substantial prejudice has been suffered as a result. On the facts of this case, the council was entitled to waive the failure to comply with the procedural requirements.

1089. Dyson LJ then summarised the different outcomes on the appeal in the following way:

[68] In my view, the difference between the failure to comply with para 1 (the first issue) and the failure to comply with para 2 (the second issue) is fundamental. As I have explained, in the first case the effect of s 67(6) was that s 67(3)(a) was not engaged and s 67(1) applied. It was irrelevant whether the failure was a breach of a procedural requirement which could be waived. On the other hand, in the second case s 67(6) is not in play. The only question here is whether the determination was a determination under para 3. On the face of it, the council unquestionably decided to make a determination. It purported to be a determination in respect of the Fosberry application: see [26]–[27], above. It must follow that it was purportedly a determination under para 3 (rather than a free-standing decision pursuant to s 53(2)). Moreover, the determination was made following receipt of what purported to be a certificate under para 2(3).

[69] It is true that the certificate was not properly issued, but it does not follow that the consequent determination was invalid. In *R v Soneji* [2005] UKHL 49 at [23], [2005] 4 All ER 321 at [23], [2006] 1 AC 340, having reviewed the authorities on the distinction between mandatory and directory requirements, Lord Steyn said: 'the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.'

[70] Adopting that approach, I conclude that Parliament cannot fairly be taken to have intended that, if a para 2(2) certificate is wrongly issued, it must follow that a determination on which it is based is invalid. The facts of the present case show that the better approach is to examine the consequences of the defect in the certificate. If they are serious and the defective certificate has caused real prejudice, then it may be that the determination on which it is based should be declared to be invalid. But in my judgment, on the facts of this case the judge reached the correct conclusion on this issue and for the right reasons.

Observations on the *Winchester College* case.

1090. Whilst the Court of Appeal expressly recognised that the timing was critical, when it came to determining whether section 67(1) NERC was disapplied, plainly the decision itself turned upon the interaction between subsections 67(3) and 67(6) NERC. In summary, because no qualifying application was made before any of the dates

specified in section 67(3) NERC, any public right of way for mechanically propelled vehicles was extinguished on 2 May 2006.

1091. Even making the fullest allowance for the need for clarity and certainty in determining whether or not a public right of way for mechanically propelled vehicles was extinguished on 2 May 2006, I see little scope for extending the argument based on a non 'qualifying' application in the *Winchester* case to a non 'qualifying' section 36(6) list for the purposes of section 67 NERC in the case which I have to decide.

1092. As the Court of Appeal itself indicated, the *Winchester* case was decided upon a specific statutory provision, the wording of which was expressed in clear and ordinary language. Moreover, it was concerned with section 67(3), and not section 67(2) with which I am concerned. Moreover, section 67(3) contained transitional provisions relating to extant applications to amend the Definitive Map and Statement itself, on which the rights of way were to be recorded.

1093. In my judgment, *Winchester* is concerned with a very specific question of statutory construction, namely *when* an application was made. Either a valid application was made by a relevant time or it was not. Furthermore, the nature of the application was one which was integral to the recording of a public right of way for mechanically propelled vehicles on the Definitive Map and Statement itself. By contrast, section 67(2)(b) (… not shown in a definitive map and statement but shown in a list required to be kept under section 36(6) of the Highways Act 1980), proceeds on the premise that the way is unrecorded on the Definitive Map as a public right of way for mechanically propelled vehicles.

1094. A section 36(6) list can contain details of all forms of highways maintainable at public expense. It is not confined to rights of way for mechanically propelled vehicles.

Moreover, the clear purpose of such a list is the *maintenance of,* not the *recording of* vehicular rights over, highways which have to be maintained out of the public purse.

1095. Accordingly, it is difficult to see why a list of a broad category of highways (and not confined to rights of way for mechanically propelled vehicles) compiled for the purposes of maintenance liability, should provide a record relevant for the prevention of extinguishment of a right of way for mechanically propelled vehicles.

1096. It seems to me that the characteristic of a section 36(6) list, most relevant to preventing the extinguishment of vehicular highway rights, is the fact that it is a public document open to inspection. It is its status as a public document, required to be kept by statute albeit for different purposes, open to inspection by the public, which is its important characteristic.

1097. In short, a record of a public right of way for mechanically propelled vehicles contained within a document, compiled for the purposes of identifying all highways which are publicly maintainable, is an adequate alternative form of public record to a Definitive Map and Statement, for the purposes of saving that right of way from extinguishment. A Definitive Map and Statement constitute a register of public rights of way, whereas a Section 36(6) list is a list of all types of highway maintainable at the public expense, yet the latter is deemed to be a sufficient public record to keep alive the relevant public right of way.

1098. The decision of the Court of Appeal in the *Winchester College* case rested upon the express wording of Section 67(6). This is further exemplified by its conclusion on the Fosberry application. Even though the certificate which had been filed was prima facie incorrect and invalid, the Court of Appeal recognised that it was nevertheless open to the Council to waive this procedural requirement.

1099. If the issue of timing, clarity or certainty were so critical, and if one had to know whether a determination was valid or not, one might have expected, as Mr Laurence had argued, that no valid determination could be made when there had been an invalid certificate.

1100. In my judgment, the manner in which the Court of Appeal disposed of these two issues, with their differing outcomes, indicates that, in the absence of clear language compelling the court to do so, the question is not the clear cut one of 'Was there a *qualifying* Section 36(6) list for the purposes of Section 67(2)(b) NERC 2006 on 1 May 2006?' The decision maker (ie the Council in the *Winchester* case) or the list maker (ie the Highway Authority as in Section 36(6)) may use an element of judgment in its task.

1101. Accordingly, I do not regard *Winchester* as underpinning a principle of wider applicability, namely that unless there is strict compliance with an exception contained in Section 67(2) then the public right of way for mechanically propelled vehicles in question is extinguished. It is necessary to look at the terms of each exception in the context of the underlying purpose of the legislation.

1102. Leaving aside subsection 67(2)(e) (concerned with vehicular use before 1 December 1930) subsections 67(2)(a) to (d) have in common the theme of easily available evidence, namely that, even though the right of way for mechanically propelled vehicles is not shown in a Definitive Map and Statement, there is either a public statute /document or recent lawful usage which saves from extinction through s67(1) a public right of way for mechanically propelled vehicles in existence on 1 May 2006.

<u>The Claimants' submissions on section 67(2)(b) NERC in summary</u>

1103. According to the Claimants' case, in order to come within the exception provided by section 67(2)(b) NERC, a qualifying section 36(6) list must have the following characteristics, namely it must :

(a) be in writing;

(b) be physically in existence on a piece of paper or other physical medium on 1 May 2006. This follows from the statutory requirement that such a list should be made, kept corrected up to date and available for inspection. These words connote a list in actual existence in a physical form;

(c) not require generation or bringing into existence by the press of a button or other device;

(d) comprise only one list, not several;

(e) contain minor highways (e.g. footpaths, by ways open to all traffic, restricted byways) maintainable at public expense, in addition to major vehicular highways maintainable at the public expense;

(f) not contain highways which are not maintainable at public expense

(g) be a list of publicly maintainable, not publicly maintained highways

(h) identify itself as the section 36(6) Highways Act list and

(i) be a compliant list, in the sense that it must contain all relevant categories of publicly maintainable highway, even if some names have been missed off by error, It cannot be one which omits a whole category (e.g. minor highways) deliberately.

Minor Highways

1104. Mr Kuipers said in evidence that minor highways did not feature on the First Defendant's Exor database. In the light of this admission, Mr Laurence argued that

there was a deliberate omission of a specified category of publicly maintainable highway which should have featured on the s36(6) list with the result that it was not a qualifying s36(6) list. He contended that this was a different situation from an otherwise compliant s36(6) list which needed correction.

1105. At this stage, it is important not to overlook the fact that, even on the Claimants' case, Rowden Lane, between points M-H-CG, is a bridleway maintainable at public expense. The First Defendant's primary case is that Rowden Lane is a publicly maintainable highway because it is a pre-1835 public vehicular highway, albeit never formally adopted. Accordingly, on both cases, Rowden Lane should feature on the First Defendant's section 36(6) list of highways maintainable at public expense.

1106. Indeed, Rowden Lane does, and on 1 May 2006 did, feature in the Exor database, on the website and in the Burgundy Books. I am satisfied that if a member of the public visited the First Defendant's offices in Trowbridge on 1 May 2006 and asked whether Rowden Lane was a street or highway maintainable at public expense, she or he would have been told that it was not only maintainable at public expense but that it was maintained at public expense. Rowden Lane was therefore shown on *some* list of highways which the First Defendant considered it was legally obliged to maintain as at 1 May 2006.

1107. The issues which I have to decide relate to what are the characteristics of a section 36(6) list, for the purposes of section 67 NERC, and whether any of the First Defendant's candidates possessed those characteristics.

1108. In summary, the Claimants say the First Defendant's Exor list did not possess the necessary characteristics, whereas the First Defendant alleges that the computerised Exor database constituted its section 36(6) list, even if it were a defective one, and Rowden Lane was on it.

1109. Does a section 36(6) list ("the council of every county shall cause to be made and shall keep corrected up to date a list of the streets within their area which are highways maintainable at the public expense") have to contain minor highways maintainable at public expense?

1110. Section 329 of the Highways Act 1980 provides that, except where the context otherwise, "street" has the same meaning as in Part III of the New Roads and Street Works Act 1991.

1111. Section 48 of that latter Act reads

"(1) In this Part "street" means the whole or any part of any of the following, irrespective of whether it is a thoroughfare –

(a) any highway, road, lane, footway, alley or passage,

(b) any square or court; and

(c) any land laid out as a way whether it is for the time being formed as a way or not.

…

(2)The provisions of this part apply to a street which is not a maintainable highway subject to such exceptions and adaptations as may be prescribed".

1112. The Claimants' contention is that all highways, major and minor, are within the definition of "street". It follows therefore that a section 36(6) list must include publicly maintainable minor highways (eg bridleways, restricted byways, footpaths etc), and so a s36(6) list which deliberately omitted minor highways was not a qualifying s 36(6) list. Minor highways should be recorded both on the Definitive Map and Statement and (if they were publicly maintainable) on a s 36(6) list.

1113. Mr Laurence developed his submission on the minor highways point by drawing my attention to a publication called *Rights of Way - A Guide to Law and Practice*, by Riddall and Trevelyan, 4th Edition, where, at page 158, the learned authors say the following:

Some authorities have taken the view that the list of streets and the definitive map are mutually exclusive: that a way should not be included in both. This view is mistaken. The definitive map records only the public's rights; the list of streets records only the highway authority's maintenance liability. Since most rights of way shown on definitive maps are also maintainable at public expense (see Chapter 10), it follows that there is likely to be a considerable overlap between the contents of the two documents. But the entries on the two will not be identical. For example, a highway that satisfies the description of byway open to all traffic but which is not publicly maintainable will appear on the definitive map but not on the list of streets; a carriageway that is publicly maintainable and is used principally by vehicular traffic will appear in the list of streets but not on the definitive map.

1114. Accordingly, Mr Laurence submitted that there was no mutual exclusivity between a Definitive Map and Statement in a s36(6) (list) and, because the Exor database did not contain details of minor highways maintainable at public expense, it was deficient and did not preserve any public right of way for mechanically propelled vehicles over Rowden Lane under section 67(2)(b) NERC.

1115. The First Defendant's answer to the minor highways point was that section 36(6) did not require *all* publicly maintainable highways to be shown. The definition of "street" is apt to cover minor highways, but not every publicly maintainable minor highway was a street within s36(6). It was a matter of judgment whether or not any particular highway is a street maintainable at public expense. If an error had been made, it was argued that an Exor list which omitted highways, or was otherwise out of date, was still a s

36(6) list. Since s 36(6) contains the power to correct an omission, even the omission of the category of minor highways, does not prevent the Exor database being a s 36(6) list, and, at 1 May 2006, the First Defendant had a list with over 11,000 sections of publicly maintainable highway on it marked with the letter "A".

1116. In my judgment, unless the context indicates to the contrary, a list of the streets which are highways maintainable at the public expense should include minor highways. This is because the purpose of such a list is to identify those highways which are maintainable out of the public purse, and I cannot see why there should be a difference between publicly maintainable major and minor highways in this context.

1117. It is has been suggested on behalf of the First Defendant that Mr Laurence's 'minor highways' argument represents a collateral attack which should have been dealt with by way of an application for judicial review. Such an application is manifestly out of time. Mr Laurence's answer to this contention, and I think the correct answer, is that since the burden of proof is upon the First Defendant to establish that public vehicular rights were not extinguished (and the argument could only be run on and after 2 May 2006) it is for the First Defendant to make out its exception. Accordingly, there is no impermissible collateral attack by the Claimants.

1118. If the First Defendant's Exor database did not contain details of minor highways, is this fatal to the First Defendant's case?

1119. In my judgment, the omission of minor highways from the First Defendant's Exor database does not, of itself, prevent it from establishing Section 67(2)(b) exception for the following reasons:

1. The Act which has to be construed is NERC. One question for consideration is whether the Exor database constitutes a section 36(6) list *for the purposes of section 67(2)(b) NERC 2006*.

2. Section 36(6) itself envisages that the list can be corrected. I see no reason why the power of correction only extends to the occasional highway, as opposed to a complete category which has been omitted. In my judgment, all omissions from the list can be corrected. The question is whether that which falls to be corrected can in fact properly be called a section 36(6) list for the purposes of the 2006 Act.

3. Unlike the *Winchester College* case, there is no clear statutory language which drives me to the conclusion that a list, which omits minor highways, fails to qualify as a section 36(6) list. It does not seem to me that the exception should be construed narrowly.

4. Section 67 NERC is concerned with public vehicular rights of way not recorded on the Definitive Map and Statement. In other words, one only gets to the exceptions in section 67(2) if a relevant right of way is not so recorded. In those circumstances, I do not feel compelled by the language of section 67 NERC to strike down a section 36(6) list because it omits minor highways *maintainable at the public expense*, when one only has to consider the exception at all if the way is not *recorded on a Definitive Map.* I appreciate that there is scope for overlap between the Definitive Map and Statement and a section 36(6) list. I also accept that they are not mutually exclusive in principle.

However, where the starting point is that *any* public vehicular highway not recorded on the Definitive Map is extinguished, it seems wrong to construe an exception based upon the entry of a highway on a section 36(6) list (compiled for a completely different statutory purpose) so strictly as to render it inapplicable merely because minor highways are omitted from that list. Whilst I accept this is not in logic a complete answer, it certainly fortifies my view that, as a matter of construction, there is nothing in section 67 which requires me to give to a section 36(6) list the narrow interpretation advanced by Mr Laurence.

5. It seems to me that a Highway Authority has to exercise some judgment in deciding whether or not a particular way is a highway maintainable at public expense, especially in the absence of a formal adoption. There is room for judgment to be exercised in the compilation of a section 36(6) list, just as there was judgment to be formed about waiving procedural requirements in the *Winchester College* case. Again, the two cases are not exactly comparable, but the need to exercise some judgment in the compilation of the list militates, in my view, against too narrow an interpretation of the exception. A section 36(6) list is concerned with maintenance of a much wider category of highway than a right of way for mechanically propelled vehicles.

In my judgment, it is the existence of a *publicly available list* of highways which is the reason for the exception. The Act sought to eliminate unrecorded byways open to all traffic, but saved from extinction a way which was otherwise recorded on a public document required by statute to be kept. Because of the relative mismatch of purpose between the object to be achieved by NERC and the specific section 36(6) exception, I am inclined very strongly against a narrow interpretation of the exception, having regard to the purpose of the legislation and the purpose for which the section 36(6) list was required to be kept.

1120. Finally, before leaving this topic I should address one submission made by the First Defendant which I believe lacks substance. The First Defendant argued that if Mr Lawrence's submission were correct, it would have the effect of extinguishing public vehicular rights of way over the major road network in Wiltshire. I do not think that this is correct. The major road network would be preserved from extinguishment by its main and lawful use over the preceding five years by mechanically propelled vehicles. Alternatively, such roads would usually have been created under an express enactment. Therefore, Mr Laurence's interpretation of the exception contained in section 67(2)(b) would not have had this widespread effect.

1121. That is not to say that the exception in section 67(2)(b) was unimportant. As I have already indicated, this exception obviated the need to argue about what the main and lawful use of a particular way was over the preceding five years. It encompassed the equivocal cases, as well as the little used minor and unclassified roads of antiquity which had not been created by any statute or had not been formally adopted.

1122. Accordingly, whilst I do not regard any failure by the First Defendant to make out its exception under section 67(2)(b) as threatening the survival of the major road network in Wiltshire, I do not accept that the exception applies only to a very limited number of cases of Byways Open To All Traffic.

1123. The First Defendant has satisfied me, on the balance of probabilities, that the omission of the category of minor highways from its s36(6) list does not of itself prevent it from discharging the burden of proof on it of establishing the exception.

1124. On the contrary, I am satisfied, on the balance of probabilities, that not only was the Defendant's Exor database *capable* of constituting a section 36(6) list but also, subject to the arguments with which I later deal, it *did in fact* constitute such a list for the purposes of Section 67 NERC 2006, notwithstanding the omission from it of the category of minor highways.

1125. For the sake of completeness, I should add that I accept Mr Kuipers' evidence that on the only occasion in 22 years service he could remember of the First Defendant being asked for a complete list of the highways it maintained (a request by Kennet District Council), the First Defendant supplied not only the Exor database list but also the Definitive Map and Statement for the area concerned.

Written list

1126. All parties accept that a section 36(6) list must be in writing.

1127. Section 320 of the Highways Act 1980 provides:

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

1128. Section 5 of, and Schedule 1 to, the Interpretation Act 1978 define "writing", unless a contrary intention appears, as follows:

> "Writing" includes typing, printing, lithography, photography and all other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly."

1129. This is not an exhaustive definition of what "writing" means.

1130. The Claimants have argued that the examples in the definition have in common a physical and tangible end product on which the words are visible. Therefore, a list on a computer database which had to be opened to be visible on a computer screen, or printed off in hard copy, did not physically exist until generated, and so could not be "made", "kept", "deposited" or "corrected up to date". Can a list which has to be generated by, or retrieved from, a computer be said to exist in writing before such generation?

1131. NERC 2006 is a modern statute to be construed against a background which includes the existence of modern technology. The Exor database was only compiled in 1994, long after the enactment of the Highways Act 1980 (and its earlier equivalent) and the Interpretation Act 1978. In any event, I would regard words and data recorded in a computer language on a computer hard-drive as being written. They are written in a computer language. Moreover, I would regard words and numbers retained in

computer language on a computer database as a "mode of representing or reproducing words in a visible form". I see nothing in the statutory definition which precludes an intermediate process producing the image or document containing the words.

1132. It would be a strange paradox if a typed or manuscript list of streets, written in a language or code which might have to be interpreted using a dictionary or other guide, met the statutory definition. If documents, for example company records, were kept on a microfiche, they would be in physical form and constitute a photograph containing words in visible form. However such a microfiche would not be legible without the intervention of a viewer to magnify the content of the microfiche. Yet, no doubt, this would still be a physical and existing list in writing.

1133. I find as a fact, on the balance of probabilities, and hold as a matter of law, that the First Defendant's Exor database of highways maintained at public expense, which can be rendered visible to the public either by printing off a copy of it or by displaying it on a computer screen, constitutes a list in writing for the purposes of the Interpretation Act 1978, the Highways Act 1980 and section 67 NERC 2006.

1134. Such a computer database was made and kept as well as corrected up to date by the First Defendant, at its office in Trowbridge, where members of the public are and were able to inspect the list either on a computer screen or by receiving a print off. Usually, a member of the public wants to know whether a named street is maintained or maintainable at public expense or not. An enquiry at the First Defendant's offices on 1 May 2006 would have found Rowden Lane on the list of highways maintained at public expense.

Must a qualifying section 36(6) list be a self contained list which identified itself as a section 36(6) list without the need for further enquiry?

1135. It is the responsibility of each Authority to decide how best to make and keep corrected up to date its own s36(6) list. Each case must be decided on its own facts but, in my judgment, there is no need to introduce any prescriptive rules about the format in which any such list is to be kept.

1136. I find as a fact, on the balance of probabilities, and hold as a matter of law that the First Defendant's Exor database is not precluded from being a qualifying section 36(6) list merely because it does not contain a statement identifying itself as such, or requires some further explanation from a council official to address the enquirer's query. A section 36(6) list is designed to serve a practical purpose, namely whether a particular section of highway was to be maintained out of a private or public purse. In my view, the First Defendant's Exor database, with information retrievable at the press of one or two buttons, constitutes, on the balance of probabilities, a s36(6) list, even if it requires the intervention of a council employee to explain how the database works.

1137. In my judgment, the First Defendant's Exor database (containing over 11,000 sections of road maintained by the Highway Authority, with start and finish co-ordinates as exemplified by the extract at JK1) clearly constitutes such a list without the need for any further label.

Maintainable not maintained

1138. A 199 page printout, produced by Mr Kuipers on 13 November 2008 (trial bundle 10, pages 237/238 and following), represents a complete list of all roads maintained at public expense within Wiltshire, as at Tuesday 13 November 2008. This was produced from a report run on Mr Kuipers' computer, using the data held within the Exor database. All the streets on this printout had the status "A". This means 'maintained by the local authority'. At page 10/239 is a list of 19 roads, all bearing the

designation “U”, namely unadopted. They too are shown on the database, but which are not maintained at public expense. The 199 page list is headed “List of streets maintained at public expense”.

1139. Leaving aside the minor highways argument, with which I have dealt above, Mr Laurence submitted that a list of streets maintain**ed** at public expense is not a list of streets maintain**able** at public expense, and so not a qualifying s36(6) list. The Exor database contains both the 11,000 “A” roads and the 19 rogue or “U” roads.

1140. The Claimants argued that the fact that the Highway Authority has in fact maintained certain streets does not mean that they are maintainable at public expense. Mr Kuipers’ evidence, which I accept, is that when printing off a list of highways maintainable at public expense he would sort the lists so as to produce only “A” streets or roads and would exclude the 19 “U” (unadopted roads). The Claimants’ contention is that a single list which contains “A and “U” roads and which contains streets which are maintained in fact at public expense, whether or not they are legally obliged to do so, is not a list of highways maintainable at public expense for the purposes of section 36(6) of the Highways Act 1980 and section 67 NERC 2006.

1141. I do not agree with this submission.

1142. The “U” roads appear on the list because they are roads in the course of construction or because the highway authorities are expecting soon to adopt them. The fact that these 19 “U” roads appear on the list does not rob the list of its essential quality as the First Defendant’s list of highways maintainable at public expense. 19 such “U” roads in a list of over 11,000 “A” roads is, in my judgment, de minimis and irrelevant. In any event, even if it were impermissible to show the “U” roads on the same list as the “A” roads, that is a simple matter of correcting an error which section 36(6) envisaged could be done.

1143. Mr Kuipers' evidence, which I accept, was that every street bearing the "A" designation was a street which was in fact inspected, maintained and repaired by the First Defendant. It is important to remember that NERC was concerned with the extinguishment of unrecorded public rights of way for mechanically propelled vehicles. It has nothing to do with the liability to maintain highways out of the public purse.

1144. It seems to me that the question which I have to ask is whether, in fact, the Exor database purported to be the First Defendant's section 36(6) list. As the heading itself indicated ("List of streets maintained at public expense") it is plainly referring, in substance, to section 36(6) of the Highways Act. The only departure is the use of the word maintained instead of maintainable.

1145. As a matter of common sense, it seems improbable that a Highway Authority would use public money to maintain highways it has no obligation to maintain. In my judgment, 'maintained' and 'maintainable' are, for the purposes of the First Defendant's Exor database, substantially synonymous terms. However, I accept that there may be in Wiltshire public highways which were dedicated and accepted after 1835 but which were not the subject of any formal statutory process, and so not maintainable at public expense. Nevertheless, having regard to the mischief at which section 67 NERC 2006 is directed, I am of the view that, on the facts of this case, the difference between 'maintainable' and 'maintained' is an insignificant one.

1146. The fact remains that the highways created post 1835, otherwise than through a process of formal adoption or some other statutory procedure making them maintainable by the public purse, are either insignificant in number as a matter of common sense or, in any event, do not in any way undermine my confidence in the view, reached on the balance of probabilities, that the Exor database was the First Defendant's section 36(6) list in fact. It contained a list of the roads for which the First Defendant had accepted liability to maintain. To that extent, in any event, they were maintainable at public expense.

1147. Even if I had found that Rowden Lane only became a public vehicular highway in or after 1835 (and therefore not maintainable at public expense, because it has never been formally adopted), I would still have held that it was not extinguished by s67 NERC. I would have held that the fact that Rowden Lane was actually *recorded* on an otherwise compliant s36(6) list on 2 May 2006 (even though, on this assumption, it was not publicly maintainable and should not have been on the list) was sufficient to preserve it, having regard to the mischief at which sections 66 and 67 NERC were directed and the power to correct the list under s 36(6).

Can there be more than one section 36(6) list?

1148. I agree with Mr Laurence that the Highway Authority can only have one qualifying definitive and master section 36(6) list at any one time, having regard to the requirements of section 36(6) and (7) Highways Act 1980. Not only does the statute referred to "a" list, but the requirement that it should be made, kept corrected up to date, deposited and available for inspection fortifies this conclusion. This does not, however, preclude multiple originals of the list if in identical form to the master list.

1149. The First Defendant's case is that the Exor database was in fact its s 36(6) list. I agree with that view.

1150. I find, on the balance of probabilities, that the computerised Exor database was in writing, was the First Defendant's list of highways maintainable at public expense, notwithstanding (i) that it had to be generated by the computer to be visible (ii) that it did not describe itself on its face as a section 36(6) list and (iii) its omission of minor highways. Moreover, I am satisfied that such a list was in existence on 1 May 2006, even if no physical printout of the contents in the list had been made.

1151. Moreover, I am satisfied on the balance of probabilities that, on 1 May 2006, sections M – H - CG of Rowden Lane were shown in a list of highways maintainable at public

expense, which the First Defendant kept, as required by section 36(6) of the Highways Act 1980 and for the purposes of section 67 NERC 2006.

Other candidates for the section 36(6) list

1152. On 4 May 2009, the First Defendant pleaded reliance only on the Exor database as its qualifying s36(6) list. However, during the trial, and before the pleading of 4 May 2009, the Claimants and the Defendants had raised in court other potential candidates for a qualifying list. However, I received no closing submissions on the other candidates, since the First Defendant had expressly relied only on the Exor database before those written closing submissions were due. Nevertheless, even in the absence of those submissions and any further evidence which the parties might have called on those other candidates, it may be of assistance if I give my necessarily provisional views on those other candidates.

1153. Of course, the core information on the Exor database was reproduced on the First Defendant's website. Many, if not all, of the Claimants objections to the Exor database applied to the website list. The website contains details only of the "A" roads and does not contain details of minor highways. For all the reasons which I have advanced in relation to the Exor database, my provisional view (subject to (i) any amendment to allege the other candidates, (ii) any further evidence and (iii) further submissions) would be to regard the website as also constituting a qualifying section 36(6) list, notwithstanding the road adoption disclaimer appearing on the website.

1154. The Burgundy Books were kept up to date, as well as the information on the Exor database and website. Could the Burgundy Books also qualify as a s36(6) list?

1155. Mr Laurence's objections to the Burgundy Books, as a qualifying section 36(6) list, included the following:

(a) A book of coloured maps is not ‘a list’ in writing of streets maintainable at public expense;

(b) The maps themselves do not tell you which of the depicted ways are intended to be included within a section 36(6) list;

(c) The legend attached to the plans does not enable a distinction to be drawn between whether a street is maintained or maintainable;

(d) The key entitled “Key to large scale highway records” does not identify itself as a section 36(6) list, and further information would need to be given, namely that it is only those roads coloured yellow and orange which are streets legally maintainable at public expense;

(e) On the maps, the legal status of the ways depicted is unknown.

(f) Although the maps within the Burgundy Books contain both major and minor ways, there is no clarification as to which ones are maintainable at public expense.

1156. It can be seen that one difference between the Burgundy Books and the Exor database/ website is that minor highways do appear on the maps in the Burgundy Books, but it is only the ways coloured orange and yellow which are maintainable at public expense.

1157. In my judgment, the Burgundy Books also purport to be a list of highways maintainable at public expense. They contain both major and minor highways, and their purpose is self evident. The Burgundy Books may need correction and the legend may need clarification, but, subject to the qualifications I have expressed above, my provisional view would be to regard the Burgundy Books also as constituting a qualifying s 36(6) list.

Conclusion on NERC 2006

1158. The First Defendant has satisfied me, on the balance of probabilities, that Rowden Lane was, on 1 May 2006, shown in a list required to be kept under section 36(6) of the Highways Act 1980 (list of highways maintainable at public expense). This list comprised its Exor database. I would also have been minded, albeit provisionally only, to conclude that the details available on the website and the Burgundy Books themselves would independently have constituted a qualifying section 36(6) list for the purposes of making out the exception in section 67(2)(b) NERC 2006.

1159. Accordingly, the First Defendant has satisfied me, on the balance of probabilities, that it has made out the exception in section 67(2)(b) NERC 2006. As a result, section 67(1) of that Act did not extinguish the public right of way for mechanically propelled vehicles, which I find always to have existed, along the relevant sections of Rowden Lane.

Chapter 23: Summary of Findings of Fact

1160. I make the following findings, on the balance of probabilities:

1. Rowden Lane has been dedicated as a public vehicular highway in accordance with common law, as well as under section 31 of the Highways Act 1980.

2. Rowden Lane and Gypsy Lane were not merely the historical private drives to Rowden Manor.

3. Plans and maps of 1773, 1792, 1828, 1829, 1848, 1862, 1867, 1890 and 1910 show a vehicular through route from the Bath Road to Rowden Lane, along a track of unenclosed fields, to Gypsy Lane and back on to the Bath Road. They do not show either Rowden Lane or Gypsy Lane as a cul de sac.

4. While there is an absence of any depiction of a vehicular track cutting the corner at point K on any map large enough to show this detail, point K has always been in an open field which would have provided an ample turning area for carts and carriages and, if the field were used in that way, the wheel marks may not have been susceptible to formal mapping.

5. The old maps are, at least, consistent with, but in fact demonstrate, a usable vehicular through route having existed along Rowden Lane and Gypsy Lane before 1910.

6. There existed public attractions at the end of Section B sufficient to attract the public there from the Bath Road. Rowden Lane was used by members of the public. This included users such as wood cutters, footballers and persons going to football matches. Sufficient members of the general public made trespassory user of Sections A and B sufficient to give rise to a common law presumption of dedication as a public highway.

7. On the 1848 Tithe Award Map, the sienna colouring on sections A and B shows a vehicular road which is significant and similar physically to the main public vehicular network, although the soil is declared to be held by private owners who were not made subject to a rent charge.

8. The shaded lines on the 1900 Ordnance Survey Map, marking sections A and B of Rowden Lane, are in the same form as the shaded lines marking the Bath Road on the same map. The shaded lines indicate that Sections A and B were metalled and well maintained at the time of the survey for that map.

9. The 1910 Finance Map shows Section A and B of Rowden Lane as an untaxed public road comprising a full vehicular highway.

10. In maps showing the requisite level of detail, Rowden Lane is consistently shown as occupying a curtilage separate from the surrounding land in private ownership. The verges, whether or not owned by the adjoining legal titles, are part of the land used as road.

11. After (i) the 1919 conveyance by the Rich Trustees to General Palmer and (ii) the 1927 conveyance from Baron Glanely to Herbert Holt, the legal title of Sections A or B of Rowden Lane are not shown in any 20th Century plan or map as being owned by any identifiable person.

12. No land owner has, in his capacity as owner of Rowden Lane, granted an express easement over Sections A or B1 of Rowden Lane.

13. On 6 April 1937, Chippenham Council declared the whole of Sections A and B of Rowden Lane to be a new street.

14. On 6 April 1937, Chippenham Council were satisfied that Rowden Lane was a public vehicular highway to the point where the cattle grid now is located.

15. In 1955, Inspector Dale was satisfied on the evidence which he heard that Rowden Lane Section C was subject to public rights of way (i) on foot (ii) on horseback and (iii) as a cartway.

16. The Highway Surveyor's involvement in the repair of the road bridge carrying Section A of Rowden Lane in 1881, as evidenced by the 1881 Chippenham Corporation Minute, shows that the road was regarded as a publicly maintainable public vehicular highway in 1881.

17. The bridge was constructed, and has subsequently been maintained, to carry the metalled vehicular carriageway and exceeds the reasonable needs of a horseman or pedestrian.

18. An 1896 Minute of the Chippenham Corporation shows that the Corporation (at that time responsible for roads in Chippenham) did not regard itself as the private landowner of any part of Sections A and B of Rowden Lane, and that it did not regard Rowden Lane as private.

19. There is significant evidence of public maintenance of Sections A and B as a carriageway from before 1983.

20. There is no positive evidence that Sections A and B or Rowden Lane are public bridleway rather than public vehicular highway.

21. No horse riders use Sections A and B of Rowden Lane and have not done so for many years.

22. The general public made regular vehicular use of Sections A and B of Rowden Lane up to the cattle grid from the 1960s up to 2002 for purposes of accessing the countryside to the east for recreational purposes.

23. HGV drivers in the 1960's were turned back not on the basis that they were trespassing in a private road, but rather because they were on the wrong road.

24. There is no other credible evidence that Mr and Mrs Burridge (the owners of Rowden Farm up to about 1985) or their agent, or Dick Jennings (the father of Mary Puntis) did turn or attempt to turn members of the public away from Sections A and B before 1985, or at any time.

25. Painting the “Private” sign across the carriageway at the junctions of Sections A and B brought the public’s right to use Section B into question between 12 August 2002 and 4 September 2002.

26. Before this 2002 sign was so painted, there was no private sign erected or displayed in Rowden Lane at any time.

27. The centre lines of the hedges on Rowden Lane demarcate the boundaries between private land and the highway.

28. As the verges are public highway, the Claimants had no right to obstruct them, and the First Defendant was empowered by Sections 113 and 143 of the Highways Act 1980 to remove the obstructions.

29. Sections A and B of Rowden Lane were properly shown, on and before 2 May 2006, on a list required to be kept under section 36(6) of the Highways Act 1980.

30. Public vehicular rights over Sections A and B of Rowden Lane have not been extinguished by the Natural Environment and Rural Communities Act 2006.

Chapter 24: Conclusion

1161. I am satisfied, on the balance of probabilities, that Sections A and B of Rowden Lane have, for hundreds of years, been a full vehicular public highway across its entire width measured from hedge to hedge. This status is not affected by the provisions of the Natural Environment and Communities Act 2006, and, in particular, section 67 thereof.

1162. Section 130 of the Highways Act 1980 provides as follows:

(i) *It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the Highway Authority, including any roadside waste which forms part of it.*

...

(iv) *Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.*

(v) *Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of the section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient.*

1163. Accordingly, the First Defendant, as Highway Authority, was entitled to remove the obstructions and obstacles from the verges in 2002 and 2006. Any rights which the Claimants may have in the subsoil did and do not entitle them to place obstructions and obstacles on the highway verges.

1164. Moreover, the structure erected by the First Claimant on the verge outside Swallow Falls, shown purple on plan 4077A, together with the existing posts, stones and sleepers placed on the grass verges and hard standing outside Brookfields, constitute an unlawful encroachment on the highway and should be removed.

His Honour Judge McCahill QC

Draft Judgment released: 15 April 2010

Judgment delivered in Court: 12 October 2010