Neutral Citation Number: [2020] EWHC 811 (Admin)

Case No: CO/3424/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before :

MR JUSTICE FORDHAM

- -

Between :

THE QUEEN (ON THE APPLICATION OF PREETI PEREIRA)

Claimant

- and –

ENVIRONMENT AND TRAFFIC ADJUDICATORS

Defendant

- and –

LONDON BOROUGH OF SOUTHWARK

Interested Party

- -
- -

GEORGE LAURENCE QC and SIMON ADAMYK (instructed by **MYERS FLETCHER & GORDON**) for the **Claimant**
The Defendant did not appear and was not represented
The Interested Party did not appear and was not represented

Hearing dates: 19 February 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 3rd April 2020 at 10am.

Mr Justice Fordham :

Introduction

1. This is a case about a car parked on a pavement: a black Land Rover owned by the claimant ("Dr Pereira") which received a parking ticket from the interested party ("Southwark"). It is also a case in which some potentially far-reaching legal points were raised, in particular in relation to when a privately-owned piece of pavement is a "road to which the public has access" so as to preclude even the owner of the land from parking there. Viewed from the perspective of Dr Pereira, the story of this case can I think be encapsulated in this way: this was part of the pavement privately-owned by me and my husband ("Dr Stephen Pereira"), where we have parked our cars on most days of the year for many years in front of our own hedge; surely that pattern of conduct by us means we haven't permitted 'public access' to the pavement so as to make our parking of our cars illegal. Viewed from Southwark's perspective, and from the perspective of the mum pushing a toddler in a buggy along the pavement, in one of the photos which I was shown, the story of this case can perhaps be encapsulated in this way: this is a pavement, privately-owned but publicly-accessed and used; neither the Pereiras, nor anyone else, can block part of the pavement by parking on it; if a drunk driver drove along the pavement, they would be driving on land to which the public has access and would not escape conviction.

2. The idea that someone can commit an offence by parking their own car on their own privately-owned part of the pavement is not new. In 2009 Dr Dawood challenged the parking ticket received for parking his motor scooter on a section of pavement in Cleveland Street W1 of which he was the owner. His claim for judicial review of the decision of the parking adjudicator failed. In a ruling refusing permission to appeal at [2009] EWCA Civ 1411, Sedley LJ said this: "One might have thought that nobody could commit a criminal offence by parking a motor scooter on his own land". In that case, the courts concluded that such an offence had occurred. That was also the conclusion, in the present case, of Southwark and of the adjudicators who heard an appeal and conducted a review.

3. Dr Pereira and Dr Stephen Pereira ("the Pereiras") live at Number 1, College Road, Dulwich Village, London. They own their house and land surrounding it. The front of the house, facing College Road, has a strip of land between the house and a hedge. In the middle of the hedge is a gate which a person can use to get to the front door. This case is about the land outside the hedge, between it and College Road, in the middle of which the mum with the buggy was photographed walking alongside the Pereiras' parked car.

4. I will start by describing the lie of the land. I will try to do so in fewer than the thousand words which a picture would paint. You are walking in a northerly direction on the pavement on the east side of College Road. You have just crossed Woodyard Lane. To your right is the hedge and the Pereiras' house. There are white wooden posts sticking out of the pavement, some of which are linked by chains. The pavement is a wide one, wide enough for three cars parked side by side. The pavement you are standing on can be thought of as comprising three strips of land, side by side, as I will explain. But to the naked eye, it is a single pavement. On the far left-hand side of the pavement, nearest

to College Road and the traffic driving up and down it, you would be walking on a strip of land not owned by the Pereiras. It has chain-linked white posts to your immediate left. I will call this "the chain-link strip". As soon as you had gone past the Pereiras' house, walking along the chain-link strip, you would encounter a tree, with a white post in front of you. That would make you deviate into the middle of the pavement. I will call the middle of the pavement "the middle strip". The middle strip is owned by the Pereiras. It forms part of their registered title. In the photo the mum with the buggy is walking along the middle strip. In a version of the photo with superimposed colour hatching, the middle strip appears to be a little less than a car's breadth. If you were walking on the right-hand side of the pavement, this is the part of the pavement nearest to the Pereiras' house. Like the middle strip, this is land owned by the Pereiras, adjacent to the hedge and the gate. I will call this "the hedge strip". It also forms part of their registered title. On a day when no car is parked in the hedge strip, if you walked along that strip past the Pereiras' house, you would encounter a white wooden post which, like the tree and post in the chain-link strip, would make you deviate into the middle strip. All of which means that the most natural route to walk along the pavement is in the middle strip.

5. In this case, Dr Pereira's car was parked on the hedge strip. In all the photographs which I have seen, this is where the parking of a car outside the house is illustrated. Judging from the photos, there would probably be enough space to park three cars in a line nose to tail, directly alongside the hedge, in the hedge strip. It makes perfect sense for the Pereiras and their visitors to park in the hedge strip. That leaves the middle strip clear and unobstructed. Moreover, the photos suggest that the combined width of the hedge strip and the middle strip would be less than two cars' breadth, parked side by side. All of this supports the common sense position that when the Pereiras (and their guests) park on their own land outside their house they park on the hedge strip, nose to tail if there is more than one car being parked.

6. The area consisting of the middle strip and the hedge strip combined was referred to by everyone in this case as "the Relevant Land". That has been for two reasons. First, because that is the land owned by the Pereiras. Secondly, because various claims were made by the Pereiras and by Southwark about the whole of that land. In my judgment, it is important to remember that the part of the land on which Dr Pereira's Land Rover was parked when the ticket was issued was the hedge strip. In written submissions, Counsel for the Pereiras have described this as "the all-important hedge strip". I agree with that characterisation.

7. Section 15(1) of the Greater London Council (General Powers) Act 1974, under the heading "As to parking on footways, grass verges, etc", provides: "… any person who causes or permits any vehicle to be parked in Greater London with one or more wheels on or over any part of the road… shall be guilty of an offence…" Section 2, headed "interpretation", provides: "'road' has the same meaning as in the [Road Traffic Regulation Act] 1967 and includes any length of road and any part of the width of a road". Section 104 (1) of the 1967 Act provides: "'road' means any highway and any other road to which the public has access…" There was a technical argument as to whether this, or the materially identical definition in the Road Traffic Regulation Act 1984, was the legally correct one, but everybody agreed that there was no need to resolve this and that nothing could turn on it in the present case. In the case-law, there is a parallel between "road to which the public has access" and "public place":

Richardson v DPP [2019] EWHC 428 (Admin) [2019] 4 WLR 46 at paragraph 23. The definition of "road" in section 104 has two limbs: the "highway limb" ("any highway") and the "public access road limb" ("any other road to which the public has access"): Clarke v Kato [1998] 1 WLR 1647 at 1651H. It was agreed on all sides in this case that the onus was on Southwark to prove, on the balance of probabilities, that the hedge strip fell within one or other of these two limbs.

8. Southwark issued the penalty charge notice (parking ticket) in relation to Dr Pereira's car, parked on the hedge strip, in the middle of the day on 15 July 2018. It was challenged by letter dated 20 July 2018, on the basis that the vehicle "was parked on land which belongs to me and which falls within the title of my house". The recipient of a penalty charge notice who wishes to challenge it has procedural rights. There is a right of appeal to an adjudicator, followed by a right to seek review by a review adjudicator, followed by a right to seek judicial review in the High Court.

    i) In this case, an appeal hearing took place before an adjudicator on 4 and 5 March 2019, culminating in a determination dated 26 March 2019 by which the adjudicator refused the appeal and upheld the penalty charge notice. The appeal adjudicator determined that Southwark had established the highway limb, on the basis that the Relevant Land had been demonstrated to be an adopted public highway ("APH"). The appeal adjudicator determined, in the alternative, that Southwark had established the public access road limb.

    ii) These conclusions were challenged by Dr Pereira and a review hearing before a review adjudicator took place on 23 May 2019. That led to a determination dated 10 June 2019 by the review adjudicator, upholding the penalty charge notice. In that determination, the review adjudicator adopted different conclusions from those arrived at by the appeal adjudicator. The review adjudicator determined that Southwark had not established the highway limb by demonstrating the relevant land to be an APH. However, concluded the review adjudicator, the highway limb was established on a different basis, namely deemed dedication in accordance with section 31 of the Highways Act 1980. Section 31, under the heading "dedication of way as highway presumed after public use for 20 years" provides by subsection (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". As to the public access road limb, the review adjudicator made no determination on whether that limb was satisfied, in the alternative, reasoning that it was not necessary to address that question in the light of the conclusion on the highway limb.

9. Dr Pereira filed grounds for judicial review on 28 August 2019, seeking an order (1) quashing the review adjudicator's decision and (2) substituting a decision directing the cancellation of the penalty charge notice. The defendant to the claim (the Environment and Traffic Adjudicators) is the judicial body encompassing adjudicators and review adjudicators, a body supported by London Tribunals, a service provided by London Councils. The defendant is a tribunal which adopted the position that it did not intend to make a submission in these judicial review proceedings. Southwark is a party to the judicial review proceedings, as the interested party who successfully defended the

penalty charge notice at the hearings before the appeal adjudicator and the review adjudicator. Southwark's position in these proceedings is that it confirmed that it did not intend to contest the claim, referring in a letter of 18 September 2019 to the "potential for incurring costs that are wholly disproportionate to the value of the Penalty Charge Notice that is at the centre of the dispute". Southwark also provided a letter dated 13 October 2019 to which I will return below. Permission for judicial review was granted by Foster J on 8 October 2019. The claim has been pursued, not because of the value of the individual penalty charge notice, but because of the importance to the Pereiras of establishing the correct position in law as to whether they can or cannot lawfully park their cars on the part of the pavement which they own at the front of their house.

The Highway Limb

10. As I have explained, the appeal adjudicator upheld the highway limb on the basis of Southwark's APH claim. The review adjudicator determined that the APH claim was not established on the evidence. Nobody in these proceedings has sought to put in issue, or reopen, that conclusion. That issue stands resolved. The question in these proceedings, so far as the highway limb is concerned, is whether the review adjudicator acted lawfully (in a public law sense) in upholding the highway limb on the alternative basis of deemed dedication under section 31 of the 1980 Act. The Pereiras submit that that course was not lawful, on two alternative bases. First, because Southwark was not advancing such a claim, still less one which marshalled evidence capable of supporting such a conclusion. Secondly, because the review adjudicator's reasoning involved a material error of law. In granting permission for judicial review, Foster J recognised each of these bases as properly arguable. As to consequence, the Pereiras submit that there is no legitimate basis for remitting the deemed dedication issue for consideration afresh at a further review adjudication hearing. I will deal with each of these points in turn.

Point Unadvanced/Unevidenced

11. I accept Mr Laurence QC's submissions on the first point. The review adjudicator's determination upholding the highway limb cannot stand, because Southwark was not advancing such a claim, still less one which had marshalled evidence capable of supporting such a conclusion.

    i) The starting point was correctly identified by the review adjudicator at paragraph 16 of his determination: "the burden of proving the contravention rests on [Southwark]. The standard of proof is the balance of probabilities. [Southwark] must therefore satisfy me on the balance of probabilities that at the material time the Relevant Land was a highway or part thereof".

    ii) The basis on which Southwark contended for such a conclusion was the APH claim, which the review adjudicator rejected. At no stage throughout the entirety of the proceedings, before the appeal adjudicator and again before the review adjudicator, did Southwark advance any claim based on section 31. There was ample opportunity for Southwark to take the position that it was inviting a conclusion on the highway limb, on this alternative basis. As the judicial review grounds put it: "[Southwark] had made no such claim, and had never sought to argue that there had been a deemed dedication under s.31… [Southwark] never

(even in its closing submissions) sought to advance a case at all based on s.31, whether by 'pleading' such a case or otherwise, in spite of numerous occasions on which it could have stated that it was." Mr Laurence QC tells me – and one of the functional virtues of the ethical standards applicable to the Bar is that I know I can accept – that this description of what happened in the proceedings is factually accurate.

iii) Those grounds have been served on Southwark, who have considered this aspect and have written the letter dated 30 October 2019. The factual correctness of what is said in the grounds has not been disputed. Indeed, the letter states: "it is correct that Southwark did not raise the issue concerning section 31 Highways Act 1980".

iv) The letter goes on to make a different point, namely that the section 31 "issue had been raised by the [Pereiras'] Counsel at paragraphs 72 – 79 and 90 of their skeleton argument placed before the Review Adjudicator. It would therefore appear that the [review] adjudicator's decision on these issues was based on matters raised by the [Pereiras and their] legal team including evidence adduced and authorities cited". In my judgment this does not assist Southwark or provide appropriate support for what the review adjudicator did. What the Pereiras' skeleton argument before the review adjudicator had done was to raise – "for the sake of completeness" – the principles governing section 31. The skeleton argument made the key points that Southwark "cannot establish" that which section 31 would require, and that "even if [Southwark] had tried to put forward a case based on s.31 (which it did not) such a case would have been bound to fail." All of that, fairly and squarely raised by the Pereiras, made it all the more – not less – important that Southwark made clear to the review adjudicator whether it was, even in the alternative, advancing any case based on section 31. It made it all the more important that, if Southwark was doing so, it was identifying the evidential basis for any such contention. Nothing of the kind happened.

v) In order for the highway limb to be upheld on the basis of section 31, Southwark would need to have discharged the burden – by reference to evidence – that "a way" over the land "has been actually enjoyed by the public as of right and without interruption for a full period of 20 years". As Hilbery J put it in Merstham Manor Ltd v Couldon [1937] 2 KB 77 at 82: "he who asserts the right must establish as a matter-of-fact, on the one hand, the actual enjoyment of the right by the public as of right and, on the other hand, the actual suffering of the exercise of that right by the landowner for the full period of twenty years".

vi) The evidence marshalled in the case by Southwark did not seek to establish the factual basis for this conclusion. "Interruption" means "actual and physical stopping": Merstham Manor at 85. The question was one of fact: Lewis v Thomas [1950] 1 KB 438 at 442. The evidence of the Pereiras, who spoke of their position during the 13 years of their ownership of the land, did not purport to and could not be taken to provide a sound evidential basis for a finding adverse to them, on a point not being taken against them. I have no doubt that, had section 31 being raised or adopted by Southwark as the basis of a claim or contention made to the adjudicator, the preparation, presentation and evidential content of the case being put before the review adjudicator by both parties would

have been different. I can test that by reference to the way in which the Pereiras' legal team prepared the evidence and argument on those points which were being raised by Southwark.

vii) The review adjudicator spoke in the determination of drawing inferences on the section 31 issue, by reference to an appeal determination in January 2002 by adjudicator Houghton in a case called Robert White v City of Westminster. That was a case about "busy thoroughfares in the heart of the West End", in which an issue was evidently squarely raised and able to be addressed by the parties, and in which the adjudicator's reasoning was that an adjudicator is "able to infer in the context of a city centre street 20 years' use by the public which would give rise to a presumption under s.31". The approach in that case was not capable, in my judgment, of transference into this case: where section 31 was at no stage invoked; where the evidence related to privately-owned land forming part of a Dulwich pavement; where what had or hadn't taken place on a continuous basis without interruption for a full 20 years, could not be lawfully, fairly, or reasonably determined on the basis of evidence about the last 13 years; still less, remembering where the onus of proof lay.

Error of Law

12. That analysis would alone dispose of the case on the highway limb. But, even if that were wrong, I also accept Mr Laurence QC's submissions on the second point in this part of the case. The review adjudicator's determination upholding the highway limb cannot stand for the further and independent reason that, in my judgment, the reasoning involved a material error of law.

i) The review adjudicator accepted the Pereiras' evidence in relation to the pattern of their parking on the Relevant Land over the 13 years during which they had owned it. He found as a fact that a vehicle had been parked there, during each of 200 days, during every year over that 13-year period; albeit not for a full 24 hours each day, but rather for some hours in each day. These were findings of fact on the evidence by the primary fact-finding decision-maker. No attempt was made on this application for judicial review to impugn or re-open them. They stand and I treat them as a solid factual platform for the analysis.

ii) The review adjudicator also accepted that this frequent (but not continuous) presence of a parked vehicle on part of the relevant land could in principle constitute a relevant interruption of the use by the public over the relevant period, for the purposes of assessing the position under section 31.

iii) Approaching the issue in that way, the review adjudicator made clear the reason why he found the highway limb to be satisfied, on the basis of section 31 deemed dedication. That reason was that, whenever a car was parked on the pavement, a pedestrian would have been able to avoid the obstruction which it presented by deviating and walking along the pavement around the car. The review adjudicator said: "the width of the vehicle is less than the width of the Relevant Land. Therefore I conclude that it has been established on the balance of probabilities that a parked vehicle on the Relevant Land might inconvenience a member of the public walking on foot through the Relevant Land (by making such a person step to one side of the vehicle to remain on course over the

Relevant Land) but would not stop him walking on or over it". In the light of that, the review adjudicator stated: "I conclude that the parking of a vehicle on the Relevant Land approximately 200 times a year did not in fact interrupt the use of the way over the Relevant Land as I am satisfied that members of the public could easily walk to the side of a parked vehicle and still maintain a course of passage across the Relevant Land. I therefore conclude that it has been established that as at the time of the issue of the PCN the Relevant Land was a highway as it had been dedicated by virtue of section 31 (2) of the Highways Act 1980".

iv) This was a material error of law. In short, the all-important land was the hedge strip. The fact that pedestrians could always walk along the middle strip, whenever the hedge strip was blocked by a parked car – even if there was never a parked car in the middle strip – could support a conclusion that there was a "way" over the middle strip. But that was not good enough to support the parking ticket for the car parked on the hedge strip.

v) The review adjudicator did not spell out whether the finding of fact was that the pattern of parking cars involved use of the hedge strip. It is possible to read the determination as allowing for the fact that a car was sometimes being parked in the middle strip, in which case the hedge strip and the chain-link strip were available to the pedestrian; or to read the determination as allowing for the fact that cars were sometimes being parked in the middle strip and in the hedge strip, in which case the chain-link strip was available to the pedestrian. In my judgment, it would not matter if this was the review adjudicator's analysis. There would still be a material error of law.

vi) It is, in my judgment, an error of law to allow fluctuation in the course of passage across land to constitute the maintenance of "a course of passage", so as to support a conclusion of uninterrupted enjoyment by the public of "a way" over land. What is needed is greater precision, the identification of what the uninterrupted "way" is, and an analysis of whether the location in question falls within that uninterrupted "way".

vii) Suppose the review adjudicator had explicitly found as a fact that the cars parked on the 200 days per year for 13 years had always been parked in the hedge strip. There are very good reasons to think that this would have been the finding, had a more precise approach been taken. Suppose, therefore, on those days any pedestrian would necessarily need to pass along the middle strip, just as they could on any day even where a car was parked. That would not support the conclusion that the car parked on 15 July 2018 on the hedge strip had one or more of its wheels on or over any part of a road, being a highway, through being a way over land actually enjoyed by the public without interruption for the full period of 20 years. The conclusion that such a finding could support – leaving aside the problem of whether the point was open and the problem of whether 13 years' evidence was a basis of a finding as to the position over a full period of 20 years – was that the middle strip (and the chain-link strip) would constitute a highway. But Dr Pereira's Land Rover had not been parked on the middle strip. She would have succeeded.

viii) Or test it this way. Suppose it were found that the Pereiras' cars were, on some occasions out of the 200 per year over the 13 year period, parked only on the hedge strip and on other such occasions only on the middle strip. Suppose it were found that, on each such occasion, the pedestrian could use the hedge strip or the middle strip, avoiding the parked car, and not needing to use the chain-link strip. In those circumstances, neither "a way" over the middle strip nor "a way" over the hedge strip could be said to have been actually enjoyed by the public without interruption. Each such "way" had been interrupted.

ix) So, the review adjudicator concluded that a pedestrian could always have found a "way" along a part of the pavement, but that will not do.

x) In submissions, Mr Laurence QC took the example of a farmer's field and a privately-owned track which broadens out so as to serve two nearby gates: Gate A and Gate B. I accept his analysis of that example and can express it as follows. On days when both gates are open, a person walking would be able to choose which to use. If the farmer for 20 years left Gate A always open, while frequently closing and obstructing with her tractor Gate B, the "way" through that frequently-closed and obstructed Gate B would not be demonstrable by the fact of always being able to deviate through Gate A. Moreover, if the farmer frequently closed and obstructed Gate A, and frequently closed and obstructed Gate B, but only ever one at a time, neither "way" through either gate would be demonstrable. In the case of neither route would there be "a way" actually enjoyed without interruption for the full period. It would be no answer in either of these scenarios to say that the walker could "still maintain a course of passage" across the field.

xi) Particularity and precision, in identifying the relevant "way", is well recognised in the law. Lord Oliver described the position in this way in AG ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425 at 434C: "… a public right on land depends upon proof of public user over an exactly demonstrated course…" In R v Secretary of State for the Environment, ex p Blake [1984] JPL 101, Walton J discussed the significance of obstruction and deviation and the logical problem if: "it would in practical terms be impossible ever for a landowner to prevent the acquisition of a right of way over… land by the erection of a gate across any part, because given the nature of the terrain it would always be possible for persons wishing to use the path to find a way around and then… claim that they were using the way". In R (Dunmill) v Director of Public Prosecutions [2004] EWHC 1700 (Admin) at paragraph 5, McCombe J referred to the commentary on the definition of "road" in the then Stone's Justices' Manual: "A road has the physical character of a defined or definable route or way, with ascertained or ascertainable edges…" In Riddall and Trevelyan, Rights of Way (4th edition page 142), the public right-of-way evidence form requires specificity as to whether "the way" has "always run over the same route" and whether there has been "any locked gates or other obstruction to the way".

xii) These points explain why there was a material error of law. But they also serve to emphasise and illustrate the importance of the question whether Southwark was or was not – and in this case it was not – advancing any claim based on section 31. Had such a claim been advanced, this is precisely the sort of

argument that would have needed to be ventilated. It would have been grappled with, against the evidence. It was not. But the review adjudicator's findings and reasoning contain a material error of law independently vitiating the adverse conclusion arrived at in relation to the section 31 (non-)issue.

Consequence

13. I accept Mr Laurence QC's submission as to consequence, that there is no legitimate basis for remitting the section 31 deemed dedication issue for consideration afresh at a further review adjudication hearing.

    i) It is not appropriate to remit for reconsideration afresh by a review adjudicator the question of section 31, in circumstances where Southwark had every opportunity to advance such a contention and chose never to do so.

    ii) It would also, and independently, be inappropriate to remit the issue of section 31 for reconsideration afresh by a review adjudicator in the light of the error of law. For reasons which I have explained, the review adjudicator's conclusion was erroneous and unsustainable in law. There was a clear finding that the public could always have found 'a way' along the pavement when a car was parked. But that cannot, in law, sustain a conclusion that there was an uninterrupted 'way' along the hedge strip. That is fatal and there is nothing justifying remittal for fresh findings.

    iii) The conclusion as to the inappropriateness of remittal is reinforced by the correspondence written in these judicial review proceedings. The court has been told in emphatic terms that Southwark, who has confirmed that it never took the section 31 point, considers the further incurring of costs by it in relation to this matter to be wholly disproportionate. Southwark is not supporting remittal, if the review adjudicator's determination is quashed in these judicial review proceedings, which it does not contest.

    iv) Southwark's letter of 18 September 2019 told the court: "we believe that the Traffic Adjudicator's position on review can be justified and the Claimant's position is flawed as a matter of law". But nothing else was said to explain that contention, and Southwark in its acknowledgement of service confirmed that it was not contesting the claim. For the reasons I have given, it is not a contention in any event that I can accept.

The Public Access Road Limb

14. Notwithstanding these observations about remittal in the context of the highway limb, an issue arises as to whether it is appropriate to remit the appeal for reconsideration afresh by a review adjudicator of the public access road limb. As I have explained, the public access road limb was determined against the Pereiras by the appeal adjudicator, but it was left unaddressed by the review adjudicator when the case was considered afresh by the review adjudicator. The position is that there is an open question, left unresolved by the review adjudicator, as to the rights and wrongs of the public access road limb. The correct position in law is that I should remit the case in those circumstances, so that this issue can be determined, unless the Pereiras are able to satisfy me that resolution in their favour of the public access road issue was the only

conclusion to which the review adjudicator could lawfully have come had the point been grappled with. That is the combined effect of section 31(5A) of the Senior Courts Act 1981 and rule 54.19 (2) (b) of the Civil Procedure Rules. It is accepted by Mr Laurence QC. That is the challenge to which he rises.

15. On that basis, I turn to consider the public access road limb and whether there was only one decision on it to which the review adjudicator could lawfully have come, had he addressed it. The starting point is to recall that the review adjudicator addressed the evidence in relation to the 200 days per year over 13 years on which the Pereiras (and their visitors) had parked cars on the Relevant Land, and made the findings of fact to which I have referred. That assessment of the facts was plainly open to the review adjudicator. It was also entirely appropriate that the review adjudicator should state his findings of fact, notwithstanding that he could not lawfully accept any section 31 deemed dedication conclusion based on it. In any event, making findings of fact is what the review adjudicator did. Given that he had rejected the APH claim and (as I have held) could not accept the section 31 basis, and given that he could not therefore uphold the highway limb, the review adjudicator would have needed to deal with the public access road limb. That would have taken him into the very evidence which he addressed, albeit that he addressed it in the context of section 31 deemed dedication. The question is: is there a single legitimate answer to the public access road limb, based on the review adjudicator's findings of fact and the evidence as a whole? Or does the case now have to go back to a review adjudicator, to address the public access road limb?

16. I repeat that what is all-important in the present case is the hedge strip. The critical question under the public access road limb was whether the hedge strip – on which the car had been parked – was "part of a road" which was a "road to which the public has access". It is well-established that "road" can include a pavement (Bryant v Marx [1932] All ER Rep 518) and that "road" is identified by reference to physical character and function (see Clarke v Kato [1998] 1 WLR 1647 at 1652F-H). The question in the present case is not so much as to "road", but as to "to which the public has access". That involves twin preconditions: (i) factual public access and (ii) legal public access.

17. The twin preconditions (factual and legal public access) can be seen in what one Lord Clyde said in 1998 citing what another Lord Clyde ("Lord Justice-General Clyde") had said in 1931. In Clarke v Kato Lord Clyde said this (of an equivalent provision in the Road Traffic Act 1988):

> "this provision has to be analysed into two parts: first, is it a road? And second, if so, is it a road to which the public has access? In the present case we are not concerned with the matter of public access, but two observations on that phrase may be made. The first is that the element of public access has to be tested by reference to facts as well as rights. The question in this context is whether the public actually and legally have access."

Lord Clyde continued:

> "As the Lord Justice-General (Lord Clyde) observed in Harrison v Hill 1932 JC 13, 16:

> 'there must be, as matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed – that is to say, must be permitted or allowed, either expressly or implicitly by the person or persons to whom the road belongs'.

Lord Sands observed in the same case, at p.17:

> 'any road may be regarded as a road to which the public have access upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied'."

18. In their written and oral submissions, Mr Laurence QC and Mr Adamyk advanced four distinct propositions in support of the contention that the only decision to which the review adjudicator could have come on the public access road limb was a finding in the Pereiras' favour. The first two propositions are about factual access and were put forward as fatal to any contention that the public "actually… have access". The third and fourth were about legal public access and were put forward as fatal to any contention that the public "legally have access". Their essence, in my judgment, can accurately be encapsulated as follows:

    i) Proposition (i). The requisite factual public access is defeated by the actions of the landowner in regularly impeding that access.

    ii) Proposition (ii). The requisite factual public access is defeated by the actions of the landowner impeding that access on the relevant occasion.

    iii) Proposition (iii). The requisite legal public access is defeated, insofar as the public were correctly to be characterised as trespassers (tolerated by the landowner).

    iv) Proposition (iv). The requisite legal public access is defeated, insofar as the public were correctly to be characterised as persons permitted access under an implied licence, since such licence was inoperative on the relevant occasion.

Factual Public Access

19. I deal first with factual public access, and therefore with propositions (i) and (ii). My conclusion is this. I accept, in the circumstances of the present case, that propositions (i) and (ii) – at least in combination – serve to defeat any sustainable claim under the public access road limb, and that no other decision would have been lawfully open to the review adjudicator on the evidence and on the findings as to the facts which he made.

20. My reasons are as follows:

    i) I cannot accept proposition (ii) standing alone. It would involve interpreting the phrase "road to which the public has access" by reference to whether or not – at the particular time in question in any case – the landowner has factually impeded that access. That would mean any act, even the first of its kind, by which the landowner obstructs the road could be relied on as defeating the definition of

public access which makes it a road. I cannot accept that this is how the statutory definition operates or is to be taken as intended to operate. I was shown no authority or textbook commentary which extended to supporting that proposition.

ii) I find it helpful to think about the way that the question "what is a 'road?'" is answered by reference to its physical character, the function which it exists to serve, and its ascertainable route. A landowner would not, through an act of obstructing the road on a single particular occasion, be able convincingly to contend that such an act meant that there was no longer a road, because no function of passing along the definable way was at that point recognisable. I am not saying the concept of "road" and the concept of "to which the public has access" have the same shape, so far as pattern over a passage of time is concerned. But what I do think is that it should be possible to identify "road" and "to which the public has access" by reference to a picture broader than simply a current obstruction by the landowner, based on a snapshot taken only on the occasion in question.

iii) In the Harrison v Hill case, in the passage endorsed by Lord Clyde in Clarke v Kato, Lord Sands spoke of public access as access other than "by overcoming a physical obstruction". That recognises, and I accept, that the existence of a physical obstruction, serving to preclude the relevant access on the part of the public, can in principle defeat the conclusion that there is actual public access to a road. The question becomes: what sorts of incidence of physical obstruction, over the course of a period of time, serve to support a conclusion that the requested factual public access does not exist? In Harrison v Hill, in another passage, Lord Justice-General Clyde referred to two extremes. He said (at page 16): "I think… that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as matter of fact, walking or driving by the public on the road…" This passage, in my judgment, is consistent with the idea that public access – so far as physical obstruction is concerned – is not an 'on-off' switch, to be addressed by reference to extremes, but involves an evaluation of the pattern of the landowner's conduct so far as access and obstruction are concerned.

iv) In another passage in the same judgment, Lord Justice-General Clyde (at page 17) expressed the view – without deciding the point – that the pattern of conduct of the landowner would be relevant. He said this: "the private avenue leading from a public highway to a private residence or a public institution, although prima facie a road to which the public (generally) does not lawfully have access, may become such when – or so long as – the owner or owners by reason of goodwill or otherwise allow them to have it. There are familiar instances of private avenues and roads which owners open to the public generally, except on a particular day or days in the year, when they are closed in order to prevent any assertion of public right. It may be – I am not expressing any opinion on the

point – that such a road would be a 'road' within the meaning of the act on all the days of the year except that on which the public was denied access to it."

v) In Blackmore v Chief Constable of Devon and Cornwall Constabulary 22 November 1984, CO/780/84, The Times, 6 December 1984, Robert Goff LJ (as he then was) discussed the case of Sandy v Martin [1974] RTR 263, in which a car park at the back of a pub was held to involve actual public access while the pub was open, but not after closing hours. He added: "in my judgment, there has to be an element of common sense about this".

vi) Adopting a common sense approach, and viewed by reference to the pattern of the landowner's conduct – and the review adjudicator's findings of fact as to that conduct – the pattern of parking for significant periods of some 200 days per year, every year, over an extended period negatives the conclusion that, expressed as a generality viewed over a period of time, the location at which the Pereiras park their cars on their own land alongside the hedge in front of their own house is one to which the public has factual access. That goes to proposition (i) and, I am satisfied and find, is the only legitimate answer which the review adjudicator could have given on the evidence.

21. I am satisfied that proposition (i) is correct. It is sufficient to negative the required factual public access, at least in circumstances where proposition (ii) is also correct. That is the case here, because at the relevant time when Dr Pereira's Range Rover was parked on the pavement on 15 July 2018, the landowner was acting in such manner as factually prevented public access. Whether or not that matters does not call for a determination, because – if it does matter – it was the case here.

22. I think it right to set out my views as to whether it does matter. In my judgment, proposition (ii) is relevant to the legal analysis and it is the combination of propositions (i) and (ii) which best explains the legal position as regards the hedge strip. I think the better analysis as to factual public access in the present case is a 'dynamic' one, under which it is relevant to ask how the circumstances at the time in question matched the landowner's pattern of behaviour in restricting or allowing public access.

i) A dynamic approach would allow for the question of factual public access to be answered positively, in circumstances where such public access has habitually been permitted by the landowner. On this occasion the Pereiras were taking steps to park one of their cars, in the usual way, in accordance with their pattern of conduct, in a manner which prevented and obstructed access by the public to the hedge strip.

ii) That circumstance enables an analogy to be drawn between this case and the case of the pub car-park owner in Sandy v Martin, who may restrict public access to the car park after closing hours, while allowing it at other times. That means the answer to the question 'was there factual public access?' is 'yes, sometimes, but not on this occasion'.

iii) This will fit with what I will say at the end of this judgment in relation to proposition (iv), about implied permission as the preferable analysis of the present case.

iv) The dynamic approach, which combines propositions (i) and (ii) and which chimes with proposition (iv), has real virtue and real practical relevance. Suppose the case where a third party, such as a customer visiting the estate agent near the Pereiras' house, parks their car in the hedge strip at a time when the Pereiras are allowing factual access. Equally, on a day on which the Pereiras were not exercising their habitual practice of parking adjacent to the hedge, if an incident were to occur involving a drunk driver of a car on the hedge strip, and the question were asked whether an offence was committed on a road "to which the public has access", I think, on factual public access, the better answer to such questions would be 'yes': there is factual public access when the Pereiras choose to permit it, by their concrete acts in accordance with their pattern of enduring behaviour.

v) I do not think this approach is objectionable on grounds of lack of certainty. I see no reason in principle why the answer to the question 'is there factual public access to the hedge strip?', viewed against a settled pattern of landowner conduct, should not be 'yes, when the owner is not parking their car there'.

vi) So, in my judgment, the combination of propositions (i) and (ii) – in the light of the findings made by the review adjudicator – defeats the prerequisite of factual public access necessary for the public access road limb to be upheld, at the time which was relevant in the present case, and the review adjudicator could have come to no other sustainable conclusion. This was not a road to which the public had access at the relevant time. That is because, as I shall explain, public access was in accordance with an implied permission which was not operative at the relevant time.

vii) If it were wrong to combine propositions (i) and (ii) in this way, and if the true position were that the law allowed no 'dynamic' answer to the question of factual public access, I would have had to consider whether proposition (i) standing alone would have been fatal to the prerequisite of factual public access. If the law constrained the viable analyses in that way, I would have found in the Pereiras' favour on proposition (i) standing alone. Viewed as a whole and by reference to the pattern of conduct on the facts, and in circumstances where a 'dynamic' analysis is unavailable, there could not justifiably on the evidence be held to be the requisite factual public access over the hedge strip. So, if in law a dynamic analysis to factual public access is unavailable, and if factual public access is an 'all or nothing' question, then I would have found – on the evidence and on the review adjudicator's finding – no factual public access.

23. My conclusion on factual public access disposes of the public access road limb and disposes of the question of whether any remittal for consideration by a fresh review adjudicator is appropriate. It is not. The claim succeeds and the appropriate remedy is an order substituting the success of the Pereiras before the review adjudicator.

Legal Public Access

24. I am conscious, in these circumstances, that anything I may say in relation to legal public access is obiter. It is here that legal waters run deepest, and where the implications of the analysis for other cases seem most acute. It is here that any Court, notwithstanding good faith attempts to cite authorities in all directions, is most

hampered by the absence of contested argument with a proper contradictor, in a contested claim. Nevertheless, I heard full argument on behalf of the Pereiras. Mr Laurence QC put various authorities before the Court relevant to legal public access and invited me to set out my reasoned conclusions on this aspect, whatever my views relating to factual public access. These issues are important and difficult. They raise considerations relevant to what I have already said about the relevance of proposition (ii). In all the circumstances, I am satisfied that the least I should do is to set out transparently what I made of the arguments, and what I would have decided, had this issue mattered.

25. My conclusions on legal public access would have been as follows.

    i) There are two ways in which the facts of the present case could conceivably be analysed, reflected in the premises within propositions (iii) and (iv). The first, favoured by Mr Laurence QC as correct on the evidence and findings of fact, is that the public have access to the Relevant Land only as trespassers, tolerated by the Pereiras. The second, embraced by Mr Laurence QC as the alternative if he is wrong in his primary position, is access pursuant to an implied licence. The position is much as it was in R (Barkas) v North Yorkshire County Council [2014] UKSC 31 at paragraph 27: "As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers". Propositions (iii) and (iv) are alternatives, arising out of the only two available premises.

    ii) Each of propositions (iii) and (iv) – on its alternative premise – is sound and would lead to the same conclusion favourable to the Pereiras: namely that no legal public access arose in the present case at least so far as the hedge strip (where the car was parked on the day in question) is concerned.

    iii) If it were necessary to do so, I would have found that proposition (iv) – and not proposition (iii) – is in fact the correct legal analysis on the findings of fact, and evidence, in this case. I would also have reached that conclusion as being the only view of the evidence to which the review adjudicator could have come, in the light of his findings. I would therefore have allowed the claim on this aspect of the case, even if the Pereiras are wrong about proposition (iii).

26. I would have found that proposition (iii) is sound for the following reasons.

    i) Clarke v Kato is a modern House of Lords authority which was concerned with the relevant statutory definition. Although primarily concerned with the question of "road" rather than "to which the public has access", and albeit in a passage which is obiter, Lord Clyde (for the House of Lords) did two things. First, he articulated the clear proposition that: "The question in this context is whether the public actually and legally have access." Secondly, he cited with approval the approach of Lord Justice-General Clyde in Harrison v Hill, including the observation that "such walking or driving must be lawfully performed – that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs". There are many

other cases and textbook commentaries citing Harrison v Hill, which has been an influential authority in this area of the law.

ii) The question is whether walking or driving could be treated as "lawfully performed" in a case of trespass, albeit tolerated by the person to whom the land belongs. An English reader might read the passage which Lord Clyde in Clarke was citing with approval, from Lord Justice-General Clyde in Harrison v Hill, as allowing for trespass to be lawful use. That is because the Lord Justice-General said this: "I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor."

iii) Lord Justice-General Clyde's reference to "the tolerance of a proprietor" was, however, never a description of trespass. In the very next sentence in the passage, Lord Justice-General Clyde said this: "The statute cannot be supposed to have intended by public 'access' such unlawful access as may be had by members of the public who trespass on the property of either individuals or corporations." So, trespass was not lawful use. Trespass could never be the basis of lawful public access. Lord Justice-General Clyde's analysis in Harrison v Hill was always authority for that proposition.

iv) The "tolerance of a proprietor" which was being included in "permission or allowance" therefore always meant something other than tolerated trespass. This has been recognised. It was, always, a reference to a Scottish usage of tolerance, namely implied permission. Lord Clyde in the Clarke case would have well understood this. This point has itself been explained in House of Lords authority: see *R (Beresford) v Sunderland City Council* [2003] UKHL 60 [2004] 1 AC 889 at paragraphs 6, 65 and 92 in the speeches of Lord Bingham, Lord Rodger and Lord Walker respectively.

v) Next, there is recent Supreme Court authority confirming that a tolerated trespasser – lacking tolerance in the sense of implied permission – is still a trespasser: see Lord Neuberger in Barkas at paragraph 27.

vi) In a town or village green case like Barkas or R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335, the idea of 'tolerated trespass' as not being legal public use promotes the prospect of finding a public right in respect of the land. That is because *"as of right"* in town or village green cases requires unlawful use, because it means *"as if of right"*, not *"by right"*: this was explained by Lord Walker in R (Beresford) v Sunderland City Council [2003] UKHL 60 [2004] 1 AC 889 at paragraph 72. The Sunningwell case establishes that tolerated public access, which constitutes trespass and is unlawful, for that reason constitutes public use which is *"as of right"* (see Lord Hoffmann at 358F).

vii) There is a different dynamic at play in a 'public access road' case like Clarke or Harrison v Hill. Here, by contrast with town or village green cases, the idea of 'tolerated trespass' as not being legal public use undermines the prospect of finding a public right in respect of the land. The point cuts in the opposite direction. That is because 'public access to a road' requires legal public access. In the light of this different dynamic, it is possible that different public policy considerations could therefore apply in these different contexts. It is possible

that legal public access could exclude tolerated trespass in town or village green cases and include it in 'public access to a road' cases. More plausibly, it is possible that the requirement of legal public use could be the subject of a qualification to allow tolerated trespass, in 'public access to a road' cases. Either of these could be the law. They may be found in the fulness of time to constitute a way forward for this area of the law. Such a way forward may be needed. For my part, I do not find convincing the contention that "unwelcome consequences", for criminal cases where there is tolerated trespass (proposition (iv)), are met by the solution involving landowners erecting permissive notices. But I find either of these analyses to be impossible to discern as being open to a High Court judge, faithfully following the binding and persuasive statements of principle in the leading authorities which discuss these ideas, and do so across the two relevant categories of case.

viii) Mr Laurence QC and Mr Adamyk, including in researches and written submissions following the hearing before me, tell me that they have identified no authority or textbook commentary, subsequent to the Clarke case, which analyses and calls into question the correctness of this straightforward logic: that public access must be lawful; and that trespass is not for these purposes lawful.

ix) However, in the finest traditions of the legal profession, when advancing an unopposed claim, Mr Laurence QC did draw to my attention certain authorities in which the reasoning or outcome may now have become unsafe, in light of the more recent authorities. Some of these arose in the context of criminal offending on privately-owned land said to constitute a "road to which the public has access", or said to be a "public place" which is an analogous term (see Richardson at paragraph 23).

x) Deacon v AT (A Minor) [1976] RTR 244 was decided in December 1975 by a Divisional Court comprising Lord Widgery CJ, Park and May JJ. It concerned underage uninsured driving on a road in a council estate. The magistrates acquitted the accused teenager, finding that the permission of the council for residents and their visitors to use the road did not extend to the public in general. The Divisional Court upheld the acquittal. Giving the leading judgment, May J cited Harrison v Hill and said that the prosecution had failed to prove that the public in general had access to the road "at least by the tolerance of the owner or proprietor". Deacon is not authority for the proposition that the trespassing public, albeit 'tolerated' by the landowner, would be exercising legal access. May J cited the passage from Lord Justice-General Clyde's judgment in Harrison v Hill, in which he specifically said: "The statute cannot be supposed to have intended by public 'access' such unlawful access as may be had by members of the public who trespass on the property of either individuals or corporations". If the Divisional Court in Deacon thought that "tolerance" in Lord Justice-General Clyde's analysis equated to implied permission, or if they thought that tolerated trespass was not trespass, neither conclusion can stand in the light of the more recent authorities.

xi) Blackmore v Chief Constable of Devon and Cornwall Constabulary was decided in November 1984 by a Divisional Court comprising Robert Goff LJ and McCullough J. It concerned a conviction for drink driving on a privately-owned road on a trading estate. The Divisional Court upheld the conviction. The

magistrates had found as a fact that the public as a whole had "legitimate access to the roadway", including after trading hours. Blackmore is not authority for the proposition that the trespassing public, albeit 'tolerated' by the landowner, would be exercising legal access. Goff LJ cited Deacon in order to demonstrate the significance of Harrison v Hill, from which the quotation specifically included the sentence about "members of the public who trespass". As with Deacon, if the Divisional Court in Blackmore thought that "tolerance" in Lord Justice-General Clyde's analysis equated to implied permission, or if they thought that tolerated trespass was not trespass, neither conclusion can stand in the light of the more recent authorities.

xii) Price v Director of Public Prosecutions [1990] RTR 413 was a decision in April 1989 of a Divisional Court comprising Woolf LJ and Saville J. It was a case in which a shop-owner drove across the pavement to park in front of his shop and was charged with driving on a road without reasonable consideration for others (Road Traffic Act 1972 section 3). The pavement was described as, in part, private property. The Divisional Court held that the magistrates had been entitled, on the material before them, to conclude that the pavement as a whole could in the ordinary sense be described as a road. The conviction was upheld. There was no discussion or analysis in relation to whether public access requires lawfulness, nor whether the individual pedestrian had been a tolerated trespasser. None of the other cases were cited. Indeed, a point relating to whether the pedestrian in question had been "a lawful road user" was recorded as having been abandoned. Price does not stand as authority, still less binding authority in light of the authorities as a whole 20 years later, for the proposition that public access to a road need not be legal public access, nor for the proposition that tolerated trespass is legal public access, for the purposes of the familiar definition of "road".

xiii) Cowan v Director of Public Prosecutions [2013] EWHC 192 (Admin) was decided by Mitting J in January 2013. It was a drink driving conviction involving an internal roadway at Kingston Hill University. The conviction was overturned, because of a lack of evidence that the public as a whole had access to the roadway. The Court followed Deacon. In exchanges with Counsel regarding remedy, Mitting J said: "it would not have taken much in the way of additional evidence to establish that the public did have access to this campus site". Cowan is not authority for the proposition that legal public access is unnecessary, or that tolerated trespass constitutes legal public access. It goes no further than Deacon.

xiv) Richardson v Director of Public Prosecutions [2019] EWHC 428 (Admin) [2019] 4 WLR 46 was a decision of Julian Knowles J in February 2019. It was a case about drink driving in a private car park. The magistrates had convicted, finding the car park to be a "public place". The High Court overturned the conviction on appeal, for insufficiency of evidence in a number of respects. One of these (paragraph 33) was insufficiency of evidence that "the public did in fact use the car park … [with] lawful permission to do so either explicitly, implicitly or as the result of tolerance by the owners of the land in question". He returned to this (paragraph 34) saying: "there was no evidence" that the appellant was "entitled" to park in the car park "lawfully because there was no evidence of

general tolerated use by the public". Richardson is not authority for the proposition that tolerated trespass suffices to constitute lawful use. The observation at paragraph 34 needs to be read with the observation in paragraph 33. To speak of "tolerance" as a type of "lawful permission" is consistent with the correct understanding of "tolerance" as used in Harrison v Hill, which was cited. Julian Knowles J was not saying that trespass could be "use … [with] lawful permission". Had he been invited to do so, he would doubtless have addressed the sentence in Harrison v Hill which expressly says that the "statute cannot be supposed to have intended … unlawful access … by members of the public who trespass"; and he would doubtless also have addressed authority on what "tolerance" actually meant in Harrison v Hill, as well as authority on tolerated trespass as trespass.

xv) There are not therefore authorities which propound the fallacy that access need not be legal public access, or the fallacy that tolerated trespass can constitute legal public access, or the fallacy that tolerance in Harrison v Hill meant tolerated trespass rather than implied permission. If they were, they would clash with persuasive, and binding, recent authorities at the highest level.

27. For all these reasons I would have accepted that proposition (iii) is, on the current state of the authorities, legally correct. It does not follow from this analysis that I would have found that the premise for proposition (iii) – that the public has access to the hedge strip only as tolerated trespassers – is the correct factual analysis in the present case. That would not have been my conclusion.

28. Turning to proposition (iv), I would have held that this proposition is also legally correct. The requisite legal public access is defeated, insofar as the public were correctly to be characterised as persons permitted access under an implied licence, since such licence was inoperative on the relevant occasion. This is a short but compelling point. It is correct for the following reasons:

i) An implied licence arises where warranted by the facts, as was explained in Beresford by Lord Bingham at paragraph 5. Lord Bingham said this: "A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the [local] inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days…"

ii) As Lord Bingham then explained at paragraph 7: "the authorities preclude reliance on mere inaction as giving rise to an implied licence to use the land." The fact that implied permission requires an overt act, beyond passive acquiescence, was confirmed by the Supreme Court in R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58 [2020] 2 WLR 1 at paragraphs 39-40 (in the joint judgment of Lord Carnwath and Lord Sales), referring to Beresford at paragraphs 78-79 (Lord Walker).

iii) Where an implied licence arises, the circumstances at any given time may be either that the implied licence is currently operative or that it is currently inoperative. Examples of the latter – where it is currently inoperative – would

be those occasions described by Lord Bingham, where the private landowner is excluding the public from the relevant access because the landowner wishes to use the land for their own purposes. At any such time, there would be no implied licence on which a member of the public could rely to support access, with the consequence that such access would not be legal public access. Legal public access is, on the authorities, a prerequisite for the public access road limb, as explained above.

iv) There are many examples in the authorities of situations where there is an implied licence allowing public access in some circumstances and at some times, and not at others. They include the local field in Mann (see below), the Highland Show field in Paterson v Ogilvy 1957 JC 42; and the pub car park in Sandy v Martin. This phenomenon links directly to what I said was my preferred 'dynamic' analysis to the issue of factual public access, and as to propositions (i) and (ii) in combination.

v) If and insofar as the correct analysis of this case is that there is public access to the hedge strip in accordance with an implied licence, then that implied licence does not extend to walking along the hedge strip when the Pereiras' (or their visitors') cars are parked there. The Pereiras' use of the land for their own purposes by parking their cars there excludes the public from access to that part of the land where a car is parked. It follows that that would not be a place which at that time could satisfy the requirement of lawful public access to a road.

29. If propositions (iii) and (iv) are each correct, then it would not be necessary to grapple with which factual premise is the correct starting-point. There are only two possible starting-points, and they each lead to the same conclusion. It would, however, have mattered if one of propositions (iii) and (iv) were unsound. It is also relevant to what I said about the 'dynamic' approach to proposition (ii) in combination with proposition (i), on factual public access.

30. As to which starting-point was correct in the present case, I would have found that this is an implied licence case, and that proposition (iv) is the correct way to characterise the position, on the evidence and the findings in the present case. It follows that, even if I were wrong about the correctness of proposition (iii), I would have found in the Pereiras' favour on the question of legal public use.

i) This was not a case of mere "passive acquiescence". It was not a case of "mere inaction" on the part of the Pereiras. There was concrete action by them. The Pereiras acted, and acted very frequently, so as to "exclude" the public from the hedge strip part of their land, whenever they wished to use that part of the land for their own purposes. The Pereiras' concrete and regular actions clearly signalled that there was an implied permission to pass along the hedge strip, but only at other times. The act of parking a car on the hedge strip was a physical barrier and a physical exclusion from that part. The consequence is that, as and when the Pereiras wished and chose to park their car on part of their land, they were excluding anyone else from having the implied licence otherwise permitted, to pedestrians at least, at other times. That would have been my view, in which I would have been sufficiently clear to conclude was the correct and only tenable view, of the evidence on the facts as found.

ii) I would have found that Lord Bingham's description fitted this case. I would also have been supported in my analysis by the case of R (Mann) v Somerset County Council [2017] 4 WLR 170. That was a case in which the implied licence characterisation was adopted and upheld by this Court (see especially paragraphs 71-74) in circumstances where part of a privately-owned local recreational field was occasionally used by the landowner for a beer festival or funfair. That occasional use was held, on the facts as found, to render the field – in its entirety – land to which the public only ever had access pursuant to an implied licence. In the present case, the frequency of own-use is far greater than it was in the Mann case, and it would not be necessary for the conclusion as to implied licence to cover the entirety of the land owned by the Pereiras, but only a relevant part. As I have indicated, it may very well be – had the question been ventilated and evaluated on the facts – that a finding would have applied only to the hedge strip. In Mann, a question had arisen as to whether it was only the northern part of the field – that being where the beer festivals and funfairs were occasionally held – in which the relevant interruption of public access was occurring, with the consequence that the southern part of the field could be regarded as land to which there was uninterrupted public access. That alternative characterisation of the case was not pursued by the local authority: see paragraph 22(2) of the judgment.

iii) The position can I think be tested by changing the facts of the present case. Suppose the Pereiras had installed within their hedge two poles on hinges which could easily be opened out so as to be at right angles to the hedge, each pole being the width of a car and the two poles being the length of a car parking-space apart. Suppose that, at some time on more than 200 days within each year, one of the Pereiras opens out the two poles so that they constitute a physical barrier across that part of the pavement adjacent to the hedge on the hedge strip. They then manoeuvre the car to park it in between the two poles, where the car stays for a substantial period. That would be an obvious act obstructing the public from access to that part of the land, and diverting the public into the middle strip. It would signal the landowner excluding pedestrian members of the public in circumstances where the landowner wishes to use the land for their own purposes. It would, equally, signal to pedestrian members of the public that they are being permitted to access that part of the land on all other occasions. I cannot see a convincing reason why this analysis – if it is right – should be any different from the analysis where the car is parked next to the hedge but without the installation or use of any further physical obstruction in front of or behind the vehicle.

iv) There are undoubted virtues to this implied permission analysis (proposition (iv)), including comparative virtues when put alongside tolerated trespass (proposition (iii)), and especially if accompanying my preferred approach to propositions (i) and (ii), in combination. This approach would allow for the hedge strip to be a road to which the public had factual and legal access, at such times when the Pereiras were not using it for the parking of cars. In written submissions, Mr Laurence QC and Mr Adamyk referred to the following as "sensible consequences": "It would mean that whenever the public had implied permission to be present … the private road in question would qualify as a road to which the public had (lawful) access while the permission endured. Therefore

> eg. a drunk driver on that land at those times could still be convicted. This is a common sense outcome which also has a sound legal basis … The reasoning would apply equally to private land generally (ie. would not be confined to private roads) for the effect of the implied permission would mean that the land would then qualify as a 'public place' while the permission endured". I agree. I see this analysis, on the current state of the authorities at the highest level, as a sound way forward in a case such as the present.

31. That, then, is how I would have approached the issue of legal public access if it had arisen for consideration as part of the ratio in this judgment. As it is, these are obiter observations, to explain what I made of the submissions advanced and authorities shown to me, on this fully-argued aspect of the case.

Conclusion

32. For the reasons which I have given, the claim for judicial review succeeds. The review adjudicator's adverse conclusion on the section 31 issue cannot stand, nor could he have found factual public access on his findings of fact and on the evidence. He should have overturned the decision of the appeal adjudicator and allowed the appeal. Remittal is inappropriate and unnecessary. The circulation of this judgment in draft has enabled me to deal here with the appropriate Order, in which I decline to include further recitals and declarations because this judgment speaks for itself and sets out my findings. I make the following Order. (1) The decision of the Environment & Traffic Adjudicator dated 10th June 2019 is quashed with the substitution of a decision allowing of the Claimant's appeal against penalty charge notice no. SO38405730. (2) Pursuant to Regulation 7(2) of the Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007 (SI 2007 No. 3482), the Interested Party is directed to cancel the said penalty charge notice. (3) There is no order as to costs.