Neutral Citation Number: [2021] EWHC 3254 (Ch)

Case No: PT-2020-000702

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 3 December 2021

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

(1) JOAN LOIS BOWEN **(2) JANE ELIZABETH FAWCETT BOWEN GRACE** **(3) JACOB HENRI CLOUD**	**Claimants**
- and -	
ISLE OF WIGHT COUNCIL	**Defendant**

- -
- -

Samuel Laughton (instructed by **Irwin Mitchell LLP**) for the **Claimants**
Ashley Bowes (instructed by **Isle of Wight Council**) for the **Defendant**

Hearing date: 29 November 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Friday 3 December 2021.

JUDGE KEYSER QC:

Introduction, facts and summary

1. The first and second claimants are the registered proprietors of certain land at Ryde, Isle of Wight ("the Site"), to which the only access is over a privately owned way known as Guildford Road. The third claimant has an option to purchase the Site and has made an application for outline planning permission to build houses on it. The defendant is the local planning authority for the area in which the Site is situated; it is also the relevant traffic authority. It has refused the application for outline planning permission, principally because it considers that the proposed development of the Site would be unacceptable on road safety grounds unless a traffic regulation order ("TRO") were made in respect of Guildford Road pursuant to section 1 of the Road Traffic Regulation Act 1984 ("the 1984 Act") and that it is impossible to make such a TRO because Guildford Road is not a "road" for the purposes of the 1984 Act.

2. This case (which might, perhaps, have found a more natural, though not a more welcoming, home in the Queen's Bench Division than in the Chancery Division) raises a single issue: whether Guildford Road is a "road" for the purposes of the 1984 Act. The claimants say it is. The defendant says it is not. The relevant definition is found in section 142:

> "'road'—(a) in England and Wales, means any length of highway or of any other road to which the public has access, and includes bridges over which a road passes …"

3. The material facts are not in issue. Guildford Road is a cul-de-sac on the north side of the public highway, Upper Green Road (the B3330); the south end of Guildford Road joins Upper Green Road. There are pavements on either side of the carriageway. There has never been any barrier or obstacle to access at the southern end of Guildford Road, nor has there ever been a sign to show that the road was private or that access was restricted. Guildford Road serves eight residential properties on either side, a Hall at the south-eastern corner with Upper Green Road, and the Site (which was formerly a camp site) at the northern end of the road. Vehicular entrance to the Site is barred by a gate, though the gate has no lock and pedestrians can walk around it, but the Site is not part of the road. Title to Guildford Road is unregistered and, in the absence of any deeds, it is presumed that the adjoining landowners on either side own the land to the middle line of the road. The unchallenged evidence of the claimants shows that the public have long exercised access to Guildford Road and continue to do so. Local people have used the road both with cars and on foot. They have parked their cars there in order to make use of local amenities, such as a medical centre, a chapel, a Community Hall, and a recreation ground. They have also used it for walking, whether singly or in company, with or without dogs, and sometimes in organised groups, and for the purpose of calling on the houses along the road without invitation (for example, carol singers, religious canvassers, and "trick-or-treaters").

4. It is common ground that Guildford Road is not a "highway" and that, as a matter of ordinary language, it is a road. Therefore the question is whether it is a "road to which the public has access". The facts as summarised above show that the general public have had and continue to have access to Guildford Road, but it is common ground that they do so without any permission or other lawful right. The claimants

contend that it is sufficient that the public do in fact have access to Guildford Road and that their access is tolerated, albeit not permitted, by the owners (when I refer to owners, or sometimes proprietors, what I mean strictly is the persons entitled to possession). The defendant contends that the public access must be pursuant to an express or implied permission; it is not enough that the public access the road as tolerated trespassers.

5. In my judgment, the claimants are correct. In brief, I consider that the defendant's contention and supporting arguments are open to objection on four grounds: first, they are contrary to authority; second, they make the application of the definition turn on a distinction that has nothing to do with the basic policy of the legislation; third, they introduce unnecessary complexity into decisions that have to be made regularly, in particular, by magistrates' courts when considering whether motoring offences have been committed; fourth, as I shall explain, one of the main arguments in support of the defendant's position is nothing more than an invitation to the courts to tangle themselves in a linguistic web of their own weaving.

6. The basis for these conclusions will, I hope, become apparent from what follows. But I shall explain it briefly now. It has often been said that the public access mentioned in the definition of "road" must be both actual access and legal or lawful access. However, simple reference to a requirement of lawfulness is capable of being rather misleading. Since 1931 the courts in this jurisdiction and in Scotland, where the same definition has applied equally, have treated public access as falling within the terms of the definition if it is exercised with the permission of *or the tolerance of* the owner of the road. Such access may strictly speaking constitute a trespass, because a tolerated trespasser is a trespasser nonetheless. But access by the public will still satisfy the definition, provided it is not exercised in the face of, or in defiance of, efforts by the owner to prevent access: that is, provided it is exercised with the owner's tolerance. There is perfectly good reason why this should be so, and it is referred to in the cases: the, or at least an, underlying purpose of the legislation relating to traffic regulation and motoring offences, to which the definition applies, is the safety of the public who have access to the roads; and the important question is not whether their presence on the road is impliedly permitted or merely tolerated but whether the road is one on which they may reasonably be expected to be present. The case of members of the public who wilfully defy prohibitions by entering onto private land where they clearly have no right to be is, for this reason, different from the present case, where members of the public habitually use a road that appears to be no different from any other road.

7. Against this conclusion, the defendant advances two basic arguments. The first is that the authorities, when properly understood, have not accepted that public access by way of tolerated trespass is sufficient for the purposes of the statutory definition. I disagree with that argument, for reasons that I hope will be apparent from what follows. The defendant's second argument is advanced as a matter of the logic of first principles: the cases say that for the purposes of the statutory definition public access must be lawful; though it may previously have been the practice to overlook the point, it is now very clear that so-called tolerated trespass is trespass and therefore unlawful; the law would be incoherent if it called the same thing lawful in one context and unlawful in another; therefore tolerated trespass, being unlawful, cannot be conduct that satisfies the requirements of the statutory definition. With great respect to Dr

Bowes, who advanced this argument with skill and persuasiveness (though not so as to persuade), the argument strikes me as misguided. The statutory definition refers merely to access by the public. The courts have explained the nature of the required access. If the defendant's reading of the cases is correct, and the courts have required that access be with at least implied permission and not merely tolerated, there is an end of it: this second argument is unnecessary. However, if in explaining the nature of the required access the courts have made clear that access with the tolerance of the owner, in the sense of tolerated trespass, suffices, that is also an end of it. It is no objection to say that the courts have also used the words "lawfully", "legally" and so forth, and that access by tolerated trespass must be excluded, because the courts have explained more fully what they mean by those words in this context. Whether or not words like "lawfully" are ideal, it is the substance of the decisions that matters. We cannot be prisoners of words of our own choosing.

8. In what follows I shall summarise a little of the legislative history and then consider a number of authorities. Counsel assured me that I had been referred to only a selection of the cases. I in turn shall mention only what seem to me to be the more useful cases to which I was referred.

The Statutes

9. Counsel's researches indicate that the first statutory appearance of the expression "any other road to which the public has access" was in the Road Transport Lighting Act 1927 ("the 1927 Act"). The preamble records that that was an Act "to regulate further the lighting of vehicles". Section 1 provided that "every vehicle on any road" should during the hours of darkness carry specified lamps. Further sections contained provisions relating to bicycles, tricycles, horse-drawn vehicles and so forth. Section 10 made it a criminal offence, punishable by fine, to fail to comply with the provisions of the Act or of regulations made under it, subject to a statutory defence. Section 15 provided inter alia:

> "The expression 'road' means any public highway and any other road to which the public has access".

10. The definition of "road" now found in the 1984 Act appears in almost identical terms in the Road Traffic Act 1930 ("the 1930 Act"), a wide-ranging Act described as follows in the preamble:

> "An Act to make provision for the regulation of traffic on roads and of motor vehicles and otherwise with respect to roads and vehicles thereon, to make provision for the protection of third parties against risks arising out of the use of motor vehicles and in connection with such protection to amend the Assurance Companies Act 1909 to amend the law with respect to powers of local authorities to provide public service vehicles, and for other purposes connected with the matters aforesaid."

Part I concerned the "Regulation of Motor Vehicles". Part II made "Provision against Third-party Risks arising out of the use of Motor Vehicles". Part III concerned

"Amendment of Law relating to Highways". Part IV concerned "Regulation of Public Service Vehicles". Part V concerned "Running of Public Service Vehicles by Local Authorities". Part VI contained general provisions. The Act, like those that have succeeded it, applied to Scotland, subject to minor modifications. Section 121(1) included the following definition:

> "'Road' means any highway and any other road to which the public has access, and includes bridges over which a road passes".

11. Part III of the 1930 Act (sections 45 to 60) contained provisions for the regulation and restriction of the use of vehicles on certain roads in the interests of road safety. Thus, section 46, headed "Power to restrict use of vehicles on specified roads", provided in part:

> "(1) The Minister may, on the application of a council to which this section applies and after holding, if he thinks fit, a public inquiry, by order prohibit or restrict, subject to such exceptions and conditions as to occasional user or otherwise as may be specified in the order, the driving of vehicles, or of any specified class or description of vehicles, on any specified road within the area of the council in any case in which he is satisfied that any such vehicles cannot be used, or cannot without restriction be used, on that road without endangering the safety of the vehicles or the persons therein, or of other persons using the road, or that the road is unsuitable for use or for unrestricted use by any such vehicles."

Again, section 47, headed "Power of highway authority temporarily to prohibit or restrict traffic on roads", provided in part:

> "(6) A highway authority may at any time by notice restrict or prohibit temporarily the use of any road or any part of any road by vehicles or by vehicles of any particular class or description where owing to the likelihood of danger to the public or of serious damage to the highway, it appears to them necessary that such restriction or prohibition should come into force without delay. …"

The powers conferred by these provisions are by no means as extensive as those exercisable now by TROs, but Mr Laughton was I think justified in referring to the provisions in the 1930 Act as the antecedents of TROs.

12. It was the Road Traffic Act 1960 ("An Act to consolidate, with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949, certain enactments relating to road traffic") ("the 1960 Act") that introduced TROs. The relevant provisions in section 26 are materially similar to those in section 1 of the 1984 Act. The 1960 Act again dealt both with traffic regulation and with motoring offences. Part I contained "General Provisions relating to road Traffic". Part II concerned "Minimum Age for Driving motor Vehicles and Licensing of Drivers thereof". Part III concerned "Public Service Vehicles". Part IV provided for the

"Regulation of Carriage of Goods by Road". Part V concerned "Licensing of Drivers of Heavy Goods Vehicles". Part VI concerned "Third-Party Liabilities". Part VII contained "Miscellaneous and General" provisions. Section 257(1) defined "road" in the same terms as those contained in the 1930 Act.

13. Accordingly, in the 1930 Act and the 1960 Act a definition of "road" in materially identical terms to that now contained in the 1984 Act was used in respect both of traffic regulation and of motoring offences.

14. The Road Traffic Regulation Act 1967 ("the 1967 Act") was, again, a consolidation Act. Unlike the earlier Acts, however, it made provision only in respect of traffic regulation. There were provisions for criminal offences (for example, section 42 for parking offences, and section 86 for forgery of parking meter tickets), but the Act did not deal with motoring offences. Section 1 of the 1967 Act is, for present purposes, materially the same as section 1 of the 1984 Act. The definition of "road" in the 1967 Act is in identical terms to the definition in the 1930 Act and the 1960 Act.

15. The provisions of the 1960 Act in respect of motoring offences were repealed and replaced by the provisions of the Road Traffic Act 1972 ("the 1972 Act"). The definition of "road" in section 196(1) was again unchanged: "any highway and any other road to which the public has access, and includes bridges over which a road passes".

16. The 1984 Act was "An Act to consolidate the Road Traffic Regulation Act 1967 and certain related enactments, with amendments to give effect to recommendations of the Law Commission and the Scottish Law Commission". The definition of "road" has already been set out. For completeness, I refer also to the relevant provisions regarding TROs:

> "1. Traffic regulation orders outside Greater London.
>
> (1) The traffic authority for a road outside Greater London may make an order under this section (referred to in this Act as a 'traffic regulation order') in respect of the road where it appears to the authority making the order that it is expedient to make it—
>
> (a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or
>
> (b) for preventing damage to the road or to any building on or near the road, or
>
> (c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians), or
>
> (d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or

> (e) (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or
>
> (f) for preserving or improving the amenities of the area through which the road runs or
>
> (g) for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995 (air quality)."

> "2. What a traffic regulation order may provide.
>
> (1) A traffic regulation order may make any provision prohibiting, restricting or regulating the use of a road, or of any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the order,—
>
> (a) either generally or subject to such exceptions as may be specified in the order or determined in a manner provided for by it, and
>
> (b) subject to such exceptions as may be so specified or determined, either at all times or at times, on days or during periods so specified.
>
> (2) The provision that may be made by a traffic regulation order includes any provision—
>
> (a) requiring vehicular traffic, or vehicular traffic of any class specified in the order, to proceed in a specified direction or prohibiting its so proceeding;
>
> (b) specifying the part of the carriageway to be used by such traffic proceeding in a specified direction;
>
> (c) prohibiting or restricting the waiting of vehicles or the loading and unloading of vehicles;
>
> (d) prohibiting the use of roads by through traffic; or
>
> (e) prohibiting or restricting overtaking."

17. The principal statute now dealing with motoring offences is the Road Traffic Act 1988. Section 192(1) states that "road"

> "(a), in relation to England and Wales, means any highway and any other road to which the public has access, and includes bridges over which a road passes, and

> (b) in relation to Scotland, means any road within the meaning of the Roads (Scotland) Act 1984 and any other way to which the public has access, and includes bridges over which a road passes".

The Case-law

Harrison v Hill

18. The meaning of "road" in the 1930 Act was considered by the High Court of Justiciary in Scotland in *Harrison v Hill* [1932] JC 13. That case has consistently been taken to state the law as it applies in England and Wales and, as it lies at the root of subsequent discussion in the cases, I shall deal with it at some length. Mr Harrison was convicted by the Sheriff-substitute of an offence under section 7(4) of the 1930 Act on the ground that, while disqualified from holding a driving licence, he had driven a vehicle on a specific road. The Sheriff-substitute stated a case for appeal to the High Court. The facts admitted or proved included the following:

> "[O]n the road leading from Drygate Road to Auchenames Farm House, occupied by Robert Middlemas, in the Parish of Kilbarchan, appellant drove a motor vehicle, namely, a motor lorry. There was no evidence to show that appellant drove said motor vehicle on any other road, nor was he charged with driving on any other road. … The said Drygate Road is a public highway. Said road leading therefrom to said farmhouse is a road leading only to said farmhouse, and there are no houses other than said farmhouse on said road. Said road is part of the farm of Auchenames aforesaid, and goes no further than said farmhouse. It is not maintained by any public authority, but the said Robert Middlemas is bound under the lease of said farm to maintain said road. There is no gate on said road, nor, except as aftermentioned in the summer time, any obstacle to prevent members of the public going on to it from the said highway, nor was there any intimation that it was not open to the public. In the summer time, when the farmer's cattle are at the grass in the fields adjoining said road, the farmer puts a pole across the entrance to said road to prevent his cattle straying on to the said Drygate Road. Any member of the public desiring to call at said farmhouse for any purpose uses said road to get to the farmhouse, and members of the public not having business at said farm frequently walk, on said road. … The said farmer has on several occasions put members of the public off said road when he had reason to believe that they were likely to do damage to his crops in the field adjoining said road."

The primary question of law stated for the opinion of the High Court was whether the Sheriff-substitute had been entitled to hold that the road was a "road" to which the 1930 Act applied. The High Court held that he had been so entitled. Each of the three judges gave a judgment.

19. Lord Clyde, Lord Justice-General, said at 16-17:

> "The road is in no sense a public road; but it is found in the case that members of the public not having business at the farm frequently walk upon it. The question for decision thus comes to be whether the road is one 'to which the public has access' within the meaning of the definition.
>
> It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it.
>
> I think that, when the statute speaks of 'the public' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways.
>
> I think also 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, 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. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor. 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.
>
> In arriving at these conclusions I am partly influenced by the broad consideration that, as the statute is intended for the protection of the public, it is natural to suppose that the statutory traffic regulation should apply to any road on which the public may be expected to be found. Hence the inclusion of such private roads as the public (generally) is, as [a] matter of fact, allowed to use, and the exclusion of those which the public (generally) cannot lawfully use at all.

> I am conscious of the difficulties and uncertainties to which the definition—or the construction I have put upon it—may give rise in administering the Act. Thus, 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. But I am not able to find any construction of the definition clause which fits the terms in which it is expressed other than the one I have adopted; and, if that is right, any difficulty or inconvenience which may result is the creation of Parliament itself."

Lord Sands expressed his own reasoning as follows at 17, and I set out his judgment in full:

> "As may be clearly gathered from the terms of the Act here in question, the object of the special legislation in regard to certain prosecutions and offences was the protection of the public. This clearly explains why the prohibition here dealt with is not limited to public highways but extends to any road to which the public have access. It is the public who are to be protected, and the provisions of the Act are made to apply to all roads on which the motorist may encounter members of the public.
>
> The learned Sheriff-substitute has found that the road here in question was a road answering that description. I think that, on the facts stated, he was entitled so to find. In my view, access means, not right of access, but ingress in fact without any physical hindrance and without any wilful intrusion. In one view, it is a technical trespass for any person to put a foot upon an owner's land without the owner's permission. But, as is matter of common knowledge, there are many roads upon which members of the public enter without any sense of wilful intrusion. In my view, 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."

Lord Blackburn gave a very short judgment:

> "I concur. I have no doubt that the definition of a 'road' in section 121 of the Road Traffic Act is wide enough to cover the road in question in this case, and that the conviction was justified. The definition applies to all roads, whether public or private, 'to which the public has access,' and it appears to me that any driver of a motor car whose licence had been withdrawn would contravene the Act if he entered upon a private avenue and drove a car thereon without the express permission of the owner of the avenue."

20. *Harrison v Hill* established, or recognised, four things that are not in dispute in this case. First, a piece of land is capable of being a "road" within the statutory definition only if it is a road according to normal usage. So, for example, a car park is not a road and therefore cannot fall within the statutory definition (cf. *Clarke v General Accident Fire and Life Assurance Corporation Plc* [1998] 1 WLR 1647). Second, a road is capable of being within the statutory definition only if the public do in fact have access to it: there must be factual access, not merely the opportunity for factual access. Third, the access must be by the public generally, not merely by some special class or subset of the public. Fourth, not every instance of general public access to a road will suffice to bring the road within the statutory definition: the access must, in some sense or other, be "lawful" or at least not prohibited. The issue between the parties concerns the precise nature of this final requirement.

21. Lord Clyde's reasoning appears from the paragraph beginning "I think also that" in his judgment (above). He states in terms that the definition requires that the public "actually and legally" access the land and that the requirement is not satisfied by "such unlawful access as may be had by members of the public who trespass on the property of either individuals or corporations." The first sentence of the paragraph appears to mean that, on the one hand, the lawfulness need not consist in some "positive right of [the public's] own to access" and, on the other, that the mere absence of a physical obstruction to physical access does not suffice to make the access lawful. Consistently with this, he said that the access "must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs". All of this would seem to mean that access by so-called tolerated trespassers—those who enter land without any right or permission but whose presence is passively tolerated by the owners in possession—does not suffice to satisfy the definition. The matter is rendered less clear, though, by the statement,

> "I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor."

This would seem to be patient of alternative interpretations. The first is that, for the purposes of the statutory definition, access by the public as tolerated trespassers suffices (and is thus to be considered, for these purposes, as exercised "legally"). I think, indeed, that this is how the judgment has been understood in some later cases. The difficulty, however, is that such an interpretation seems to be inconsistent with both what precedes and what follows the sentence concerning "the tolerance of a proprietor". I think that the judgment can be read as internally consistent if the second interpretation is adopted and if "the tolerance of a proprietor" is understood to refer to a form of actual, if grudging and implied, permission; the sentence therefore explicates the preceding statement that the access "must be permitted or allowed,

either expressly or implicitly". This understanding gains indirect support from remarks made by Lord Rodger of Earlsferry in *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, at [65]:

> "The phrase 'nec vi nec clam nec precario', taken over from Roman law, has resounded just as powerfully among Scots lawyers and judges as among their brethren south of the Border. But in reading the Scottish cases a linguistic point must be noted. English judges have tended to use 'tolerance' as a synonym for acquiescence. See, for instance, *Mills v Silver* [1991] Ch 271. Scottish judges, on the other hand, have tended to use 'tolerance' as a synonym for permission and as a translation of precarium. This is perfectly understandable since an owner who, perhaps somewhat reluctantly, decides to permit the public to walk across his land until further notice may be said to 'tolerate' them doing so."

According to this second interpretation, therefore, Lord Clyde required that, for the purposes of the statutory definition, access by the public be access with permission of the landowner or legal right but not as trespassers. In the present case, that would mean that Guildford Road was not a "road", because—as is rightly accepted on behalf of the claimants—the evidence shows that the public access the road as mere tolerated trespassers.

22. The grounds on which Lord Clyde could have thought that a requirement of implied permission was satisfied in *Harrison v Hill* are far from clear. It is possible that the final paragraph of his judgment (not quoted above) indicates that he may have been impressed by the fact that the farmer did indeed prevent access when there was reason to believe that the persons using the road "were likely to commit mischief". However, I cannot see why active prohibition of some people in particular circumstances should be taken to mean that total passivity in the face of access by other people in different circumstances was anything other than mere toleration, in particular why it should be taken to imply permission. In my view this second interpretation of Lord Clyde's judgment would provide a seriously deficient model for construction of the statutory definition, for two related reasons. First, the distinction between mere tolerance that amounts to implied permission and mere tolerance that is no more than a failure to take active steps to prohibit access is liable to be difficult to draw (as is seen by Lord Clyde's conclusion on the facts of the case, if he is taken to have required some form of permission) and very largely a matter of subjective interpretation, and is a distinction wholly inappropriate for the kind of decision that falls to be made in practice, such as whether a particular motorist committed an offence by drunken driving on a "road". Second, the distinction has nothing to do with the legislative policy to which Lord Clyde expressly adverted or his conclusion that "the statutory traffic regulation should apply to any road on which the public may be expected to be found."

23. Lord Sands did not in terms express agreement with Lord Clyde, although their conclusion on the case before them was the same. He remarked, "In my view, access means, not right of access, but ingress in fact without any physical hindrance and without any wilful intrusion." That seems clearly to stop short of requiring that the access be with legal right or permission. The remaining sentences of the judgment

show that Lord Sands would regard the public access as sufficient if, although strictly speaking a trespass ("a technical trespass"), it were achieved "without any sense of wilful intrusion", such as would be involved "by overcoming a physical obstruction or in defiance of prohibition express or implied." As the first paragraph of his judgment shows, this construction commended itself to Lord Sands because of his understanding of the object of the legislation as being the protection of the public. Thus his conclusion that

> "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."

24. Lord Blackburn's three-sentence judgment is, with respect, a little puzzling. The first sentence seems to me to imply agreement with Lord Sands' judgment. It does not strictly seem to imply agreement with Lord Clyde's judgment. The second sentence just states the result. The third sentence begins with a paraphrase of the relevant part of the statutory definition, and the second part of the sentence appears to be both irrelevant and misguided (because the lawfulness of the actions of the disqualified driver turned on the status of the road, not on whether he had the landowner's permission to drive on the road while disqualified).

25. At all events, insofar as it is relevant to know the *ratio decidendi* of *Harrison v Hill*, I am of the opinion that it is found in Lord Sands' judgment. One interpretation of Lord Clyde's judgment is entirely consistent with Lord Sands' judgment.

Subsequent case-law

26. *Cheyne v MacNeill* 1973 SLT 27 was another decision of the High Court of Justiciary in Scotland (Lord Emslie, Lord Justice-General, and Lords Migdale and Cameron). A motorist was convicted of an offence of driving a vehicle on a road without due care and attention contrary to section 3 of the 1960 Act. The question for the High Court was whether the road was a road to which the public had access. The road, a private road, provided a link between two public roads and formed a convenient link between two populous areas and "a material number of members of the public" had driven along it without permission. There had never been a physical barrier to access at either end of the road, but on one day each year for the previous few years the occupiers of the private land had placed a barrier roughly halfway along the road to prevent drivers from proceeding further. There were reasonably prominent notices at each end of the road indicating that it was private and that there was no admittance except for those with business at the occupier's premises. In the two or three years before the alleged offence, the occupier's security officers had challenged some but not all motorists whom they believed to have no business at the occupier's premises and told them that persons with no such business had no right to use the road; some drivers turned back but others continued along the road.

27. The High Court upheld the finding that the road in question was a "road" for the purposes of the statutory definition. It considered that, as the policy of the legislation was public protection, the test properly focused on the likely presence of members of the public rather than on their legal right to be on the road. The single Opinion of the Court said at 29-30:

> "In deciding what is the proper construction to be put on the critical words [i.e. 'road to which the public has access'], the purpose of the relevant statutory provisions has always to be kept in view. Plainly the purpose is to secure the safety of the public whose members may be upon or passing over the ways within the scope of the provisions. The question then is not one of determining the measure or extent of the statutory protection by reference to the measure or extent of the legal right of access or passage which members of the public can enforce or enjoy over a particular way, but whether the way is one on which members of the public may be expected to be found and over which they may be passing, or to which they are in use to have access."

The Court then explained, in the light of this, what was meant by the requirement that the access be exercised "lawfully" or "legally":

> "The statute does not in terms require that the access upon which the issue of liability to the statutory provisions depends shall be in respect of any legally enforceable rights of passage. Further, the definition contrasts 'highway' with the words 'road to which the public has access'. Upon a 'highway' the public right of passage is secured by law and its maintenance is the responsibility of a statutory authority. A 'road' within the meaning of the definition would therefore seem to include a way which need not possess either of these qualities. From this contrast, it is not difficult to infer that the words 'to which the public has access' are necessarily referable to a situation in which it is found-in-fact that the public has access — access for the purpose for which a road is intended or designed, i.e., passage on foot or in a vehicle. But when the statute refers to access it cannot be assumed that this means access which is obtained unlawfully, e.g., by climbing over or opening gates, or by surmounting walls or fences, designed to exclude potential intruders. In our opinion "access", as the word is used in the definition, covers access for passage by permission express or implied from, or acquiescence or toleration by, the person or persons with legal right to control the use of the road. The degree or extent of use necessary to bring a particular road within the definition will necessarily be a question of fact in every case. Where there is such permission, acquiescence or tolerance demonstrated by use or otherwise, it can properly be said that there is nothing illegal or unlawful in such access as the public is proved to enjoy, and therefore that the public has access lawfully to the road. In using the word 'lawfully' we would attach to it the meaning which was given to the word 'legally' by Lord Justice-General Clyde in *Harrison v. Hill*, 1932 J.C. 13, (1931 S.L.T. 598), at p. 16 where he said: "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. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor." It is in this sense that the use of the word 'legally' in the opinion of the Lord Justice-General in the case of *Hogg v. Nicholson*, 1968 S.L.T. 265 is also to be understood.
>
> If this is the proper construction of the words 'to which the public has access', as in our opinion it is, then the question in every case becomes one of evidence, i.e., whether the facts proved establish such an access by the public. What will suffice to prove such an access must necessarily depend on the circumstances of the particular case, but we are satisfied that the mere posting of prohibiting notices or warning signs indicating a private road will not be conclusive of the question or amount to such 'express prohibition' as was mentioned by Lord Sands in *Harrison v. Hill* (supra), at p. 17. This appears to have been the view taken by Lord Parker, C.J., in *Knaggs v. Elson* (1965) 109 S.J. 596 and we agree with it. The existence of notices and, indeed, evidence of actings by proprietors in relation to public use of private roads, are simply facts which form part of the whole evidence which must be considered; and if the evidence as a whole shows that, in spite of the posting of notices and other actings by a proprietor, substantial access or passage was enjoyed by the public, it may well entitle the court to draw the inference that the public use of the road was, in fact, permitted, acquiesced in or tolerated by the proprietor."

The particular conclusion on the facts was expressed as follows:

> "In short, so extensive is the use of the road by the general public that, in spite of the notices, the annual blocking of the road, and the actings of the security officers, all of which, in our opinion, appear to have been designed to obviate the risk of a successful declarator of public right of way, there is ample warrant for the inference drawn by the sheriff that public access to the mill road is tolerated by the proprietors."

28. It is clear, in my view, that the High Court in *Cheyne* was not using "tolerance" or "toleration" to signify a form of implied permission. Use by members of the public having no business at the premises of the occupiers was not exercised with any form of permission but was tolerated, in the sense in which that word is understood of tolerated trespassers. Those who used the road without having business at the owner's premises specifically did so without permission, though they were not actively prevented from doing so. The High Court expressly distinguished the cases of use "permitted, acquiesced in or tolerated by" the owner. Further, and importantly, the logic of the first paragraph from the Court's Opinion quoted above, concerning the purpose of the legislation, is entirely inconsistent with attributing relevance to the distinction between tolerance in the sense of implied permission and tolerance in the sense of passive acquiescence in a trespass. The High Court interpreted Lord Clyde's

judgment in *Harrison v Hill* in a manner consistent with the judgment of Lord Sands in that case. In doing so, the Court took pains to explain the particular meaning to be attributed to "lawfully" and similar words in this context. Further, it deliberately and expressly reduced the relevant question to a relatively simple question of fact rather than a legal question of right. The case is also significant because the High Court considered that a reasonably prominent sign negativing permission would not render public access unlawful in the relevant sense if, as a matter of fact, the access were tolerated.

29. *Houghton v Scholfield* [1973] RTR 239 was a decision of the Divisional Court of the Queen's Bench Division on appeal from justices and is therefore binding on this court. Unlike the earlier Scottish cases, it concerned a TRO. The issue was whether the cul-de-sac to which the TRO applied was a "road" within the definition in section 104 of the 1967 Act. At 243-244 Lord Widgery CJ, with whom Melford Stevenson and Brabin JJ agreed, said:

> "On the question of what is meant by the public having access, we have been referred to a judgment of McNair J in *Buchanan v Motor Insurers' Bureau* [1955] 1 All ER 607, where, having pointed out that the public for this purpose being the general public rather than people who have a specific concern with walking on the area here in question, he went on, at p 608, to quote from Lord Sands [in *Harrison v Hill,* 1932 JC 13 , 17] who said:
>
> > 'In my view, 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'.
>
> On the disputed area, there is no sort of physical obstruction for the public to get over, no prohibition express or implied, so one could legitimately regard it as an area to which the public have access if members of the public are to be found there."

The Lord Chief Justice's review of the evidence showed that, at least so far as the scanty record before the Divisional Court went, it was unilluminating. But he concluded that the justices had been entitled to conclude that the cul-de-sac was a road for the purposes of the statutory definition. There are two points of significance in the case. First, the Divisional Court proceeded on the basis that Lord Sands' dictum accurately represented the law. Second, accordingly, the Court regarded the question as being essentially a simple one of fact rather than of legal right. This latter point is made clearly in Lord Widgery's remarks at 244 concerning the material on which the justices had been entitled to act:

> "[A]t the end of the day, on one of the most unsatisfactory cases stated this court has recently seen, the justices reached a conclusion, which is essentially a matter of fact, on material which included their own inspection, in circumstances where their own inspection would be of considerable value."

In treating the question as essentially one of fact rather than of legal right, the Divisional Court was taking the identical position to that taken in *Cheyne*.

30. *Deacon v AT (A Minor)* [1976] RTR 244 was another decision of the Divisional Court presided over by Lord Widgery CJ. Justices held that a defendant, charged with a motoring offence on a road within a council's housing estate, had no case to answer, because there was no evidence that the road in question was used by the public in general; therefore it had not been established that it was a "road" within the definition in the 1972 Act. The Divisional Court upheld the justices' decision to dismiss the charge. The issue in the case concerned the fact of access rather than its legal quality. However, May J, with whose judgment Park J and the Lord Chief Justice agreed, adopted the approach of the High Court of Judiciary in *Harrison v Hill* as follows at 247-248:

> "Whether or not a road is a 'road' within the meaning of the definition in section 196(1) of the Act of 1972 requires consideration in my view of two particular words in that definition: first of all 'public'; and, secondly, 'access'. For my part, with respect, I do not think that one can do better than go back to the well-known case of *Harrison v Hill*, 1932 JC 13. There the court had to consider the same definition in the relevant section [section 257(1)] of the Road Traffic Act 1930 and, in giving judgment, the Lord Justice-General, Lord Clyde, said, at p 16:
>
> > 'I think that, when the statute speaks of "the public" in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways'.
>
> Then he continued, a little later on in his judgment, at p 16:
>
> > '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, 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. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor. 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'.
>
> Lord Sands in his judgment said, at p 17:

> 'In my view, 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'.
>
> On this authority I think that, in order to prove that a road on a housing estate such as this is a 'road' within the definition in section 196(1) of the Road Traffic Act 1972, the prosecution must at least prove two things: first, that the public in general, in the sense that those words were used by the Lord Justice-General in *Harrison v Hill*, 1932 JC 13 , 16 and not a special class of members of the public who are either residents or visitors only to the estate, had access to the road concerned; and, secondly, that they had this at least by the tolerance of the owner or proprietor of the road on the estate.
>
> In passing, I may add that of course the best way of showing that a member of the general public has access to a road with at least the tolerance of the owner of the property is to show that a member of that public does in fact so use it."

31. *Deacon* again shows that access by the public in general would be sufficient if it were at least tolerated by the proprietor of the road. In the light of the use of Lord Sands' dictum, together with normal usage in English courts, I cannot see that "tolerance" as used by May J is here to be equated with a form of implied permission; rather it is used in respect of unpermitted access that is not actively resisted by the proprietor. Support for that reading is also gained from the last paragraph in the quotation from May J's judgment, above. As in *Cheyne,* and by implication *Houghton*, Lord Clyde's judgment in *Harrison v Hill* was, whether rightly or wrongly, read as being consistent with Lord Sands' judgment. The Divisional Court's judgment is inconsistent with any requirement that the public access be with the owner's permission.

32. *Cox v White* [1976] RTR 248, another decision of the Divisional Court, again concerned motoring offences under the 1972 Act. Justices dismissed the charges on the ground that the driving had not been proved to be on a "road" within the statutory definition. On the prosecutor's appeal, the Divisional Court remitted the case to the justices to clarify their findings of fact and their reasoning. Kilner Brown J, with whom Watkins J and Lord Widgery CJ agreed, explained at 250 what the proper approach should be and where the justices had got themselves into difficulties:

> "The justices heard argument. They were referred to a number of authorities, including the well-known Scottish case of *Harrison v Hill*, 1932 JC 13, passages from which have been cited with approval on more than one occasion in this court and the effect of which is broadly speaking that all questions of whether or not the public have a right of access are questions of fact.
>
> The justices may, as they purported to do in this case, use their local knowledge. That has been decided in this court. They

> have to take into account matters such as the existence of other premises, maybe private residences, maybe shops and matters of that kind. In the end it comes down to a simple question of fact. The law is quite plain that a mere slight degree of access would not be sufficient to justify the finding that it was a road.
>
> The trouble in this case, as I see it, is that the justices, instead of applying their minds to the critical issue which was the degree of user and the nature of the user by members of the public, allowed themselves to be confused by an irrelevant issue. Paragraph 7 of the case reads as follows:
>
> > 'We were of the opinion that the road was used by the public as members of the public but that the attitude of the owners of the road to that use, to bring it within the scope of the Act, must be consent, rather than tolerance. We accepted the defendant's contentions 5(b) and (c) above [to the effect that the distinction between the road in question and the public highways was readily apparent, and that there were no premises on the road to which the public in general had any right of access], applying our own local knowledge of the area. We were, therefore, of the opinion that this was not a road to which the relevant sections of the Act applied and accordingly dismissed the three informations'.
>
> The question posed for the court is whether No 2 Road, Colwick Estate is a road within the scope of the relevant sections of the Road Traffic Act 1972. That was a question of fact for the justices to decide along the general lines which I have just indicated.
>
> Speaking for myself, I find myself in this difficult position that I do not understand precisely how the justices went about coming to their final opinion. The introduction of this question of whether the use should be by consent of the owners of the road rather than tolerance seems to be something which they themselves must have allowed themselves to think was a relevant issue, no doubt by consideration of the authorities which were put to them."

33. This passage shows clearly that it is beside the point to consider the distinction between access to which there is implied consent and access that is merely tolerated and thus is strictly speaking a trespass. Thus it provides a sufficient answer to the present case. Further, the passage is entirely consistent with the earlier decisions of the Divisional Court and the reasoning in those cases and in the Scottish cases. Magistrates and other judges will be at risk of tying themselves up in knots unless they follow the straightforward approach set out by Lord Sands in 1931. This point was made expressly in the short concurring judgment of Lord Widgery CJ in *Cox*, which I set out in full:

> "I agree that the case must be remitted for reconsideration by the same bench of the matters referred to in the judgment of Kilner Brown J. I would only add this. I have a great deal of sympathy with the justices in this case because by one means or another they have been persuaded to think that the issues are far more complicated than they ever possibly could be if they were properly instructed. I would invite the justices next time, and other justices charged with this same question, to look at the very brief statement of Lord Sands in *Harrison v Hill*, 1932 JC 13 , 17 which I am reading at the moment from *Houghton v Schofield* [1973] RTR 239 , 244A–B. Lord Sands said:
>
> > 'In my view, 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.'
>
> I think that in 99 cases out of 100 that direction is all the justices need to decide whether a road is a 'road' for current purposes."

34. That approach was followed in *Adams v Commissioner of Police of the Metropolis* [1980] RTR 289, where Jupp J decided that the Commissioner had been wrong to conclude that he could not bring prosecutions in respect of driving on a certain road because it was not a "road" within the definition of the Road Traffic Act 1972. Having observed that "[c]ounsel and solicitors in magistrates' courts, in the Divisional Court and in the Crown Courts can quite easily get confused with much learning", Jupp J referred to the Lord Chief Justice's judgment in *Cox v White,* which he optimistically called a "salutary clearing away of the complications which have arisen around this matter".

35. *Director of Public Prosecutions v Vivier* [1991] RTR 205 was a decision of the Divisional Court (Mann LJ and Simon Brown J) on appeal by case stated from the respondent's acquittal by justices of an offence of driving with excess alcohol on a road or other public place contrary to section 5 of the 1988 Act. In accordance with prior authority, followed also in later cases, the Court proceeded on the basis that "other public place" should be construed *ejusdem generis* with "road" as representing a place to which the public has access. The land in question was a caravan park. Those attending at the caravan park had in fact been admitted by the owners; they were there with permission. The issue was whether those persons were members of the public generally or members of a specific category of the public. The Court referred to the judgments of Lord Clyde and Lord Sands in *Harrison v Hill* and to Lord Widgery CJ's judgment in *Cox v White,* with its reference to 99 cases out of 100, and continued at 210-211:

> "Alas, this seems to us the 100th case. Certainly, we find Lord Sands' approach an insufficient touchstone by which to decide the present appeal. Let us explain. What Lord Sands, and indeed Lord Clyde, say in *Harrison v Hill*, 1932 JC 13, 16, 17 can really be summarised thus. A road is one to which the

> public have access if: (a) it is in fact used by members of the public; and (b) such use is expressly or implicitly allowed—or, putting it the other way round, not achieved by overcoming physical obstruction or defying express or implied prohibition.
>
> (b) presents no problem. But (a) does. In particular, as it seems to us, (a) essentially begs rather than answers the often crucial question whether those who use the road are members of the public. Take our case. We have not the least hesitation in accepting that the only material use of this caravan park was by those who had complied with the various site requirements and been properly admitted, in short those who had been expressly or implicitly allowed into the caravan park, either as caravanners or campers or as their bona fide guests. We think it right to ignore both the few trespassers who escaped the security controls and also the users of the bridleway (which in any event could not affect the character of the park as a whole). And, indeed, we do not understand Mr Glen for the prosecutor to contend otherwise.
>
> What that leaves outstanding, however, is the critical question: are the caravanners, campers and guests to be regarded, within the park, still as members of the general public or are they instead, as the justices found, at that stage a special class of members of the public."

36. Therefore the issue in *Director of Public Prosecutions v Vivier* was not the issue that arises in this case. The Divisional Court's summary of the reasoning in *Harrison v Hill* was clearly not meant to change the law, and as regards the point in (b) no issue arose. The remarks concerning (b) cannot be taken as authority for the proposition that access by the public with toleration, in the sense of passive acquiescence in trespass, on the part of the proprietor is not within the statutory definition.

37. Against what seems to me to be a clear picture have to be set dicta of Lord Clyde in the House of Lords in *Clarke v General Accident Fire and Life Assurance Corporation Plc* [1998] 1 WLR 1647. In conjoined appeals by insurers held liable to indemnify plaintiffs for injuries caused by the use of vehicles on a road, the House of Lords held that the car parks in question were not within the definition of "road" in the 1988 Act. The issue in each case was whether the car park was a road in normal English usage; it did not concern the distinct question of public access. Lord Clyde, with whom the other Lords agreed, turned at 1652 to the statutory definition and said:

> "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. As the Lord Justice-General (Lord Clyde) observed in *Harrison v. Hill*, 1932 J.C. 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.'
>
> Secondly, the public in this context means the general public. To quote again from the opinion of the Lord Justice-General in *Harrison v. Hill*, at p. 16:
>
> 'I think that, when the statute speaks of "the public" in this connection, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways.'
>
> It is important to observe that the consideration of access by the public only arises if the place is a road. It may well be that the public has access to it but that is not enough."

38. I make three points about Lord Clyde's observations on public access. First, they were obiter. Second, they were clearly meant as a statement of existing law; Lord Clyde did not intend to change, or propose a change to, the law. Third, if read incautiously, by themselves and without close attention to either the full texts of the judgments in *Harrison v Hill* or the subsequent use made of those judgments both in Scotland and in England and Wales, they have the potential to mislead. Lord Clyde is not to be blamed for this: he was making short observations sufficient for the purposes of the instant case, not legislating or purporting to give a definitive statement of a point of law that did not arise for decision. But the case before me illustrates the danger that can arise from the mistaken argument suggested by the dictum: the public must have access lawfully; access of a tolerated trespasser is trespass and therefore not lawful; therefore if the public access a road as tolerated trespassers they do not access it lawfully; therefore the road is not within the statutory definition.

39. The next case in time to which I was referred was the decision of the Court of Appeal, Criminal Division, in *R v Spence* [1999] RTR 353, concerning an allegation of an offence of dangerous driving contrary to section 2 of the 1988 Act. The issue in the case was whether the car park where the driving had taken place, not being a road, was an "other public place". The case turned on the fact that there was "no evidence of the general public as such using the car park" (355) and that "[i]n the absence of evidence of any such user, there was no case to go to the jury" (356). The Court also

emphasised that it would not suffice to prove that the general public could have access; it was necessary to show that they did in fact have access. Although *Clarke* was cited in argument, the Court did not refer to it when giving judgment; the law was taken from *Harrison v Hill* and the Court quoted from Lord Clyde's judgment in that case.

40. The same issue, namely whether a particular car park was a "public place" for the purposes of the 1988 Act, arose in *May v Director of Public Prosecutions* [2005] EWHC 1280 (Admin). Laws LJ quoted from the judgments of Lord Clyde in *Harrison v Hill* and the Divisional Court in *Director of Public Prosecutions v Vivier*. The case, however, turned, as did *Vivier*, on the question whether access was had by the public generally or only by a specific part or category of the public. That is not the issue in this case.

41. In *Hallett v Director of Public Prosecutions* [2011] EWHC 488 (Admin), again on an appeal from justices by case stated, Rafferty J gave a short and, in my respectful opinion, for present purposes entirely accurate summary of the law at [11]:

> "The issue in this case being narrow, help to be derived from the relevant authorities can be summarised as follows. Any road may be regarded as one to which the public has access if the public is there without overcoming physical obstruction or in defiance of a prohibition: *Harrison v Hill* 1932 JC 13. Whether a place is public will generally be a question of fact and degree: *Montgomery v Loney* [1959] NI 186. Help may also be derived from asking whether access is meant only for a special class of members of the public, including for example guests of residents, postmen, milkmen and so forth: *Harrison*; *DPP v Planton* [2001] EWHC Admin 450. A sign or barrier lends weight to restriction of the area to a special class and thus to its being private but the absence of such is not determinative: *Edwards v DPP* unreported 10 March 1994 QBD."

Rafferty J also quoted, with evident approval, the dictum of May J (which she wrongly attributed to Lord Sands) in *Deacon v AT (A Minor)* to the effect that the best way of showing that a member of the public has access to a road "with at least the tolerance of the owner of the property" is to adduce evidence of such user in fact.

42. The most recent of the decisions upon appeal by case stated to which I was referred is *Richardson v Director of Public Prosecutions* [2019] EWHC 428 (Admin), [2019] 4 WLR 46. The appellant had been convicted by justices of an offence of being in charge of a mechanically propelled vehicle on a public place while unfit through drink, contrary to section 4 of the 1988 Act. The issue was whether the vehicle was on a public place. The place in question was a private car park that provided parking spaces for the employees and customers of a number of businesses. The material facts on the basis of which the justices found that the place was a public place were (a) that there were no physical restrictions on access to the car park, (b) that there were a number of different signs for different parking spaces at the car park, and (c) that the appellant, who was an employee of a public house that had parking spaces in the car park, had parked in the car park on the night in question as a member of the public rather than as an employee: see [14] and [17]. Applying *DPP v Vivier* and *R v*

Spence, Julian Knowles J allowed the appeal and quashed the conviction, on the grounds that the car park was not a public place within the meaning of the Act.

43. The decision in *Richardson v DPP* occasions no difficulty. There was no evidence of any use of the car park by the public in general, as opposed to those members of the public who had business at the premises served by the car park: see [31]. Therefore an essential requirement of the definition was not satisfied. As Julian Knowles J observed at [34], the mere absence of physical barriers does not suffice to make a place a public place. The judge was also impressed by the fact that there was no evidence as to the precise location of the appellant's vehicle in the car park and that it was therefore possible that it had been parked underneath a sign stating in clear terms that parking by persons other than employees was prohibited. Whether that latter point was, as the judge thought, itself "fatal to the conviction" might be doubted, in the light of *Cheyne*, though the question is irrelevant for present purposes.

44. More relevant to this case are the remarks of Julian Knowles J at [26]:

> "In connection with (b) [that is, the need for proof that the public have actually enjoyed access to the place], it is important to make clear that the public's use of the place in question must be lawful. In other words, the public must have express or implied permission to access it. This was said expressly in the Scottish case of *Harrison v Hill*, p 16, where the Lord Justice General, in considering whether an ordinary farm road between a public highway and a farmhouse was a road to which the public has access said:
>
> > 'I think that, when the statute speaks of "the public" in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways.
> >
> > 'I think also 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 [a] 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.'"

Nothing in that paragraph is at all exceptionable, provided only that it is borne in mind that, as Lord Sands' judgment and the subsequent cases in this jurisdiction have

made clear, the reference to implicit permission is understood in a wide enough sense to include tolerated trespass. Indeed, at [33] Julian Knowles J expressly referred to the requirement of evidence that "the public did in fact use the car park, [and that] they had lawful permission to do so either explicitly, implicitly or as the result of tolerance by the owners of the land in question." Again, at [34] he noted the lack of evidence that the appellant as a member of the public was lawfully entitled to park in the car park "because there was no evidence of general tolerated use by the public." The judge therefore appears probably to have had in mind the distinction between permitted use and tolerated use. His use of the word "lawfully" is probably to be taken in the sense in which the word has been used in the cases, to mean non-permissive but tolerated user that is not (in Lord Sands' words) "in defiance of prohibition express or implied". If Julian Knowles J were to be taken as meaning that even tolerated but unpermitted access by the general public would not suffice, I would respectfully disagree. At all events, in the absence of any evidence of access by the general public in fact, the matter did not arise for decision in *Richardson v DPP*.

45. The most recent judicial discussion of the statutory definition of "road" to which I was referred by counsel is that of Fordham J in *R (Pereira) v Enforcement and Traffic Adjudicators* [2020] EWHC 811 (Admin), [2020] 4 WLR 134. Because Fordham J stated essentially the same case as is advanced by Dr Bowes for the defendant before me, I shall deal with it at some length, although the relevant part of the judgment was entirely obiter. *Pereira* concerned a judicial review of the decision by a review adjudicator to uphold a penalty notice issued by a local authority to the claimant for parking on a pavement forming part of a road. For part of its width, including the part where the vehicle had been parked, the pavement was owned by the claimant. The relevant definition of "road" was the same as in the 1984 Act; it therefore included both highways and any other road to which the public had access. The review adjudicator upheld the penalty notice under the "highway" limb, on the grounds that there had been a deemed dedication of the relevant part of the pavement as a highway. Having done so, the review adjudicator found it unnecessary to reach a decision under the "public access road" limb. Fordham J allowed the claim for judicial review and remitted the matter for fresh consideration, essentially on the grounds that it had not been open to the review adjudicator to rely on a deemed dedication. (The precise reasons for the decision on the "highway" limb are not relevant to the present case.)

46. Fordham J decided not to remit the appeal for reconsideration in respect of the question whether the part of the pavement was part of a road to which the public had access. He made that decision on the basis that the facts showed only one possible answer—a negative answer—to the question whether the general public had in fact exercised access over the relevant part of the pavement. But he went on to state his views on the distinct question of "legal public access", because he had heard full argument on the point from Mr George Laurence QC for the claimant. In doing so, the judge expressly acknowledged that his remarks on this point were obiter and that he had not heard contested argument, neither the defendant Adjudicators nor the complainant local authority having been represented at the hearing.

47. Fordham J expressed the opinion that public access must, for the purposes of the definition, be lawful, in the sense that it must be with right or permission; access by tolerated trespassers does not suffice. The reasons for his opinion are set out in his judgment at [26] in 15 numbered sub-paragraphs. Having quoted so much from other

judgments, I shall refrain from adding several pages to this judgment by setting that paragraph out here. I hope that the following summary is not entirely inadequate.

a) In *Clarke* Lord Clyde articulated, albeit obiter, the very clear requirement that access must be lawful, and he quoted with approval the Lord Justice-General's judgment to that effect in *Harrison v Hill*.

b) The reference in *Harrison v Hill* to "the tolerance of a proprietor" was not to the case of a tolerated trespasser but to the Scottish way of referring to what in England and Wales is called implied permission, a point explained in *R (Beresford) v Sunderland City Council*.

c) A tolerated trespasser is still a trespasser, because he lacks implied permission: *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2015] AC 195, at [27]. It is its very nature as unlawful use that makes it useful for the establishment of public rights in town or village green cases, such as *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335[1]. But the same point "cuts in the opposite direction" when considering public access to a road, "because 'public access to a road' requires legal public access."

d) Counsel had "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."

e) It might perhaps be that recognition of tolerated trespass as sufficient would be a good way forward for the law to take. But it is (thought Fordham J) a way that is "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".

f) Fordham J discussed several cases that were drawn to his attention by counsel "in which the reasoning or outcome may now have become unsafe, in light of the more recent authorities." I refer only to some of them.

- *Deacon v AT (A Minor):* although May J referred to "tolerance of the owner or proprietor", the case "is not authority for the proposition that the trespassing public, albeit 'tolerated' by the landowner, would be exercising legal access", and May J cited the judgment of Lord Clyde in *Harrison v Hill* to the effect that the statute did not intend unlawful access by trespass. "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."

[1] I cannot help wondering whether the great importance attached to the nature of tolerated trespass as trespass, both before Fordham J and before me, has owed much to the importance that the point has for those interested in cases about rights over town and village greens.

- *Blackmore v Chief Constable of Devon and North Cornwall Constabulary* (1984, unreported): "As with *Deacon*, if the Divisional Court in *Blackmore* [comprising Robert Goff LJ and McCullough J] 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."

- *Richardson v DPP:* With reference to passages I have referred to above, Fordham J said: "The observation at para 34 needs to be read with the observation in para 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.

g) By way of conclusion: "(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."

48. Fordham J's obiter dicta on this issue precisely reflect the case advanced by Dr Bowes for the defendant before me but, with great respect, I do not think that they are correct. The reasons for my view are summarised in paragraphs 6 and 7 above and have, I hope, emerged more fully from my consideration of the case-law. I make the following brief observations.

1) Fordham J did not have the benefit of argument on both sides of the issue. So far as appears from his judgment, he also did not have the benefit of such extensive reference to authority as was made before me.

2) I cannot see that Lord Clyde's dicta in *Clarke* merit the weight given to them by Fordham J. This point has already been sufficiently explained in paragraph 38 above.

3) Fordham J's interpretation of the judgment of Lord Justice-General Clyde in *Harrison v Hill* is plausible, for reasons mentioned in paragraph 21 above. It may well accurately reflect Lord Clyde's intention, though this does not seem to me to be clear. However: (a) it results in a seriously problematic construction of the statutory definition, for reasons mentioned in paragraph 22 above; and, if that observation should be thought to succumb to a temptation to judicial faithlessness, (b) Lord Sands and, I think, Lord Blackburn, did consider that tolerated trespass by the general public would be sufficient, as explained in paragraphs 23 to 25 above; (c) the actual decision on the facts in

Harrison v Hill was that public access that in England would be called tolerated trespass sufficed for the purposes of the statutory definition; and (d) subsequent case-law establishes that tolerated trespass is sufficient.

4) Insistent reference to the requirement of "lawfulness" seems, with respect, unhelpful, when the courts have made clear what they mean by that word. *Cheyne v MacNeill*, though a Scottish case, is not in my view properly intelligible unless it is understood that "tolerance" was being used in distinction from permission, for reasons explained at paragraph 28 above. In particular, however, the Divisional Court cases of *Houghton v Scholfield, Deacon v AT (A Minor)* and *Cox v White* show clearly that public access will suffice for the purposes of the statutory definition provided that it is not in wilful defiance of obstacle or prohibition, to use Lord Sands' language. The last-mentioned of these cases makes it abundantly clear that it is "irrelevant" to become embroiled in questions of legal right and that the question is a factual one, on which it may even be that a site inspection by the justices is as good evidence as any other.

5) Fordham J's remarks, quoted above, concerning possible misunderstandings by the Divisional Court in *Deacon v AT (A Minor)* and *Blackmore v Chief Constable of Devon and North Cornwall Constabulary* seem to me to be problematic. The critical question concerning Lord Clyde's judgment in *Harrison v Hill* is, perhaps, not so much what he had in mind but how it has been received; and both *Cheyne v MacNeill* and the English cases show that it has been received in accordance with the judgment of Lord Sands. As for "the more recent authorities"—presumably, the same ones as the "recent authorities at the highest level"—I assume they are *Clarke* and *Barkas.* I have said enough about *Clarke*. As for *Barkas,* I confess to thinking that it is of no material relevance. The point for which it is being cited is that tolerated trespass is trespass nonetheless. But that was always the law; Lord Neuberger's remarks at [27] in *Barkas* were a statement of orthodoxy. I see no reason to suppose that the Divisional Court, in the cases I have mentioned, was unaware of the legal position; indeed, it had been reminded of it by Lord Sands' express remarks in *Harrison v Hill*.

6) Finally, it is worth remembering that none of the language around which this debate has tended to focus—"lawfully", "legally", "tolerated trespass", "express or implied permission"—is to be found in the statutory definition, which simply refers to a "road to which the public has access". This means, at least, that one must beware of making facile use of the short and convenient encapsulations of the law, such as that of Lord Clyde in *Clarke* and those found in textbooks. When considering a word like "lawfully", one must consider the context in which it has been used and the particular sense in which it has been used; cf. *Cheyne v MacNeill.* Thus, if decisions have spoken of "lawful" use and at the same time accepted the adequacy of what amounts to tolerated trespass, there is no necessary reason why the former word must trump the latter acceptance. In short: if (as I think) the courts have deliberately accepted that access by the general public, tolerated by the owner, suffices for the purposes of the definition, it is neither necessary nor right to

say that the acceptance was wrong because access merely tolerated is unlawful.

Conclusion

49. In my judgment, a road will be a "road to which the public has access", and thus within the definition of "road" in section 142 of the 1984 Act, provided that the general public do as a matter of fact exercise access to it and provided that those members of the public "have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied" (in the words of Lord Sands in *Harrison v Hill*, as approved and applied by the Divisional Court). The enquiry is thus essentially a factual one. If the conditions are satisfied, it is, as the Divisional Court sought—apparently unsuccessfully—to make clear in *Cox v White*, irrelevant to enquire further whether the presence of the public on the road was merely by the tolerance of the owners or whether the tolerance is to be taken to have given implicit permission. The simplicity of the resulting test is welcome, for at least two reasons: first, it avoids the need for courts, when considering such matters as motoring offences, to become embroiled in, or confused by, subtle distinctions regarding when an owner's inaction does and does not imply permission; second, it avoids importing into the statutory definition a distinction that is wholly irrelevant to the statutory purpose of providing for the safety of those who may reasonably be expected to be on roads and affected by what happens on them.

50. It follows that Guildford Road is a road for the purposes of the 1984 Act. Members of the general public who park their cars along it, or who walk up and down it, are, strictly speaking, trespassers on it, because they have no permission to be there and are merely tolerated by those entitled to possession. But they do not gain access by overcoming any physical obstruction, and they have never been prohibited from entering. They very probably do not understand that the road has a different legal status from the highways near to it. Their access is sufficient for the purposes of the statutory definition.

51. It remains only to express my thanks to Mr Laughton and Dr Bowes, counsel respectively for the claimants and for the defendant, for their helpful and clear written and oral submissions.