Neutral Citation Number: [2023] EWHC 3200 (Ch)

Case No: H31BS336

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
CHANCERY DIVISION

2 Redcliff Street
Bristol BS1 6GR

Date: 19/12/2023

Before :

HHJ RUSSEN KC
(Sitting as a Judge of the High Court)

- -

Between:

CHRISTOPHER PRICE	**Claimant**
- and -	
JONATHAN NUNN	**Defendant**

- -

Guy Adams (instructed by **Red Kite Law LLP**) for the **Claimant**
Ruth Stockley and **Richard Moore** (instructed by **Martin J Aylett, Solicitor**) for the **Defendant**

Hearing dates: 24th to 26th July and 13th November 2023
Draft Judgment circulated 7th December 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 19th December 2023 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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HHJ Russen KC:

1. This judgment follows the trial in a neighbours' dispute over a right of way which has a litigation life of almost half a century, though it is not so stale as to dampen the appetites of the protagonists. The dispute as now presented carries with it a procedural narrative and the consequences of six earlier, detailed judicial decisions which bear closely upon the remaining issues that now fall to be determined by me. This highly

unusual background adds a degree of complexity and certainly length to this judgment which follows the trial of those issues. Despite the factually contentious claim about a "prescriptive right of way"[1] having disappeared just before the trial, the intricacy of some of those issues is further enhanced by the need for the court, in 2023, to do its best to analyse what the line and status of the track in question might have been some two-and-a-quarter centuries ago.

2. Without such historical (including previous litigation) baggage one might expect this judgment to be much shorter than has transpired when the central questions to be addressed are, first, whether or not an alleged right of way of a certain type (private vehicular) has been established; and, secondly, over the ownership of a section of the track affected by the alleged right. However, as will also become apparent from the issues identified below, few stones have remained unturned by the parties in exploring those matters, including by reference to expert evidence. Their respective positions within some of those issues also shifted during the course of the trial. There has also been extensive citation of authority, particularly on behalf of the Claimant, some of which perhaps distracts in a search for the right answer to those questions.

3. In preparing the draft of this judgment I have come to realise that an index is therefore appropriate for its length. The structure of the judgment is as shown below:

[1] i.e. A claim that the right of way fell within the exemption under section 67(2)(e) of the Natural Environment and Rural Communities Act 2006. I analyse the provisions of section 67(5), which is still relied upon, in Section F below.

A. INTRODUCTION

4. The claim and counterclaim in these proceedings raise a dispute between neighbours over rights of way over sections of a track (using a neutral term) which runs between those neighbours living in the Gloucestershire countryside. They also involve a claim to ownership of one of those sections.

5. As I explain in more detail below this dispute goes back a long way, the Claimant in his witness statement of September 2022 saying: "*I have lived with this dispute since the age of 10. I am now approaching 63.*"

6. The dispute is now carried on between the Claimant ("**Mr Price**") and the Defendant ("**Mr Nunn**") in the current proceedings which themselves are very old. These proceedings were commenced in the Gloucester County Court on 28 April 2011 and transferred to the High Court in January 2012. Mr Price's co-claimant, his father Charles Frederick Price, died on 13 August 2012 and therefore around or at least not too long before the time when they might have been expected to have reached a trial.

7. Mr Nunn is the owner and occupier of a bungalow ("**Woodside Bungalow**") at the top of the track and Mr Price is the owner of Painswick Slad Farm ("**the Farm**") whose farmyard is at the bottom of it. Mr Price no longer farms himself (he runs a chauffeuring business which sometimes involves parking clients' vehicles in the farmyard) but he still lets out his farmland land under summer grazing licences.

8. At a relatively early stage in the life of these proceedings Mr Nunn's Defence and Counterclaim came under the scrutiny of Morgan J (see [2012] EWHC 1251 (Ch) and on consequential matters see [2012] EWHC 1605 (Ch)), and then of the Court of Appeal (see [2013] EWCA Civ 1002) when Mr Price launched a strike-out application against it. I refer in more detail in the next section of this judgment (and then, later, in addressing Issue 1 in Section G below) to what the judges have already said about the nature of the claim to a right of way which Mr Nunn was, and was not, entitled to pursue to trial.

9. That strike-out application, which was based upon principles of *res judicata* (whether cause of action estoppel or issue estoppel) and related abuse of process arguments, was made by reference to earlier court proceedings over the alleged right of way. Those earlier proceedings were brought by Mr Nunn's predecessors in title, Mr and Mrs Close, against Mr Price (then a minor or, as the title to the proceedings had it, "an Infant" acting by his father as Guardian ad Litem) and his parents, Wing Commander Charles Price and Mrs Pamela Price. Those proceedings also reached the Court of Appeal, in October 1979, following the determination and declaration by Deputy County Court Judge Cridlan, the trial judge, as to the (limited) extent of the right of way enjoyed by Mr and Mrs Close by his judgment of May 1978. Their focus was upon one section – "**the Lower Track**" as identified in Section B below – of what I have so far loosely described as "the track"[2]. I will refer to these proceedings commenced in the Stroud County Court as "**the 1976 Proceedings**".

10. Between the determination of the 1976 Proceedings by the Court of Appeal and the commencement of the present proceedings, in 1980, Mr Close brought a further claim against the Price family in the Stroud County Court over the alleged right of way ("**the 1980 Proceedings**"). Whereas in the 1976 Proceedings the Closes had relied upon the terms of a 1923 Conveyance, the 1980 Proceedings claimed a vehicular right of way (wider in its purpose than that established in the 1976 Proceedings so that, it was claimed, it would permit vehicular access of the Lower Track to Woodside Bungalow) through reliance upon the doctrine of lost modern grant, prescription, section 62 of the Law of Property Act 1925 and/or by implication. Again, the focus was upon the Lower Track, the section of the track owned by the Prices. In March 1983 Registrar Laurie struck out the further claim on the basis that it was an abuse of process in the light of the 1976 Proceedings. Mr Close's appeal from that decision was dismissed by HHJ Braithwaite in May 1983.

11. The interlocutory decision of Morgan J in this case, in May 2012, as unsuccessfully appealed and cross-appealed to the Court of Appeal in 2013, was obviously designed to provide clarity as to the issues between the parties which, in the light of the outcome

[2] The Particulars of Claim in the 1976 Proceedings, in reliance upon a 1923 Conveyance, appear to have marked both the Lower Track and the Upper Track – as described in the present claim - on the plan annexed to them (so that the judgments in those proceedings referred to "the red lane"). It was the Defence which took the point that the right of way conferred by that Conveyance was confined to the Lower Track; and that the judgments were concerned only with establishing the nature of that right over the Lower Track is clearest of all from an observation of Megaw LJ: "*The whole of the red lane, as I have said, is on land which belongs to the defendants, the Prices*." The Order of Judge Cridlan dated 22 May 1978 is in the trial bundle. The annexed plan (at least as replicated in the trial bundle) did not include any "road coloured red" but the darker shading of the Lower Track, compared with that of the Upper Track and Pitch, supports this view. The Court of Appeal's Order dated 23 October 1979 referred back to the same plan.

in the 1976 Proceedings and the 1980 Proceedings, could properly be pursued to and considered 'live' at the trial which has eventually taken place before me.

12. After the decision by the Court of Appeal in July 2013 these proceedings managed, somehow, to lie dormant for the best part of a decade.

13. I have so far given the barest outline of their history up to 2013 in order to provide the context for a development in these proceedings which has occurred since.

14. Mr Justice Morgan's order dated 15 June 2012 provided for Mr Nunn to serve an amended Defence and Counterclaim within 21 days of the end of the stay granted pending the appeal. Permission for both Mr Nunn and Mr Price to appeal to the Supreme Court having been refused by the Court of Appeal by its Order dated 31 July 2013 and then by the Supreme Court on Mr Price's further application for permission, no further procedural step was in fact taken by either party until 2022 when Mr Nunn applied to amend the Defence and Counterclaim and a Costs and Case Management Conference took place.

15. On 4 May 2022, District Judge Woodburn ordered the service of an Amended Defence and Counterclaim in a form which both reflected the decision of Morgan J in 2012 and the permission granted by the District Judge at that CCMC. Only since this recent order has Mr Nunn advanced a claim to a private vehicular right of way (for the benefit of Woodside Bungalow) which is said to arise under the provisions of section 67(5)(a) and (7) of the Natural Environment and Rural Communities Act 2006 ("**NERCA**").

16. This provision of NERCA came into force on 2 May 2006. The claim under NERCA therefore could have been advanced at the outset of these proceedings but it was not advanced until last year (the date on the Amended Defence and Counterclaim in the bundle indicating that it was probably first formulated on behalf of Mr Nunn in 2015).

17. Had the NERCA claim been pleaded at the outset of these proceedings then it seems obvious or at least really quite likely to me, from what I say below about their respective decisions, that Morgan J and the Court of Appeal would have been called upon to decide also whether it was or was not one which could be advanced in the light of their conclusions on the other aspects of Mr Nunn's case. And, if that speculation is too broad, then whether it could be advanced over the section of the track (namely the Lower Track) that was the subject matter of the 1976 Proceedings and the 1980 Proceedings and the focus of their interlocutory decisions.

18. My instincts on this point have been reinforced by Mr Price's ultimate position on this point. Although Mr Adams (for Mr Price) had filed written closing submissions to the effect that he did not seek to raise an issue estoppel or abuse of process argument in response to the NERCA claim, by reference to the primary way in which Mr Nunn was advancing it in the light of the expert evidence given at trial, he concluded his oral closing submissions in reply by saying the court should not entertain it on those grounds.

19. Standing back, the fluctuations within what I have therefore identified as Issue 1 in Section D below, which culminated in a submission that questioned the very basis on which the 4 days already spent at trial had proceeded, at significant cost to the parties,

illustrate what can go wrong when litigation over a relatively straightforward dispute just drags on and on.

20. The decisions in 2012 and 2013 were of course made principally by reference to the 1976 Proceedings, which were decided over 2 decades before NERCA came into force, but in circumstances where Mr Nunn's pleaded NERCA claim now extends to the Lower Track which was the focus of the strike out (so far as advancing a private right of way beyond that established in the 1976 Proceedings was concerned) it is unfortunate from a procedural point of view that it was not pleaded sooner, and before 2012.

21. There appears to have been no argument before DJ Woodburn over the grant of permission to advance the NERCA claim. At this stage of the post-trial judgment there is not much point in speculating whether or not Mr Price would have made good any argument that the NERCA claim, or part of the wider claim then advanced under the statute, should not be permitted to be advanced on the basis that to do so would be an abuse of process. There is no reason in principle why a decision at an earlier phase of the same proceedings cannot, like a decision in earlier separate proceedings, support an abuse of process argument: see *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47; [2021] 1 All E.R. 1002, at [73], per Lords Reed and Hodge.

22. However, although I cannot see any good reason why a point available since 2006 was not pleaded in 2011, even on a relatively uninformed basis at the start of the trial I could see how, when the NERCA claim did come to be advanced, Mr Price and those representing him might have considered that one or two essential building blocks for such an argument were missing. In particular, the decisions of Morgan J and the Court of Appeal, at the earlier phase of this case, very much rested upon what had been decided in the 1976 Proceedings when the point under NERCA was <u>not</u> available. And it could be said that, far from being a collateral attack upon those decisions, the NERCA claim to a private right of way (based as it is upon there having been a *public* vehicular right of way as at May 2006) was consistent with them permitting, as I explain below, Mr Nunn to advance a claim based upon a *public* right of way for the purpose of resisting the allegation that he would be trespassing upon the Lower Track if he used it for a purpose beyond that established in the 1976 Proceedings.

23. Having said that, in his oral closing submissions, Mr Adams – building upon his analysis of the basis of a claim under section 67(5) of NERCA – relied upon the particular passages in the decision of Morgan J to submit that Mr Nunn was precluded from advancing it. As I explain further in addressing Issue 1 below, this was not an argument clearly signposted before the very end of the trial.

24. Mr Price's Amended Defence to Counterclaim engaged with the NERCA claim by simply denying it and there has been a trial of it. Any point that the claim, or part of it in terms of its subject matter, should be treated as barred by an estoppel – Issue 1 identified in Section D below - has been stored up for me as the trial judge. The same goes for what I have identified as Issue 5 (again, see Section D) which arises out of Mr Nunn's contention that Mr Price is estopped from claiming ownership of the Upper Track.

25. Having abandoned an argument based on a prescriptive right of way only shortly before trial, on 17 July 2023, Mr Nunn's counterclaim really stands or falls on the case under

section 67(5) of NERCA. The evidence called at trial was really all about the basis of that claim.

26. And, within that NERCA claim, the evidence given at trial by Mr Nunn's right of way expert has resulted in a shift of emphasis towards 2 of the 3 sections of the track (again, my terminology is deliberately loose at this introductory stage) as I explain below. Those two sections, as pieces of realty, do not form the subject matter of the right of way positively declared by Judge Cridlan in 1978. I have already explained that the declaratory and injunctive relief in the 1976 Proceedings, which provided the basis for Morgan J (endorsed by the Court of Appeal) later striking out the claim to a further and better private right of way, related to the third section: the Lower Track.

27. A further, practical reason for a shift of focus lies in Mr Nunn having quite recently, in 2020, created a point of vehicular access to the B4070 highway from a separate piece of land owned by him, as I explain in the next section of this judgment. If he is able combine that new access over his own land with a right of way to one of the two sections which, accordingly, has now assumed greater prominence – "**the Upper Track**" - then his inability to improve upon his right of way over the third limb may not matter so much.

28. This shift of focus away from that limb of the track adds a further twist to the issue over the compatibility of the NERCA claim with what has already been decided in the 1976 Proceedings and, consequently, at the interlocutory stage in these proceedings. In essence, the question is whether or not this development "on the ground", almost a decade into the life of the proceedings, also serves to marginalise any legal point (assuming there might be one) that the NERCA claim, pleaded so as to include the Lower Track, is barred by an issue estoppel of the kind firmly promoted on behalf of Mr Price by the end of the trial.

29. There is one further initial and general observation to be made about this judgment. It is that it was clear from the matter investigated at the trial before me that the outcome of the claim and counterclaim was likely to rest more heavily upon the expert evidence of the parties' respective rights of way experts, and the legal submissions of counsel, than upon the testimony of Mr Price and Mr Nunn. As I explain below in addressing Issue 2, each of them has ultimately come to rely significantly on the expert evidence adduced by the other.

30. This point about the relative unimportance of the factual evidence is sufficiently marked at this stage by me noting that the focus of both the expert evidence and counsel's submissions was upon a Turnpike Act of 1800 ("**the Turnpike Act**"), a private Act of Parliament for the making and maintaining of a toll (or turnpike) road – now the B4070 Slad Road - between Stroud and Birdlip, and what numerous plans, maps and records of later date (including tithe books and maps, old commercially produced maps and historic Ordnance Survey maps) either reveal or fail to reveal what either had been or might have been the impact of the Act on older, pre-existing highways in the locality. In essence, again, the question is whether or not "the track" was one of those pre-1800 highways and, if so, what became of its highway status as a result of the Turnpike Act.

B. THE BACKGROUND IN GREATER DETAIL

The Locality

31. I have so far loosely referred to the subject matter of the dispute as being sections of a "track". They are more accurately described using the names given to them by the parties; namely "**the Pitch**" (also its local name), "**the Lower Track**" and "**the Upper Track**". Mr Price explained in his evidence that he adopted this nomenclature in around 2004 or 2005 in his correspondence with HM Land Registry.

32. The location of these tracks within the neighbourhood, together with the location of Mr Nunn's dwelling Woodside Bungalow, for which he claims the benefit of vehicular access, is shown on the plan at Appendix 1 to this judgment ("**Plan 1**"). Plan 1 is a modern Ordnance Survey Map on which Mr Price's expert, Mrs Emrys Roberts, has marked the main features that help explain the detail of the dispute. She has shown the location of Woodside Bungalow as 'the Bungalow'.

33. By omission, whereas the other routes are shown, Plan 1 also reveals the uncertainty over the third route of four (described by the parties as '**Route 3**') identified by words in the Turnpike Act as a highway which might need to be stopped up in order to achieve the aim of the Act.

34. Greater detail of the Pitch, the Lower Track and the Upper Track is shown on the other plan at Appendix 2 to this judgment ("**Plan 2**"). Plan 2 was prepared by Mr Nunn's expert, Mr Carr, for the purpose of his report. The parties have identified the Upper Track by reference to points B and C on Plan 2 and it is important to note that it forms part of a route (the footpath mentioned next) leading to Folly Lane at point F. This plan also shows Mr Price's property, the Farm, and the location of his farmyard (at point 'D') at the bottom of the Lower Track.

35. The Pitch and the Upper Track are already recorded as a public highway, with the status of Footpath. Together, they form part of a public footpath known as 'Painswick Footpath 50'. The footpath is recorded on Gloucestershire County Council's legal record of rights of way, the Definitive Map and Statement ("**DMS**"). (The DMS is kept pursuant to the provisions of the Wildlife and Countryside Act 1981 the relevant provision of which is set out within Section F of this judgment.) The footpath continues westwards and uphill through the field known to Mr Price as '**17 Acres**' (and marked 'Part of Vatches' on Plan 1) and then along the southern edge of Worgans Wood to join Folly Lane. An old quarry lies to the south of the footpath (marked '*Quarry*' on Plan 1 and '*Pit (dis)*' on Plan 2). Mr Price said in his evidence said he had filled in the quarry with stones excavated when he built a pole barn in the farmyard (on the western side of point 'D' on Plan 2).

36. No highway rights are recorded over the Lower Track. It is not disputed that Mr Price owns the Lower Track.

37. Woodside Bungalow was built in the 1920's in the reasonably extensive grounds (to the rear) of an older, substantial dwelling which is much closer to the B4070 (namely "**Woodside House**" which is shown on Plan 2). Woodside House sits above the road, behind a substantial retaining wall, and has two entrances off it. There is a dispute

between the parties as to when Woodside House was built. I deal with their competing arguments over the age of Woodside House in addressing Issue 2 in Section G below.

38. Plan 2 also shows the location of the separate piece of land also owned by Mr Nunn ("**the Paddock**").

39. The Paddock is outlined in red on Plan 2. The broken red line within the Paddock shows the new access into the Paddock from the B4070 (at point 'Y') created by Mr Nunn in 2020 and how, as a practical matter, he can now access Woodside Bungalow by vehicle by driving across the Paddock and joining the Upper Track at the point ('B') where the top of the Pitch and Lower Track and the bottom of the Upper Track meet. [My explanation below of the video evidence given at trial explains how, relying upon the judicial decisions to date, Mr Price has in fact placed obstructions at this meeting point which currently prevent Mr Nunn from doing so.] If Mr Nunn establishes the right to do that, over the Upper Track, then he would no longer have any need to pass through the Farm in order to use the Lower Track (i.e. 'D' to 'B' on Plan 2) or be concerned that the outcome of the 1976 Proceedings, reinforced by the decisions of Morgan J and the Court of Appeal in the present proceedings, limits him and his successors in title to using the Lower Track for purposes connected with the Paddock (and not Woodside Bungalow).

40. Mr Nunn has created a hard standing within the Paddock (close to where the Lower Track, the Upper Track and the Pitch meet) for the purpose of parking cars as close to his home at Woodside Bungalow as past judicial decisions currently permit.

41. It should be noted that the Pitch (which old local newspaper reports of the dispute between the Close and Price families reveal was known to some locals as 'Devil's Pitch') is very steep. In his judgment in October 1979, Megaw LJ said "*it cannot be used by motor vehicles*", because of its steepness and narrowness, though he noted that Mr Close might have used a lightweight motorcycle on it in the past. He referred to the observations of Judge Cridlan that the Pitch had in the early 1970's been surfaced with tarmac on its steepest parts which have a gradient of about 1 in 3. It was obvious to me from the video evidence adduced at trial, which I mention below, that the steepness and potential slipperiness of this slope mean it is now no more suitable for vehicles than it was 40 plus years ago. Quite apart from the question of conflicting rights of walkers using this designated footpath, the more recent installation of a metal handrail on one section of the Pitch would appear to make it difficult if not impossible to ride even a trail bike up or down the Pitch.

42. Mr Price is now the sole owner of the Farm. Mr Price's late father and co-claimant was his co-owner but the father's interest has passed to Mr Price under his will.

43. The Prices' ownership of the Lower Track was established in the 1976 Proceedings, it not being a point of contention between Mr and Mrs Close and the Prices. By contrast, in his judgment of May 1978 Judge Cridlan said that ownership of the Upper Track "*is not known and has become, as it were, public property*" and that "*[c]onsequently nobody has any right to order anybody off it because there is no known owner*."

44. The Upper Track is unregistered land and, as I mention below, Mr Nunn has registered a caution against its first registration. In these proceedings Mr Price claims ownership to the whole or one half (up to the centre line adjoining his farmland) of the Upper

Track. It is on the basis of such ownership, and presuming he obtains a negative declaration that Mr Nunn had no vehicular right of way over the Upper Track, that he seeks injunctive relief restraining Mr Nunn from trespassing through the use of vehicles over it.

45. Mr Nunn purchased Woodside Bungalow from Mr and Mrs Close in 1991.

46. Woodside Bungalow was built in the then grounds of Woodside House (shown on Plan 2) soon after the First World War by the owner of that house, Dr Green, for occupation by his gardener. In 1959 to 1960 Woodside Bungalow was let to the author Laurie Lee by the owner of the house. The author was familiar with the tracks, having been raised in the nearby village of Slad, with his childhood experiences there recounted in his book '*Cider with Rosie*' published in 1959. Within the evidence before me was a statement which Mr Lee made to the County Surveyor in September 1970 (in connection with the Prices' erection of gates at the bottom of the Lower Track so that cattle could be contained in their farmyard at certain times) in which he demonstrated that familiarity and referred to having made regular use of the Lower and Upper Tracks for vehicular access to Woodside Bungalow during his two years of occupation.

47. Judge Cridlan's judgment records that the newly married Mr and Mrs Close moved into Woodside Bungalow in October 1960 but their purchase of the property from the owner of Woodside House was not completed until 6 years later.

48. As already noted above, Mr Nunn also owns the Paddock having also purchased it from Mr and Mrs Close in 1991.

49. The Paddock had gone into separate ownership from the Farm as a result of a conveyance in 1923, but the two properties were once more reunited within the ownership of Mr Price's grandfather, Percy Teakle, in November 1947 when he purchased the Paddock. He later made a gift of the Paddock to Mr Price's uncle Harry Teakle (who had held a tenancy of the Farm and farmed it along with a neighbouring farm Stroud Slad Farm) so that when Mr Price's parents bought the Farm in 1967, under a sale at auction by the executors of the estate of Mr Price's grandmother, the ownership of the Farm and the Paddock was once again split. Harry Teakle sold the Paddock to the Closes in November 1975 and they later sold it to Mr Nunn in 1991.

50. Having now introduced both Woodside Bungalow and the Paddock into the picture I should at this point return to the 1976 Proceedings for one particular aspect of them.

51. Because the focus of those proceedings was (or, as I have sought to explain, appears to have become) the nature and extent of the Closes' right of way over the Lower Track (only) it seems to me, at this distance in time, quite possible that less thought was given to what kind of onward passage over the Upper Track they, or their successors, might enjoy, between Woodside Bungalow and the Paddock. Their ability to pass between their two properties, over the Upper Track, if only on foot in exercise of public footpath rights, was *perhaps* less clearly in mind at the time. Allowing for some ambiguity in the language of both the first instance and the appeal judgments, in a case which also concerned the Prices' counterclaim for trespass over the Lower Track (only), it does appear that, in the light of the Prices' defence and counterclaim, "*the red lane*" came to be equated with the Lower Track whereas the Upper Track was described as part of "*the public right of way*".

52. Nevertheless, and again using language which prompts further thought about the physical extent of "*the said way*" (if use of the Lower Track to its top - point B on Plan 2 - does not actually take the traveller beyond the Paddock anyway) the Court of Appeal's Order dated 23 October 1979 varied the injunctive relief between the parties by including:

> "An injunction restraining the Plaintiffs by themselves their servants or agents or otherwise from entering upon the said way save for the purpose of passing between the paddock Ordnance Survey number 1239 and the Birdlys to Slad Road."

53. Therefore, when read with the declaratory relief granted by Judge Cridlan, the clear effect of this injunction was that the owner of the Paddock (as such) could only exercise a right of way over the Lower Track, including by vehicle, in order to get to the Paddock and no further. The owner of Woodside Bungalow (as such) could not graft on to such user of the Lower Track any right to gain access to Woodside Bungalow over the Upper Track. The Upper Track, though not then defined as such, was then described in the judgments as being part of a "*public right of way*", so that one might have thought that the respective private and public rights of way could be combined to support a journey to Woodside Bungalow over the Lower Track (to the top of the Paddock) by vehicle and then to Woodside Bungalow on foot, or any other means supported by the public right, over the Upper Track. But it seems reasonably clear from its terms that the injunction intended that the owner of Woodside Bungalow (even though he might also own the Paddock with the benefit of the appurtenant right of way declared in the 1976 Proceedings) should only be able to gain access to his home from the B4070 by using the Upper Track and Pitch.

54. I mention this point because Mr Nunn stated in his evidence that when he bought Woodside Bungalow and the Paddock in 1991 he did so on the basis of his solicitor's advice that he would be able to drive over the Lower Track to the Paddock (in compliance with the injunction) and then walk from the Paddock to Woodside Bungalow. It was only at the hearing before Morgan J in 2012 that Mr Nunn said he came to understand that the injunction granted in the 1976 Proceedings was aimed at preventing the Closes (and then himself as their successor in title) from doing just that.

55. Returning to my narrative of the relevant background, Mr Nunn became registered at the Land Registry as the owner of Woodside Bungalow (on a bigger rectangular plot of land) under one title number and of the Paddock under another on 23 October 1991. The Property Register for Woodside Bungalow at the Land Registry notes a claim by Mr Nunn, supported by a statutory declaration, to a vehicular right of way over the Upper Track to the point where the boundary of the Paddock abuts the place where the Pitch, the Lower Track and the Upper Track meet (approximately point 'Y' on Plan 2). On the basis of that claim Mr Nunn has registered a caution against first registration of the Upper Track.

The Litigation History

56. The litigation between the parties and their privies (as Morgan J found the Closes to be for the purpose of striking out parts of Mr Nunn's counterclaim) has an impressive history; though any sneaking sense of admiration must be tempered by a reminder of the overriding objective under the Civil Procedure Rules, some of the subsidiary aims of which these current proceedings (at all times subject to the CPR) have clearly frustrated.

57. The history up to 2013 and the background to the issues remaining for decision by this judgment was set out by the then Chancellor, Sir Terence Etherton (with whom Kitchin and Underhill LJJ agreed) in his judgment - [2013] EWCA Civ 1002 - as follows:

> "2. The litigation concerns three different paths or tracks, over a relatively short stretch of private land at Slad, Gloucestershire. In parts they are very narrow and not made up. They are called "the Lower Track", "the Pitch" and "the Upper Track", all of which converge at one point. The dispute is as to whether there is appurtenant to the property known as Woodside Bungalow, owned by the Defendant, Jonathan James Nunn, a right of way by foot and vehicle over the Lower Track and the Upper Track or there is, alternatively, a public right of way by foot and vehicle over the Lower Track and a public right of way by vehicle over the Upper Track. It is not in dispute that there is a public footway over the Upper Track.
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> 3. The Lower Track is on land forming part of Painswick Slad Farm. That farm was owned by the Claimants, Charles Price and Christopher Price ("the Prices"), at the commencement of these proceedings, and they also claim to be the owners of the Upper Track or one half of it. Charles Price has since died, but permission has been granted for the proceedings to be continued by Christopher Price alone.
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> 4. Whether or not Woodside Bungalow has the benefit of a pedestrian and vehicular right of way over the Lower Track was the subject of two sets of proceedings between 1976 and 1983 between the Prices and Mr Nunn's predecessor in title, Donald Arthur Close. The first set of proceedings ("the 1976 Proceedings") was commenced by Mr Close and his wife against the Prices in 1976 in the Stroud County Court. Following a seven day trial Mr F.J. Cridlan, sitting as a deputy County Court judge, dismissed the proceedings in so far as they claimed a right of way for the benefit of Mr and Mrs Close other than one for the benefit of a parcel of land called the Paddock, which was and is separate and distinct from Woodside Bungalow. The Deputy Judge's judgment ran to 50 closely printed pages. Mr and Mrs Close appealed. The appeal was heard over four days in October 1979 by the Court of Appeal, which, in effect, dismissed the appeal on the point of substance. The judgments ran to 25 closely printed pages.
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> 5. Further proceedings were commenced in the Stroud County Court in 1980 by Mr Close against Charles Price and his wife claiming a right of way with or without vehicles over the Lower Track for the benefit of Woodside Bungalow by virtue of lost modern grant or prescription under the Prescription Act 1832 or section 62 of the Law of Property Act 1925 or by implication ("the 1980 Proceedings"). In March 1983, following a two day hearing, the proceedings were struck out by Registrar J.S. Laurie on the ground of abuse of process in the light of the 1976 Proceedings. Mr Close appealed. The appeal was dismissed by HH Judge Braithwaite in May 1983.
>
> 6. In 1991 Mr Close transferred Woodside Bungalow to Mr Nunn.

7. The present proceedings were commenced by the Prices in April 2011 for, among other things, a declaration that Mr Nunn does not have a vehicular right of way over the Upper Track and for an injunction. Mr Nunn has defended the claim and has counterclaimed for, among other things, (1) a declaration that there is attached to Woodside Bungalow a right of way with or without vehicles over the Lower Track, the Upper Track and the Pitch, (2) a declaration that he has, as a member of the public, a right of way without or without vehicles over the Lower Track, the Upper Track and the Pitch, and (3) injunctions restraining interference with those rights of way. The Defence and Counterclaim run to 34 pages.

8. In October 2011 the Claimants issued an application to strike out the allegations in the Defence and Counterclaim relating to the Lower Track on the grounds of estoppel and abuse of process of the court.

9. The hearing of the application took place over three days before Morgan J. His judgment runs to 32 pages and 107 paragraphs. He held that Mr Nunn is bound by an issue estoppel which prevents him from asserting that Woodside Bungalow has the benefit of a private right of way over the Lower Track, and he struck out Mr Nunn's pleaded claim making that assertion. He refused the application to strike out other parts of Mr Nunn's Defence and Counterclaim, including, in particular, those parts asserting and relying on a public right of way.

10. The appeal and cross-appeal to the Court of Appeal lasted over a day and a half. There were four lever arch files containing 94 authorities and extracts from statutes and legal books.

11. CPR Part 1.1, which states that the civil procedural rules have the overriding objective of enabling the court to deal with cases justly, provides that dealing with a case justly includes, so far as practicable, allotting to the case an appropriate share of the court's resources while taking into account the need to allot resources to other cases. The above introductory account of the litigation history of the rights of the owners of Woodside Bungalow over the Lower Track gives cause to wonder and concern at the appropriateness of the amount of the court's resources which have been deployed on that issue."

58. This was said before the creation of the 'Y' to 'B' route across the Paddock. The Chancellor used that concluding language of bewilderment (I think I can say) not knowing that the proceedings would thereafter be pursued anything but expeditiously and that, once revitalised almost a decade later, the NERCA claim would emerge and become the main focal point of a 4 day trial.

59. At the trial, a relatively modest 55 authorities and extracts from statutes and legal books were before the court (excluding the decisions of Morgan J and the Court of Appeal) though the requirements of paragraph 12.61 of the Chancery Guide indicate there probably should have been far fewer. As Ms Stockley for Mr Nunn (who, like Mr Moore, played no part in drafting the Amended Defence & Counterclaim) observed, her own client's pleaded case is regrettably voluminous; though on the claim that now matters (the NERCA claim) it is relatively succinct and, if anything, the formulation of

the parties' rival cases on it has complicated the approach to a decision on Issues 1 and 2.

60. The Order of Morgan J dated 15 June 2012 provided for the striking out of Mr Nunn's claim that his property Woodside Bungalow benefited from a private right of way when his predecessors the Closes had failed to establish as much (in relation to the Lower Track) in the 1976 Proceedings. It granted declaratory relief which said he was estopped from doing so. But it also declared that he was not estopped from asserting the existence of a public vehicular right of way over the Lower Track for the purpose of defending a claim by the Prices that he would be trespassing upon it when using it otherwise than pursuant to an express grant in a conveyance of 3 October 1960 or from asserting that public right to support a negative declaration that he is not a trespasser. The Order further declared that it was not an abuse of process for Mr Nunn to assert a public right of way for those 'anti-trespass' (my phrase) purposes. It provided that Mr Nunn's claim that any future interference by the Prices with the asserted public right of way over the Lower Track would amount to a public nuisance also should not be struck out.

61. The essence of these 'pre-NERCA pleading' decisions was, therefore, that Mr Nunn should be able to advance a case in relation to a *public* vehicular right of way over the Lower Track.

62. The Order dated 15 June 2012 said nothing expressly about the Upper Track or the Pitch. In his judgment on consequential matters, including the terms of the declaratory relief to be granted ([2012]] EWHC 1605 (Ch)) Morgan said, at [5]:

> "The draft order put forward by the Defendant also sought declarations in relation to the upper track and the Pitch. In my judgment, I did not determine any issue in relation to the upper track and the Pitch. It is therefore inappropriate for the order to contain declarations in relation to the upper track and the Pitch."

C. THE 'LIVE' PLEADED CASES

Right of Way

63. The issues between the parties on the right of way dispute have been considerably narrowed as a result of (1) Mr Nunn abandoning his claim to a vehicular right of way by prescription and (2) the experts agreeing that the use of the language of "*common Highway*" in the Turnpike Act *suggests* that the way in question was a public vehicular highway (though ultimately, of course, this is a matter of statutory interpretation for me).

64. Indeed, the issues were (at least at first sight) narrowed a little further in the light of further clarification of one aspect of Mr Nunn's case by Ms Stockley given between the hearing of the evidence, in July 2023, and the making of closing submissions in November 2023. This point of clarification arose out of the testimony of Mr Carr as to the likely line of Route 3 which I address in Section G below (under what I have identified as Issue 2). In the light of his evidence, I was told that Ms Stockley had confirmed in an email to Mr Adams, for Mr Price, that for the purposes of his NERCA

claim Mr Nunn "*contends that the vehicular private right of way arising from section 67(5) is along the Pitch and the Upper Track and not the Lower Track*."

65. I regard that as a constructive and sensible concession, in relation to the Lower Track, in the light of Mr Carr's evidence which I address below in the context of Issue 2. However, for the purposes of the issues identified in Section D of this judgment, the concession does not dispense with the need for me to address the Lower Track in the context of the expert evidence given generally on Issue 2. Nor, for the reasons I attempt to explain when addressing Issue 1, is it obvious to me that I am entitled, without further thought and analysis, to proceed as if what has already decided by the courts, including the declaratory relief granted ((i.e. *in rem* relief, albeit with the primary focus upon the Lower Track) is plainly irrelevant to Mr Nunn's pursuit of the NERCA claim over the Upper Track. Indeed, in her closing submissions Ms Stockley relied upon what Mrs Emrys-Roberts had said in her testimony about the Lower Track forming part of Route 3 to indeed suggest that her evidence provided an alternative basis for finding that the private vehicular under NERCA had been established over the Upper Track. Further, as I explain next, Mr Nunn's pleaded claim to that right is made by reference to the Lower Track and the Upper Track and *not* the Pitch. In short, the Lower Track is certainly not now out of the picture for the purposes of this judgment.

66. In her opening submissions, and therefore before that clarification of Mr Nunn's during the course of the trial, Ms Stockley drew my attention to two key paragraphs in Mr Nunn's Amended Counterclaim:

(1) paragraph 43(2) where he relies upon the terms of the Turnpike Act to say that the Upper Track and the Pitch were declared to be roads and common highways and to say that there is no evidence that they were stopped up in accordance with the procedure specified by the Act; and

(2) paragraph 27B where he says there was, for the purposes of NERCA, a public right of way for mechanically propelled vehicles ("**MPVs**") over the Lower Track and the Upper Track (though *not* the Pitch) and, as at the Act's commencement in May 2006, the exercise of that right was reasonably necessary to obtain access to Woodside Bungalow. On that basis Mr Nunn says that section 67(5) operates to convert the public right of way into a private right of way for the benefit of Woodside Bungalow and (per section 67(7)) that it is irrelevant whether or not he was at that time, May 2006, either exercising or able to exercise the public right.

67. Ms Stockley also referred to paragraph 27A which relied upon a claim based upon use of a public right by MPVs (of the Lower Truck, the Upper Track and the Pitch), of sufficient antiquity to escape extinguishment under the provisions of NERCA, but that claim was not pursued at trial.

68. Mr Price's Defence to the Counterclaim did not admit paragraph 43(2) and, subject to admitting that there is a public right of way on foot only over the Upper Track and Pitch, denied paragraph 27B.

69. The non-admission raises the issue as to whether the Turnpike Act identified the Upper Track, the Lower Track and/or the Pitch as one of the common highways vulnerable to stopping up and, if so, whether the access to what is now the B4070 was 'stopped up'. The denial not only embraces Mr Price's position on those two questions but also

challenges Mr Nunn's claim that access to Woodside Bungalow by MPV is "*reasonably necessary*" for the purposes of section 67(5) of NERCA.

70. Having noted that Mr Nunn's case had become one for a private right to use an MPV over the Pitch and the Upper Track, I raised the mismatch between that case and paragraph 27B of the Amended Counterclaim by an email sent the week before counsel made their oral closing submissions. I was concerned to establish whether it was of much consequence given that Mr Nunn's real goal was to establish such a right over the Upper Track (which is identified in that paragraph) which he can now reach via the Paddock. In her opening submissions, Ms Stockley had been frank in recognising it is now only the disputed claim to a vehicular right over the Upper Track which really matters.

71. On the pleading point, Ms Stockley emphasised that paragraph 43(2) did allege that the Pitch and the Upper Track were part of Route 3 and she also pointed out that both were identified in the prayer to the counterclaim as being subject to a private vehicular right (the original inclusion of the Lower Track alongside them having been struck out by the order of Morgan J).

72. As for Mr Adams, at certain points in his oral opening submissions I understood him to suggest that Mr Nunn had not pleaded *any* claim to a private MPV right under NERCA; and that the first expression of it was in Ms Stockley's skeleton argument. This was in connection with him saying that any such claim would be *res judicata* by reason of the decisions of Morgan J and the Court of Appeal (see what I have identified as Issue 1 below) and consequently any claim to a private right of way over the Lower Track had been struck out of the prayer for relief. In his closing submissions in reply, Mr Adams said that there had been no application on behalf of Mr Nunn to amend the claim to relief and only by making one would Mr Price then be obliged to raise the estoppel point. There was also no reference to the Pitch in paragraph 27B.

73. All of this is perhaps a little surprising in a case of such maturity.

74. In my judgment, this pleading point cannot properly have any impact on the outcome of the counterclaim. Whether or not a reference to the Pitch in paragraph 27B (as well as paragraph 43(2) and the prayer) was desirable, or indeed at all realistic as part of an identified route for MPVs, the fact is that I cannot think there is a single aspect of this dispute that could be said to have remained unidentified and unexplored at trial as a result of its omission from that paragraph. The Pitch has been central to the expert evidence and legal argument about the implications of the Turnpike Act and featured just as prominently on that front as the Lower Track (if not more so). And, although Mr Adams suggested in his opening that any *res judicata* point should await a hearing on consequential issues, only after I had reached my conclusions upon the effect of the Turnpike Act, I remain of the view (which I expressed in my response to him at the time) that, by its nature, such a point should be a preliminary consideration not a consequential one. The court should not be facilitating an abuse of its own procedure (if that is what it is) any longer than is necessary. Accordingly, I have identified Issue 1 below; though it will be noted that the estoppel argument hinges much more upon previous judicial decisions about the Lower Track as opposed to the Pitch.

75. I have therefore approached the issues in this case on the basis that, subject to any estoppel, it is open to Mr Nunn to claim a private vehicular right over the Upper Track,

under NERCA, on the basis that, alongside it, either the Lower Track or the Pitch formed part of the former public highway for MPVs.

Ownership of the Upper Track

76. For the purpose of alleging that Mr Nunn's use of the Upper Track for MPVs would be an act of trespass, Mr Price claims ownership of the Upper Track. His claim is to the whole of it or, alternatively, ownership up to its centre line. This Claim rests upon various conveyances from which he derives title to the Farm. The Particulars of Claim also rely upon the provisions of section 6 of the Conveyancing Act 1881 to say that, if ownership of the Upper Track was not expressly transferred by those conveyances, then the transfer of its ownership should be implied into them.

77. Mr Nunn denies this claim on the basis that at no time before 10 December 1919 (the date of one of the conveyances relied upon by Mr Price) did the Upper Track form part of the estate of which the Farm was part. Neither was it reputed to form part of it for the purposes of the 1881 Act applying.

78. In his evidence Mr Price said that, for the purposes of obtaining planning permission for vehicular access from the B4070 into the Paddock, Mr Nunn had made a statutory declaration to the effect that he (Mr Nunn) owned the Upper Track. Mr Price said this was at odds with Mr Nunn having previously recognised that the *ad medium filum* principle (see Section F below) meant that he (Mr Price) owned half of it. [In his Amended Defence Mr Nunn says that he owns half of it.] It was one of the reasons why Mr Price opposed the application for permission for the new access.

79. Mr Price's rival claim to ownership to the Upper Track, either the whole or half of it, obviously affects not only Mr Nunn but also the owners of Woodside House. In that regard, I was shown correspondence in November 2023 between Redkite Solicitors on behalf of Mr Price and John and Carole Wells who own Woodside House. Mr and Mrs Wells confirmed their position in an email as follows:

> "We have no knowledge of who has ownership of the upper track that fronts Woodside House.
>
> As far as we are concerned the boundary of our property is the front face of the stone wall on the edge of our property.
>
> We do not wish to join in the court proceedings.
>
> We therefore agree to abide by the decision of the judge in the current dispute."

D. THE ISSUES

80. In their arguments counsel focused upon the line of Route 3, the issue of stopping up (if Route 3 was as contended for by Mr Nunn) and the ownership of the Upper Track. I am very grateful to Mr Adams, Ms Stockley and Mr Moore for the clarity of their

written and oral submissions by reference to the legal principles and the evidence given on these core issues.

81. The parties' respective pleaded cases and the evidence relied upon in support have, however, led me to identify below seven key issues that need to be addressed for the purposes of giving structure to this judgment and a comprehensive determination of the claim and counterclaim (on my approach to the latter outlined above). I have already noted that Mr Nunn's recognition that his own expert did not support the case for including the Lower Track within Route 3 has not had much impact in reducing the scope of matters to be addressed under those issues.

82. I have also already touched upon the first of these issues which arises on Mr Nunn's counterclaim; namely a potential estoppel on *res judicata* grounds. As I have mentioned in the context of the pleaded cases, Mr Adams in his opening submissions touched upon a potential *res judicata* or *Henderson v Henderson*[3] point so far as the inclusion of the Lower Track within Mr Nunn's NERCA claim was concerned. He suggested then that any argument might await a consequential hearing if my decision (or what would otherwise be my decision) on that claim made it appropriate to do so. Then, in his written closing submissions Mr Adams said that Mr Price could have no such objection to the claim in the light of the clarification that the Lower Track was no longer said to be included within it. On that basis, Ms Stockley expressly did not engage with the point in her consequential written closing submissions. But, by the time of his oral closing submissions, Mr Adams was pursuing the estoppel point and doing so much more firmly than first time around. I infer this may well have been the result of me having raised the point about the pleadings whilst at the same time questioning whether it was really of much significance when the post-2020 battleground is really the Upper Track.

83. In his final submissions Mr Adams said that Mr Nunn's need to assert a private interest in land (Woodside Bungalow) for the purposes of the NERCA claim meant that, as the privy of Mr Close in the 1976 Proceedings, the claim fell foul of the decisions of Morgan J and the Court of Appeal. He suggested that, if the basis of the claim existed, it should not be recognised by me but could only be pursued on an application to the Court of Appeal under CPR 52.30 to re-open its determinations of 1979 and 2013.

84. Even without this late enthusiasm for a point which previously had lurked in the background, it seems to me that any lawyer reading Section B above might begin to think about a potential estoppel. The extraordinary history of this long-running piece of litigation, and of the 1976 Proceedings and 1980 Proceedings which preceded it, obviously prompt such general thoughts. This history is anything but a shining example of the public interest being served by the finality of litigation or of efficiency or economy in the conduct of litigation[4]. The reader might question, therefore, as I did on a relatively uninformed basis at the outset of the trial, how it is that Mr Nunn can be heard to assert a private vehicular right of way to the Bungalow, pleaded so as to include the Lower Track, when it has already been decided in these proceedings that no such right over the Lower Track exists.

[3] (1843) Hare 100.
[4] See *Johnson v Gore Wood & Co (No. 1)* [2002] 2 A.C. 1, at 89, per Lord Bingham.

85. I also have well in mind that some of the declaratory relief granted by Morgan J (directed to the absence of a private right of way for Woodside Bungalow over the Lower Track) constitutes a judgment *in rem* which binds not just Mr Nunn and Mr Price but also their respective successors in title of the Bungalow and the Farm. The benefit of declaration binding on the whole world is not in the gift of these particular litigants: a point illustrated by contemplating what members of the public might have said about the character of their rights of way over the Lower Track and (both before and after May 2006) the Upper Track.

86. The issues I have therefore identified for the purpose of resolving this dispute (subject, of course, to any potential third appeal to a higher court) are as follows:

Right of Way over the Upper Track

1) **Issue 1**: Is Mr Nunn estopped from claiming the benefit of a private right of way under section 67(5) of NERCA by reason of the decisions in the 1976 Proceedings and/or of Morgan J (and the Court of Appeal) in these proceedings? Or is Mr Nunn able to assert the section 67(5) private right because (1) Morgan J and the Court of Appeal recognised that Mr Nunn should be permitted to assert and rely upon a *public* right of way over the Lower Track (even though the judges did not then know this would later be relied upon to support the pleading of a *private* vehicular right of way under section 67(5) from 2006 over the Lower Track as well as the Upper Track); (2) by the end of the trial, Mr Nunn's primary case did not include the Lower Track within the NERCA claim; and/or (3) section 67(7) of NERCA says that neither Mr Nunn's actual exercise or not of any (presumed) public vehicular right of way prior to 2 May 2006 nor his ability to exercise it at that time is relevant to the outcome?

2) **Issue 2**: Did 'Route 3' (as identified by the language of the Turnpike Act quoted in Section F below) follow the path of the Upper Track and the Lower Track and/or the Pitch? If so, did the Upper Track connect to the turnpike road (now the B4070) prior to 1800 via the Pitch at point 'A' on Plan 2 ('D' on Plan 1) or via the Lower Track at point 'D' on Plan 2 ('C' on Plan 1), or both?

3) **Issue 3**: If part of Route 3 followed the Upper Track between points 'C' and 'B' on Plan 2 (alternatively between 'A' and 'B' on Plan 1) was the Upper Track an existing public right of way for MPVs, within the meaning of section 67(1) of NERCA, as at 2 May 2006? The answer to this issue requires the following questions to be addressed:

    a) Does the language of "common Highways" used in the Turnpike Act support the conclusion that Route 3 is apt to be categorised as a public right of way for MPVs as at May 2006?

    b) Was any part of Route 3 stopped up pursuant to the Turnpike Act so that (if it was one before) the Upper Track ceased to be a common highway before May 2006?

c) Can the Upper Track be considered (as the subject matter of the NERCA private right of way) in isolation from the Pitch and/or the Lower Track (depending on which one of them provided the connection to the Turnpike Road)? [It is to be noted again that (1) the Pitch was not included by paragraph 27B of the Amended Counterclaim as an existing public right of way for MPVs in 2006; and (2) that in 1979 the Court of Appeal appears not to have countenanced the idea that, as a member of the public, the owner of Woodside Bungalow might have continued his journey beyond the top of the Lower Track by vehicle.] What impact, if any, does section 67(7) of NERCA have on this question in providing that is irrelevant whether or not the claimant of the private NERCA right was actually exercising the public right or able to exercise it in 2006?

4) **Issue 4**: If the answer to Issue 3 is yes, was the exercise of a vehicular right of way over the Upper Track before May 2006 reasonably necessary to obtain access to Woodside Bungalow so that private right of vehicular access arose under section 67(5) of NERCA? Does the declaratory and injunctive relief in the 1976 Proceedings - granted to prevent vehicular use of the Lower Track by the owner of Woodside Bungalow (as opposed to the owner of the Paddock even if they are the same person) - inform the answer to this question, when the new access across the Paddock to the B4070 was not created until 2020?

Ownership of the Upper Track

5) **Issue 5**: Is Mr Price estopped or barred from pursuing his claim to ownership of the Upper Track because of the judgment of HHJ Cridlan?

6) **Issue 6**: Has Mr Price established ownership of the Upper Track?

7) **Issue 7**: Alternatively, has Mr Price established ownership of the Upper Track up to its centre line?

E. THE WITNESSES

87. Mr Price and Mr Nunn each gave evidence. I also heard from the parties' respective rights of way experts, Mrs Rosalinde Emrys-Roberts called by Mr Price and Mr Robin Carr called by Mr Nunn.

88. I found the evidence of all four witnesses to be straightforward and helpful. Each of them did his or her best to assist me in understanding and resolving the points now in issue. As one might expect in the light of the issues outlined above (and Mr Nunn's abandonment of any claim to a prescriptive right) the evidence of the experts assumes predominance in their resolution.

89. That said, in his testimony Mr Price did introduce three videos of his walk alongside Painswick Footpath 50 from its entrance at Folly Lane down the Upper Track to its junction with the Lower Track and the Pitch; the Lower Track (from that junction down

to the first set of gates to his farmyard); and the Pitch (from the junction down to the B4070).

The Factual Evidence

90. The videos (and some photographs in the trial bundle) were useful in showing the following features in particular:

(1) The narrowness of the path between Folly Lane (point F on Plan 2) and the lower half of 17 Acres (approximately at point Z). After a short section of tarmac where it leaves Folly Lane, the path has a natural Cotswold stone surface. As Mr Price described it: "*You've got a bit of soil, a bit of brash ….. bit of everything there but …. not made up at all*." There is at one point a sizeable tree in the middle of the path. There are also mature beech and ash trees as well as other vegetation growing on the 17 Acres side of the path's boundary. The boundary between the path and 17 Acres is also fenced. Mr Price explained that he had put up the fence in around 2000 to contain sheep and lambs within 17 Acres. He had no recollection of there having been a fence before then, only a wall on the other side of the path. However, I accept Mr Price's evidence that his fencing would not have significantly narrowed the pathway and that, where possible, he would have used existing trees to support the fence in order to minimise the use of fence posts.

(2) The presence of a stile where the path meets the top of 17 Acres (approximately at point E on Plan 2). At around this point the path is bounded by 3 beech trees and there are remnants of the trunk of a yew tree. The video of the path between points F and Z on Plan indicates that over this section it is not *now* suited to use other than as a footpath in accordance with its designation as Painswick Footpath 50. Even ignoring the fencing put up by Mr Price and the stile at the top of 17 Acres the physical characteristics of this section of the path show it now to be unsuitable for any vehicle. Mr Price also explained that the top (North-Eastern) section of 17 Acres is quite steeply banked – as shown by one photograph looking up the path from the entrance to the field known as '**6 Acres**' (i.e Briar Field on the old maps and on Plan 1) – and he said he could only get to point E on Plan 2 by tractor which, going uphill, he would generally approach by taking a zig-zag route across the field rather by taking the direct route. This was his practice even after he acquired a four-wheel drive tractor in 2006 unless he was harrowing or towing a trailer with some weight and traction to it. This evidence about the relative steepness in the top section of 17 Acres (for about three-quarters of its depth running south westwards) also points against the path up to Folly Lane supporting any vehicular use, at least in recent times.

(3) The route of the path below point Z on Plan 2. Below that point Painswick Footpath 50 runs into and follows the northern boundary of 17 Acres. Mr Price explained that there was no path through the field before 1985. It was created by him using a dumper truck in connection with him filling in the old quarry ('*Pit (dis)*' on Plan 2) when he built his pole barn. He said that walkers now use this section of the path through the field.

(4) The widening of the path (compared to its width between points F and Z on Plan 2) after a gate which marks its easterly exit from 17 Acres (point A on Plan 1) into what becomes the Upper Track. At around this point the path is bounded by

both 17 Acres and 6 Acres. Mr Price thought it likely that the Capel family (as owners of the Grove Estate which included the Farm) would have improved the access between the two fields – then known as 'Vatches Field' and 'Briar Field' – so that hayricks might be made on the smaller field. He also explained his understanding that, in the 1950's, his Uncle Percy had taken off the topsoil from the Upper Track so as to reveal the Cotswold stone underneath and provide better grip for farm vehicles. Mr Price accepted that the Upper Track had "*greened over somewhat*" since the days when a herd of dairy cattle would have been passing over it 3 or 4 times a day and churning it up. As the very purpose of these proceedings and the evidence of Mr Price and Mr Nunn both establish, the Upper Track is capable of being used by vehicles. The video and photographic evidence suggests to me that, as a matter of common sense, driving over it in a car might require a vehicle with a bit of ground clearance or, in difficult weather conditions, four-wheel drive. Mr Nunn said his and his wife's vehicles were both 4x4's.

(5) The existence of a dry-stone wall marking the boundary of Woodside House (and Woodside Bungalow) where it abuts the Upper Track on its southern side. Mr Price identified a boundary stone inserted into the boundary wall where it abuts the eastern edge of 17 Acres and about 80 yards from the gateway to the Upper Track. It was marked 'WF 1853' (or possibly 1858) indicating the ownership of what was then the Vatch Mills Estate by one William Fluck. Mr Price said he believed it was one of a series of such boundary stones that define the boundary of Woodside House going down the Upper Track. The trial bundle included the photograph of another such stone, with an additional marking between the 'WF' initials and clearly dated 1854, though the location of that one was not identified. On the other side of the Upper Track (opposite the dry-stone wall of Woodside House) there is what Mr Price described as a stonewall-faced bank about 3 to 4 feet high and obscured by greenery. The video footage also showed where entrance ways to the garden of Woodside House and to Woodside Bungalow had been created since the boundary wall was originally built. The first of these is marked by gate pillars on either side (now spanned by post and wire fencing rather than a gate) and Mr Price explained his understanding that this was created by agreement between his grandfather Percy Teakle and Dr Green of Woodside House, reached in the 1920's, so that the doctor might entertain guests on the newly built tennis court in his garden. Mr Price explained that the other entrance, made by a rougher gap in the wall to the grounds of Woodside Bungalow, had been created by Mr Close.

(6) The presence of regularly spaced beech trees in the grounds of Woodside House. Mr Price suggested these might have been planted in the 1850's as part-and-parcel of establishing the boundary of Woodside House.

(7) The presence of pieces of farming equipment (including an old cultivator) at the top of the Paddock where it meets the top of the Pitch and the bottom of the Upper Track. Mr Price said in evidence that these had been placed there in around 2004-2005 to "*prevent illegal use*" of vehicles from the Paddock to Woodside Bungalow. He explained how in around 1978 Mr Close had created an access to the Paddock at this point when it had previously been separated from the Upper Track by a steep bank.

(8) The narrowness and steepness of the Pitch. On its southern side the Pitch is bounded by the wall of Woodside House. The Pitch has a tarmac surface, as noted in the judgments in the 1976 Proceedings. Mr Price said he believed it was tarmacked in 1974. There is a handrail on one section of its northern side which Mr Price said was put in about 10 years ago. He also said that in around 2006 Mr Nunn had removed some larger stones at the entrance to the Pitch from the B4070 to make it wider. This was not challenged by Nunn. In her report, Mrs Emrys-Roberts had noted that a stone on the ground indicated that the Pitch may have had a narrow entrance in the past. As with the top section of Painswick Footpath 50 running down from Folly Lane, the Pitch is clearly not suitable for use by motorised vehicles, as Megaw LJ noted back in 1979.

91. The still narrow entrance to the Pitch from the B4070 was also illustrated by the street view facility within Google Maps upon which Mr Adams also relied in his closing submissions and which I mention further in my determination of Issue 2. [For this purpose he used the 2009 version, rather than the 2023, as the opening was less obscured by vegetation.] This also showed an entrance to a track on the other side of the road opposite the Pitch. In his evidence Mr Price explained that in the past this was a footpath extending down to Upper Vatch Mill (see Plan 2) but, to his surprise, ramblers had let go unchallenged the placing of a gate and sign marked "Private Land" so that it was no longer a recognised footpath. I mention this because of its potential relevance to the disagreement between the experts, addressed within Issue 2, as to whether a map of 1824 showed the Pitch or some other track.

92. In his witness statement Mr Price identified, by reference to contemporaneous diary entries, what he described as "*the thirteen most blatant*" examples of breach of the 1979 injunction. This was a reference to the Court of Appeal's order which (by endorsing the order of Judge Cridlan and varying it by granting additional relief) restrained Mr and Mrs Close from using the Lower Track as a right of way other than to the Paddock.

93. Mr Price referred to instances where Mr Nunn had used more than one car (or van) to gain vehicular access to Woodside Bungalow via the Lower Track. This involved him using his "*road going van*" (a Toyota people carrier) to and from the Paddock and another car (or van) to drive along the Upper Track. On more than one occasion Mr Price logged Mr Price using the road going van, which he parked in the Paddock, to transport him and his family up to Woodside Bungalow. Mr Price said the "*final straw*" came in August 2002. He says it prompted Mr Nunn to make the claim to a vehicular right of way which is now noted in the registered title to Woodside Bungalow and which in turn led to Mr Price claiming a declaration in these proceedings to the opposite effect. On that occasion Mr Nunn had returned with his boys from a camping trip. They used a power-barrow to move their camping kit from the van and its trailer in the Paddock to Woodside Bungalow. Mr Price said that when he asked what he was doing Mr Nunn became abusive and used foul language.

94. Allowing for the need to pass over it in farm vehicles, Mr Price's position is that the Upper Track (as part of Painswick Footpath 50) should be the preserve of walkers and dog walkers.

95. Mr Nunn explained in his evidence that, when he bought Woodside Bungalow in 1991, he had done so on the basis of "*poor advice*" that he was able to use the Lower Track to drive to the Paddock and then walk to the bungalow. In the first couple of years of his ownership Mr Nunn agreed a 'Temporary Access Arrangement' with Mr Price's parents under which he paid an annual fee in return for:

> "….. *permission to use the farm track to gain access to the Paddock or proceed directly to the Bungalow. This permission extends only to the domestic use of cars owned by Mr Nunn and his friends*."

96. The evidence of Mr Price and Mr Nunn conflicted over the circumstances in which this arrangement came to an end but nothing turns on that for the purposes of this judgment.

97. In a passage in his witness statement which was really directed to the claim to a prescriptive right of way, since abandoned, Mr Nunn said that by then using two separate cars as a "shuttle" service between the B4070 and the Paddock and then from the Paddock to Woodside Bungalow he was continuing a practice commenced by Mr Close in 1978 (when he created the access point at the top of the Paddock). But he said he had used the shuttle service very rarely (and the farm machinery obstructions now preclude it) and had not used a car or van over the Upper Track since 2000. Mr Nunn said the incident in August 2002 was "*the closest we got to having a row*" and that he had since apologised.

98. Mr Nunn said his success, on his first attempt, in securing Highway Authority approval for a new access from the B4070 into the Paddock followed a number of unsuccessful attempts previously made by Mr Price's uncle Harry and then by Mr Close. Mr Nunn explained how for years he had parked in a layby on the B4070 and walked up the Pitch to Woodside Bungalow. This took about 7 minutes. His wife's deteriorating health over recent years means that it now takes her about 10 minutes to walk it.

The Expert Evidence

99. Mrs Emrys-Roberts, of Routewise Consulting, is an independent consultant with over 28 years' experience of investigating public rights of way. She has a degree in geography and worked as a land surveyor for 8 years. She is a member of the Institute of Public Rights of Way and is a trainer for the Institute.

100. Mr Carr, of Robin Carr Associates, is also an independent consultant on public rights of way and highway matters. He has over 30 years' experience in such matters having been employed by a number of local authorities as a rights of way and highways practitioner, between 1987 and 2003, and as an independent consultant for the last twenty of them. For most of that period he has been involved in providing specialist training or advice on rights of way and highway issues to local authorities, two universities and the Local Government Ombudsman.

101. The experts' impressive knowledge and level of expertise on rights of way issues was evident both in their respective reports and in their testimony at trial. The nature of the matters on which they disagreed (bearing as they do upon Issues 2 and 3 identified above) and my recognition that Mrs Emrys-Roberts and Mr Carr were equally

impressive witnesses mean that my acceptance of the evidence of one over the other, on any of those matters, does not really rest upon the concept of credibility, at least not in its more general sense. Speaking generally, each offered a credible explanation of the original course and later fate (after 1800) of 'Route 3'. In circumstances where their rival conclusions on those key points rest upon a careful and impressive analysis of what the historic records and maps show (or do not show) the task for me instead really boils down to deciding, at this distance in time, which of the two analyses is the more persuasive.

102. The topography of what Mr Carr has labelled 'the Investigation Route' (Points A-B-C-E-F on Plan 2) will obviously inform this decision in circumstances where, allowing for the possibility of some change in the natural environment and the construction of a boundary wall, there is no basis for thinking the contours of the land have changed much in intervening centuries. The decision is also conditioned by a burden of proof which rests upon Mr Nunn in relation to establishing a pre-1800 connection between the Upper Track, the Lower Track and/or Pitch and the turnpike road, and (for reasons I explain when addressing the Turnpike Act in Section F below) upon Mr Price in relation to the stopping up of any such connection after that date.

103. Mrs Emrys-Roberts and Mr Carr helpfully prepared a Joint Report which highlighted the areas of agreement and disagreement between them. Their focus was the language of the Turnpike Act which is set out Section F. They agreed the following points:

1) that the language of "*common Highway*" used in the Turnpike Act suggests that the "*Roads*" in question were public vehicular ones;

2) that, given that the purpose of the Turnpike Act was to prevent tolls being diminished, those roads connected to what is now the B4070;

3) the Turnpike Act did not itself operate to "stop up" and discontinue the use of the roads but instead authorised and specified the legal process by which the trustees appointed under it might do so; and

4) that no documentary evidence has been discovered which expressly established that the road described in these proceedings as "Route 3" had been stopped up after 1800.

104. From these areas of consensus the experts were able to identify the key areas of disagreement between them, which were:

1) the course of Route 3 and whether each of the Upper Track, the Lower Track and/or the Pitch formed part of it; and

2) the weight to be attached to particular historical maps, plans and records in the identification of the course of Route 3; and

3) whether or not the available evidence supported the conclusion that Route 3 was stopped up after 1800.

105. I address the detail of the expert evidence in my analysis of Issues 2 and 3 below. In summary, Mrs Emrys-Roberts said the documentary evidence now available for

establishing the course of Route 3 was incomplete and inconsistent. It failed to establish on the balance of probabilities that there was, before 1800, a common highway over the Upper Track, Lower Track or Pitch which connected to what was then the Slad Road and is now the B4070. On the issue of stopping up Mrs Emrys-Roberts said it had not been possible to locate any of the records required to kept under the Turnpike Act (i.e a minute book of stopping up orders made under it) but the lack of evidence identifying those tracks as public vehicular highways since 1800 indicates that they – or any of them which formed part of Route 3 – were stopped up under the Act. Mr Carr's position was that the Pitch and the Upper Track formed the original line of Route 3. With the assistance of a professional researcher and local historian (Ms Elizabeth Jack) he had also satisfied himself that no record of Route 3 subsequently being stopped up could be found. Adopting the principle of "*once a highway always a highway*" Mr Carr said the public vehicular highway status which Route 3 enjoyed before 1800 still applied today.

F. LEGAL PRINCIPLES

(1) The Right of Way

106. The outcome of the case on the disputed right of way turns on establishing (on the balance of probability) the position, on the ground so far as Route 3 is concerned, over two centuries ago. The question is whether things said by and done pursuant to the Turnpike Act breathe life into a claim to a private vehicular right of way which is made possible only because of another enactment over 200 years later.

The Turnpike Act

107. The Turnpike Act was passed in order to create a turnpike road, which would enable the collection of tolls, which is now the B4070 between Stroud and Birdlip.

108. The Act recited that the construction of such a road would not only be for the "*convenience and accommodation*" of local landowners and inhabitants but would also open "*a shorter and better communication between the city of Bath and Town of Cheltenham, and other Parts adjacent, particularly those Parts where many considerable and extensive Clothing Manufactories are carried on*." Plan 1 shows the location of New Mills and Hazel Mill adjacent to the B4070 and Plan 2 show Upper Vatch Mill from the on the other side of the road from the bottom on the Pitch. Many of the mill buildings in the vicinity of Vatch House (also marked on Plan 2) which existed at the time of the Turnpike Act, have since disappeared.

109. The creation of an effective toll road required those responsible (the numerous trustees appointed by the Act who included John Capel and William Capel of the family which owned the estate of which the Farm was then part) to be able to stop up other roads which might otherwise be used by travellers to avoid paying a toll.

110. The Act is very long having regard to its purpose, though probably not unusual for its time in that respect. Its 57 prolix sections run, with recitals, to 30 densely typed pages.

It concludes by section LVII stating that it was to remain in force for a period of 21 years and then until the end of the next session of Parliament.

111. Section XVII of Turnpike Act provided as follows (with the parenthetical reference to 3 of the 4 routes identified by Plan 1 and to the elusive third – "Route 3" - being added by me):

> "AND WHEREAS the making of the Road hereby intended to be made, will render unnecessary the several Roads hereinafter mentioned, and the continuing of the same will diminish the Amount of the Tolls hereby granted; BE IT FURTHER ENACTED That it shall be lawful to and for the said Trustees, or any Five or more of them, and they are hereby authorized and empowered to stop up and discontinue, and to prevent the using for the future of the following Roads; (videlicet) the Road from Bulls Cross over Wickeridge Hill, to Worgans Corner ["**Route 1**"]; the Road from New Mills to Wickeridge Hill aforesaid ["**Route 2**"]; the Road through a Field called Vatches, to Wickeridge Hill aforesaid ["**Route 3**"]; and the Road from Hazle Mill through Wickeridge Farm, to Wickeridge Hill aforesaid ["**Route 4**"]; and it shall not be lawful for any Person or Persons thenceforth to use the said Roads, or any of them, but the same shall cease to be common Highways, to all Intents and Purposes"

112. Section II of the Act regulated in detail how the trustees were to exercise their powers. It provided that not less than 5 of them were to meet first at the George Inn, Stroud soon after it was passed (I note they were to "*defray their own Charges and Expences*" at these meetings) and that thereafter they would hold further meetings from time to time and at a venue near the route of the toll road. Any "*Order of Determination*" by the trustees was required to be made at such a meeting, and not otherwise, and required a majority of those present to concur. Section III made express provision for the revocation or alteration by not less than 6 trustees (at a meeting with at least 9 present) of any earlier order made by 5 of them. That section and section LV provided for orders and proceedings of the trustees to be recorded in a Book of Proceedings (signed by the appropriate number of trustees) which "*shall be admitted as Evidence in all Courts whatsoever.*"

113. The Act did not decree the means by which the roads mentioned would be 'stopped up' and 'discontinued' (at least to the point that would "*prevent the using for the future*") but section XI did provide for the erection of turnpikes, including across side roads connecting with the new toll road, as follows:

> "AND BE IT FURTHER ENACTED that the said Trustees, or any Five or more of them, shall and may erect so many Turnpikes as they shall think necessary, across any part of the said Road, and upon the Side or Sides thereof, and also across any Street, Lane, or Way leading into the same, and may also erect and provide Toll Houses, with suitable Outbuildings and Conveniences at or near each Turnpike, and may from Time to Time and afterwards remove, alter the Situation of, or discontinue the Turnpikes or Toll Houses, or any of them, as they said Trustees, or any Five or more of them, shall think expedient ……."

114. That provision continued by specifying the maximum tolls to be paid by the specific types of traffic – including horse-drawn carriages and droves of cattle and other animals

- passing through a turnpike. Section XVI identified a significant number of exemptions from the payment of such tolls.

115. I have already noted that the experts were agreed that the reference in the Act to "common Highways" *suggests* that each of Routes 1 to 4 was a public vehicular highway. Ultimately this is a question of statutory interpretation which I address below following a discussion of the common law principles governing the status of a highway relied upon by Mr Adams and Ms Stockley.

116. Consistent with the experts' view, Mr Adams on behalf of Mr Price did not suggest that the last clause of section XVII resulted in an immediate cessation of common highway status. The language of the Act (the use of "*thenceforth*" rather than "*henceforth*") and the common-sense observation that the trustees would have had no justification or financial incentive to stop up alternative, non-toll routes before the turnpike road was built both indicate that such status would be lost only upon the relevant route being stopped up.

117. In support of his argument on the stopping up of Route 3 at some point after 1800, however, Mr Adams relied on the maxim *omnia praesumuntur rite et solemniter acta* – that all things are presumed to have been done correctly and solemnly – to say that, at this distance in time, the absence of any formal record of the power being exercised (in relation to Route 3) was no bar to the court presuming that the trustees had exercised their power in that regard.

118. Mr Adams cited in his closing submissions on this aspect the authority of *Manning v Eastern Counties* (1843) 12 M. & W. 237; 152 ER 1185, *Williams v Eyton* (1859) 4 H. &N. 357; 157 ER 878 and (noting the doubt about the correctness of the decision expressed by Lord Dunedin in *Cababé v Walton-on-Thames UDC* [1914] AC 102, at 117) *Leigh Urban District Council v King* [1901] QB 747.

119. When he mentioned the maxim in his opening submissions my instinctive reaction was that it is indeed concerned with presuming the regularity (and legal effectiveness) of an act done rather than whether it was in fact done. Thus in *Williams v Eyton* and *Leigh UDC v King* there was no doubt that the relevant act had been done – the enclosure of a road in the first case and the substitution of a new road for an old public highway (which had been stopped up) in the second - and the issue as to whether the court could presume that this had been preceded by the relevant formalities required for it to be lawfully done. In each of those cases the court relied upon the nature of the act done and the lapse of time since it was done to presume that the requisite formalities had indeed been observed.

120. Mr Adams also referred to *R v Ifield Inhabitants* (1856) 4 WR 458 in observing that, ultimately, it is a question of fact whether or not the trustees exercised their power to stop up Route 3. That was a case which concerned the exercise of a stopping up power in connection with the creation of the Horsham and Crawley turnpike road. The issue there arose out of the fact that the trustees' first resolution was never signed by the chairman of the meeting. But the court found that the resolution was valid and effective because the chairman signed the minutes of the next meeting at which the trustees had passed a further resolution which confirmed the first. The decision (on a challenge to the effectiveness of the first resolution which Lord Campbell CJ described as "*one of*

the most desperate that could well be met with") was therefore also concerned with the lawfulness of an otherwise undoubted and clear act of stopping up.

121. As Ms Stockley correctly observed, the *omnia praesumuntur* principle does not therefore assist Mr Price in shifting the burden of proof on the stopping up issue to Mr Nunn. The presumption can only be relied upon in respect of the correct procedures having been followed *once* it has been established by evidence that a decision to stop up Route 3 was made and/or that action to stop it up had been taken.

122. Mr Adams had an alternative submission about the exercise of the stopping up power which was based upon the language of section XVII. He said the language made it clear that the power was an "*all or nothing"* power the exercise of which in relation to any one of the four routes resulted in all four being stopped up. This argument does not strictly lead to a shift in the burden of proof on this question within Issue 3 but, Mr Adams submitted, the evidence that Route 2 or at least some part of that route was stopped up by the trustees (and which I assess below in the determination of that issue) meant that Mr Price had discharged it in relation to Route 3. Mr Adams laid particular emphasis upon the references within the section to the "*Roads*" (plural), to them being "*the same*" and to it not being lawful to use them "*or any of them*" once their use had been prevented.

123. Indeed, Mr Adams went further in his written closing submissions by saying that the language of the section was such that:

> "On its true construction the Trustees were required by Parliament to stop up and discontinue each of the roads once the new road had been built. Indeed, on the face of it, any landowner burdened by the roads would have had a sufficient interest to obtain a mandatory order to require such stopping up once the Turnpike Road had been completed, which it clearly was in or about 1807. If it was not done as it ought to have been done, indeed such legal remedy would arguably still be available to require the relevant highway authority, as successor to the Trustees, to do so. In this regard the equitable maxim that equity looks on as done that which ought to be done is at least analogous, if not applicable, and, as was the case in *Williams v Eyton*, it can be presumed the Trustees duly exercised their power."

124. I cannot accept this submission with its component parts. I have already dealt with the last point and what I consider to be the proper analysis of *Williams v Eyton* from the perspective of the *omnia praesumuntur* principle. In my judgment, the maxim of equity does not take Mr Price any further towards the same result. I cannot see any proper basis for applying, even by analogy, a maxim which reflects the specific enforceability or equivalent recognition of an existing right when the Turnpike Act operated only to confer a power upon the trustees (acting by the requisite majority). Another maxim of equity is that equity follows the law, which means that, even if it need not do so slavishly, it probably should not operate in a way flatly inconsistent with the procedural requirements clearly laid down by a statute for achieving what *might* have been done during the 21 years or so that it remained in force. [The provisions of section LVII of the Turnpike Act raise a question as to whether the county council, as the local highway authority, would now be much too late in seeking a "remedy" of the kind contemplated when any such confirmation of a deemed act of stopping up probably should have been sought early in the 19th Century by the parish council or possibly either by the Grove

Estate or the Vatch Mills Estate (according to the line of the Upper Track discussed in Issue 2 below and the question of ownership addressed in Issues 6 and 7).]

125. Expressing myself this way shows that I do not accept Mr Adams' starting point that section XVII of the Turnpike Act imposed an obligation (or requirement) upon the trustees to stop up. That is not the language of section XVII which instead authorised and empowered them to do so. Whilst recognising that the provision began with a requirement that the trustees should meet and "*proceed to the Execution of this Act*", the elaborate language of section II governed the procedure by which they might make "*Orders and Determinations*" in exercise of this power. The provision clearly required a positive decision by at least 5 trustees and the express language of section III (in relation to a possible revocation or alteration of an earlier decision) also shows that the Act cannot be read as if, either by the time the turnpike road had been built or the date the Act ceased to have force, the trustees had no choice in the matter.

126. I find Mr Adams' point that the power was an all or nothing power, to be exercised in relation to all of Routes 1 to 4 or none of them, less straightforward. However, the fact that the trustees' power to stop up was just that, and not an obligation, indicates to me that the power was to be exercised in relation to the "*several*" roads in turn; and that the reference to it not being lawful to use "*any of them*" after the exercise of the power was to emphasise that separate power in relation to each of them in circumstances where they had been identified collectively (as "*the same*").

127. Even in the case of such an ancient statute, the process of statutory interpretation rests primarily upon reading the relevant phrase or passage in the context of the section as a whole and other pertinent sections which provide context: see *R(O) v Home Secretary* [2022] UKSC 3; [2023] AC 255, [29], per Lord Hodge. As Ms Stockley highlighted, section XI made it clear that the location of the toll houses was not known at the date of the Act. I also note that section XXVIII contained something akin to a modern-day power of compulsory purchase for the acquisition of adjacent land if the trustees considered that to be appropriate for altering the course of the turnpike road. These are indications that the trustees would have needed to consider the stopping up of each of Routes 1 to 4 separately, according to the construction of the turnpike road and the location of the toll houses, as it would not have been known at the time of the Act whether or not there was a case for discontinuing traffic over any particular one.

128. Therefore, in my judgment the burden of proof on the question of stopping up (within Issue 3) lies with Mr Price.

Common Law Principles

129. In support of her case on the facts (and analysis of the Turnpike Act) that the Upper Track, Lower Track and Pitch were subject to a public vehicular right of way, right up to the commencement of NERCA, Ms Stockley relied upon the principle of "*once a highway, always a highway*." She recognised that the principle is subject to the exceptions of lawful stopping up by due process (such as might have been done pursuant to the Turnpike Act) or the physical destruction of the land over which the highway previously ran. Where a highway is lawfully stopped up the owner of the soil

owns the land freed from the public right of passage: see *Halsbury's Laws* Vol 55 (Highways) (2019 ed.), at para. 833

130. Ms Stockley emphasised that a highway cannot, however, be lost by mere abandonment. In this regard she relied upon the judgment of Joyce J in *Harvey v Truro RC* [1903] 2 Ch. 638, at 644, where he said:

> "It is an established maxim that once a highway always a highway. The public cannot release their rights. Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper. The authorities for this are to be found in any of the ordinary text-books on the law of highways, and there is a well-known case where some of the encroachments on the roadside waste had existed for more than forty years, but it was held that no period of modern enjoyment was of any avail to deprive the public of the right they had once enjoyed."

131. That was said in a case where there was no doubt that the highway in question was a vehicular one; and the decision of the court reflected the law that, where such a highway is bounded by fences which included non-metalled (or '*waste*') land, "*the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers*."

132. Section XVII of the Turnpike Act identified Route 3 both as a "*road*" and a "*common Highway*". Mr Adams cited a number of older cases on the meaning of these terms.

133. In *Curtis v. Embrey* (1872) LR 7 Ex. 369 the court was concerned with whether or not a piece of land adjoining a railway station was a 'street', for the purposes of regulating the standing of hackney or public carriages on it, and the relevant statutory definition of that term included a 'road'. Bramwell B said: "*A road as used in the Act of Parliament must manifestly mean a public road, a road which the public have the right to use for passage*." Cleasby B agreed that the piece of land was not a road, saying he would not attempt a definition "*nor indeed do I know I could define what a road is*."

134. In *Cababé v Walton-on-Thames UDC* [1914] AC 102, which I have mentioned above in relation to the presumed regularity of any stopping up under the Turnpike Act, a road had at some point become a public highway but the circumstances surrounding that were sufficiently unclear to raise the question whether it had to be maintained at the expense of the parish. Lord Loreburn, addressing the statutory provision which specified the conditions to be met for passing the repairing obligation to the parish, said: "*A man may make a road by allowing the land to be so used until the track and the user of it becomes sufficiently definite to answer the description of a road in common parlance. It does not matter whether it is a highway or not*."

135. Those decisions were therefore concerned with statutory obligations attached (or not attached) to a 'road'. As can be assumed to have been the case for the draftsman of the Turnpike Act, to whom any present-day doubts over the line or status of Route 3 should not be attributed, the judges were probably proceeding on the basis that a road is easy

to recognise but perhaps more difficult to define. In his report, Mr Carr used the term 'road' interchangeably with 'public carriageway'. The Turnpike Act was of course passed for the purpose of creating and maintaining a new "*Road*."

136. The more meaningful question in this case is what is meant by the term 'highway'. I say that because the experts in this case agree that the draftsman's use of the phrase "*common Highway*", in the context of the creation of a toll road, suggests that Route 3 was a public vehicular highway. Using their agreement as a platform, Ms Stockley relies upon the common law maxim to say that it (or the relevant part of it – the Upper Track) remained until May 2006 a public right of way for MPVs.

137. As Ms Stockley submitted, and as appears from the discussion in *Cababé*, a highway may be created at common law by the dedication by the owner of the land of a right of passage across the land for use by the public at large coupled with the acceptance and use of that right by the public. Section 32 of the Highways Act 1980, addressed below, is concerned with documentary evidence of such dedication.

138. Mr Adams cited *R v. Hatfield (Inhabitants)* (1736) Hard. 315; (1736) 95 ER 204 where Lord Hardwicke CJ said a common highway is a highway "*for all manner of things*". This was said in dismissing an argument challenging an indictment against the defendant parish for not repairing a highway. It was argued that the description of it as a 'highway' was too uncertain to sustain the indictment which ought to have shown "*whether it is a footway, or a way for carts, or for horses &c*." This argument was rejected by Lord Hardwicke on the basis that he was unaware of "*any authority that holds it is necessary to say it is a highway for this or that particular carriage*."

139. That statement is not at odds with a recognition under the common law that there are different types of highway; and that the physical characteristics of the particular one under scrutiny might make it suitable for some types of traffic but not others. The Chief Justice did not reject the premise of the (unsuccessful) argument based upon the existence of different types of highway.

140. Mr Adams also relied upon *R v Johnson* (1859) 1 F&F 657: (1859) 175 ER 894 for the proposition that the width of a highway is to be established by its user. It is tenable to extract this proposition from a direction given by Erle C.J. to the jury in the Lincoln Summer Assizes when, on the prosecution of the owner of the land on either side of the highway for obstructing strips of grass or soil on either side with dung and other material, he said: "*The question is, were these pieces of land portions of the highway? Were they used as such by the public?*" It had been proved that the pieces in question "*had been, within living memory, used as portions of the road, being walked over by passengers &c*." As with *R v. Hatfield* in relation to the type of use, this case leaves open the question as to the physical elements of the particular highway in question. If the public user can determine the width of the highway then it would seem to me to follow that the width (or other physical characteristics) of the highway may determine the nature of the user.

141. Mr Adams also cited authority on the common law standard of maintenance of a common highway by the local parish. This has been expressed by reference to the level of repair required for it to be reasonably passable for the "*ordinary traffic of the neighbourhood at all seasons of the year*": see *R v High Halden (Inhabitants)* (1859) 1 F&F 678; 175 ER 903 (where Blackburn J gave a direction to that effect in a prosecution

concerning a road formed of Weald of Kent clay which had become soft and developed ruts fourteen to sixteen inches deep and was therefore impassable in bad weather). Again, this focuses attention upon the ordinary traffic of the particular highway in question.

142. Section 56(1) of the Wildlife and Countryside Act 1981 (see below) recognises that there can be public highways for pedestrians only. The terms of section 67(1) of NERCA (though using the expression "*public right of way*" rather than 'highway') also provide for the extinguishment of a right of way for MPVs but so as to leave in place the public's right to use the relevant way for other means.

143. It is therefore clear, as Mr Carr made clear in his report and the older authorities mentioned above appear to recognise, that a 'highway' at common law may be one of three types: a footpath, a bridleway or a carriageway. Mr Carr explained that it is subsequent legislation which has subdivided public carriageways into further categories which include motorways, cycleways, restricted byways and unrestricted byways (open to all traffic).

144. Without more, therefore, the use of the term 'highway' does not tell the reader what type of highway it is. The experts say that the rationale and aim of the Turnpike Act provide something more to the meaning of "*common Highway*" and suggest it was a vehicular one.

145. This is a legal point of statutory interpretation about the nature of the public's rights over Route 3 before 1800. In *Southwark LBC v Transport for London* [2018] UKSC 63; [2020] AC 914 the Supreme Court was concerned with the nature or extent of the property transferred between two highway authorities under secondary legislation. Lord Briggs said, at [31]-[32], that there is no uniform meaning of the word 'highway' either at common law (where it might be a reference to its physical elements, to its status as a piece of realty or to the rights of the public enjoyed over it) or in legislation. He said that where the term is used in a statute then "*the word necessarily takes its meaning from the context in which it is used*." This is a particularly relevant illustration of the general approach to statutory interpretation later confirmed in *R(O) v Home Secretary* (see paragraph 127 above).

146. Although I bear in mind that section XI of the Turnpike Act also provided for the payment of tolls for non-vehicular traffic (such as packhorses, driven cattle and livestock) passing over the turnpike road, I agree with the view adopted by the experts that in the context of the statute as a whole the reference to a common highway in section XVII indicates that Route 3 was suitable for use by the vehicles of the 18th Century.

147. This conclusion is supported most firmly by the opening statement in section XVII to the effect that the new turnpike road would be an alternative to Routes 1, 2, 3 and 4 and that continued use of those routes would have an adverse impact on toll receipts. I see no justification for excluding tolls for carriages (chargeable up to sixpence) from the assumption that the continued use of Route 3 would diminish toll revenue. Instead, using the language of Lord Hardwicke in *R v Hatfield*, I read the language of section XVII as indicating that Route 3 was a highway for "*all manner of things*" that would attract a toll on the turnpike road. The language of section XXXI, which said that all lands and hereditaments which became part of the turnpike road shall "*to all Intents*

and Purposes, be deemed a common Highway" (my emphasis in underlining) indicates that Routes 1, 2, 3 and 4 were in this respect regarded as true alternatives to the turnpike road.

148. As Mr Adams also pointed out, section XI (quoted above) made provision that toll houses might be erected across "*any Street, Lane, or Way*" leading into the new turnpike road. In the course of preparing this judgment I have also noticed that in section XL the draftsman also identified "*Foot Paths*" and any "*Road, Path or Way*" passing over private land adjoining the turnpike road (and leading to the same place as the turnpike road so as to make use of them unnecessary) in providing for the lawful stopping up by the landowner and the cessation of their use. This is an indication that the draftsman considered Route 3 to have some higher status than a street, lane, path, footpath and (perhaps most significantly) a road or way on private property.

Highways Act 1980

149. In determining whether a way has been dedicated as a highway, section 32 of the Highways Act 1980 provides as follows:

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

Wildlife and Countryside Act 1981

150. I have mentioned in Section B above that the DMS is kept pursuant to the provisions of the Wildlife and Countryside Act 1981. Section 56 of that Act addresses the effect of the DMS. Section 56(1) provides:

> "A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely—
>
> (a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right.
>
> (b)……."

151. Therefore, where a footpath is recorded, that is conclusive evidence that the public had rights of way on foot over it as of the relevant date of the DMS. But, as the experts both recognise, it is not evidence that no higher public rights of way exist over that route.

NERCA

152. In *Regina (Warden and Fellows of Winchester College and another) v Hampshire CC* [2008] EWCA Civ 431; [2009] 1 WLR 138, [10]-13], Dyson LJ explained that section 67 of NERCA was enacted in the light of the provisions of the Countryside and Rights of Way Act 2000 for the reclassification of countryside roads used as public footpaths. Dyson LJ said, at [11]: "*[T]he reclassification provisions of the 2000 Act reflected the growing concern that unmade minor vehicular ways in the countryside, green lanes, enjoyed by walkers and those on horseback, were being damaged by off-road vehicles and motorcyles*." He explained, at [12], that 67 of NERCA was enacted to address this concern and to provide, with certain exceptions, for "*the extinguishment of all existing public rights of way for mechanically propelled vehicles over ways which, immediately before commencement, either were not shown on the DMS at all or were so shown but only as a footpath, bridleway or restricted bridleway*."

153. Section 67 was also a response to the judgment of the House of Lords in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14; [2004] 2 AC 519. This established that a right of way could arise by prescription where vehicles had historically used a route for 20 years even where their use would now be illegal (as it had been since the 1930's in the case of footpaths and bridleways). In his report, Mr Carr explained the basis of the "20 year rule" by reference to section 31 of the Highways Act 1980. However, Mr Nunn's abandonment of the case based upon use of the Upper Track, the Lower Track and the Pitch by MPVs during a period ending before 1 December 1930 (per paragraph 27A of the Amended Counterclaim) means that I am not concerned with the particular exception to the statutory response to the decision in *Bakewell* which is found in section 67(2)(e) of NERCA.

154. As the experts observed, and the summary of the legislative history by Dyson LJ bears out, section 67 of NERCA came into force in circumstances where there were many vehicular rights of way which were not recorded in the DMS which is kept (and which is required to be kept up to date) by surveying authorities in accordance with section 53(2) of the Wildlife and Countryside Act 1981. Mr Carr said in his evidence that there might have been as many as 17,000 unrecorded public rights of way (of all types) at around the time when NERCA came into force. It is Mr Nunn's position that the Upper Track and the Pitch (now favoured over the Lower Track) formed part of one for MPV traffic.

155. The material parts of Section 67 are as follows:

> "(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement–
>
> (a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

(2) Subsection (1) does not apply to an existing public right of way if–

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (list of highways maintainable at public expense),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.

…….

(5) Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies–

(a) was reasonably necessary to enable a person with an interest in land to obtain access to the land, or

(b) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only,

the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.

…….

(7) For the purposes of subsections (3)(c)(i) and (5)(a), it is irrelevant whether the person was, immediately before commencement, in fact–

(a) exercising the existing public right of way, or

(b) able to exercise it.

……..”

156. Section 71 of NERCA excludes electrically assisted pedal cycles from the definition of ‘mechanically propelled vehicle’.

157. Mr Adams submitted that section 67(5) really does nothing more than recognise the common law right of a 'frontager' to gain access to his property. It was reasonably clear to me that Mr Adams' argument on this point was motivated by a desire to put Mr Price on the right side of the line (demarcated by "private right" versus "public right" so far as the effect of the earlier decisions in this case are concerned) for what, by the end of the trial, was his *res judicata* submission covered by Issue 1. As I explain shortly, if correct, the submission about the nature of the right might even lead (as Mr Adams appeared to accept) to any private right that Mr Nunn is able to establish, assuming he is not estopped from asserting one, being potentially wider in its scope than the language of the section initially suggests.

158. In support of his analysis of section 67(5) Mr Adams referred to the House of Lords decision in *Marshall v The Mayor, Aldermen, and Burgesses of the County Borough of Blackpool* [1935] AC 16. That case concerned a challenge by the appellants, who operated a coach business, to the respondent corporation's refusal to sanction works that would create an opening to their premises over a paved and kerbed footpath so that they could access the highway beyond it. The appellants' premises had previously been a house comprising let apartments with an enclosed walled garden fronting the pavement. In refusing to sanction the works the corporation had taken into account the safety of the public and the convenience of pedestrians and also the hope that the street would soon be zoned for residential purposes only.

159. The House of Lords upheld the appellants' challenge of that refusal. Lord Atkin said, at 22:

> "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to that right of access: just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. ……. Moreover the ordinary traffic on any highway is always likely to be increased by the exercise of the adjoining owner of this right of access. A building estate may be developed, or a theatre, concert hall, cinema, or hotel erected on premises which will necessarily involve incalculable increase of traffic."

160. Mr Adams said it was this common law right that section 67(5) of NERCA was simply recognising and preserving.

161. I cannot accept this analysis of the NERCA right which, in my judgment, introduces an unwarranted distraction into the resolution of any disputed claim to the private right created by it. The subsection is concerned with the creation (the language is "*the right becomes*") by statute of a private right whose basis lies in a former public right of way. It has nothing do with *preserving* any common law private right. And, although it most obviously benefits so-called frontagers, I see no reason why the statutory based right should not be invoked by a person whose own land is separated from the former public right of way by some other land over which he has an existing right to pass (which itself falls short of "an interest in land").

162. Although it is clearly necessary for the claimant of the private right under section 67(5) to establish some type of ownership interest which supports its stated purpose of providing access to the property owned, it is not ownership next to a highway but instead a particular kind of public right of way over the "highway" (the subject matter is per section 67(1)) which provides the essential basis for it. As Ms Stockley remarked, the common law right addressed in *Marshall v Blackpool* would have been more relevant to Mr Nunn's creation of the new access from the Paddock to the B4070 in 2020.

163. The effect of section 67(5) is that where a public right of way with vehicles is extinguished, it nonetheless becomes a private right of way for MPVs for the benefit of land if the exercise of the public right of way was (immediately before 2 May 2006) "*reasonably necessary*" as a means of access to that land. In a case like the present, which does not concern a claimant's access to (a notional) part only of the land held by him as at 2 May 2006, section 67(7) makes clear that it is irrelevant for such purposes whether the person was immediately before that date exercising the existing public right of way or even able to exercise it.

164. There appears to be no authority on the meaning of the phrase 'reasonably necessary' as it appears in section 67(5)(a). This prompts the question as to what someone in Mr Nunn's position has to show.

165. Section 67(7) of NERCA clearly eschews any notion of apparent or actual enjoyment of the (previously public) right for a claimant in Mr Nunn's position. That is the position at least so far as exercise (or not) of the right just before 2 May 2006 is concerned. It is less clear to me (the draftsman having chosen to repeat the phrase "*immediately before*" in the subsection) that its exercise or non-exercise over a longer period before that date should also be regarded as irrelevant. I also recognise that a private right of way for MPVs, which springs from an existing public one that may not have been utilised by the party asserting its existence, is of a markedly different nature than one which arises from the actual use of a way during an earlier time of unified ownership of all the land affected by such use.

166. However, subject to that, the concept of its exercise being "reasonably necessary" is one that struck me as being quite similar to the well-known test under the rule in *Wheeldon v Burrows* for establishing whether or not an easement is to be implied into a conveyance which operates to split unified ownership of land into what potentially thereafter become dominant and servient tenements. [I note that the parallels with the *Wheeldon v Burrows* test are perhaps even clearer where a claim is instead based upon section 65(7)b) of NERCA. The non-application of section 67(7) to such a claim appears, impliedly, to import a requirement that the claimant should show some actual use of the existing public right of way that would support a private vehicular right to get to "*a part of [the] land if he had had an interest in that part only*."]

167. In *Wheeldon v Burro*ws (1879) 12 Ch D 31, Thesiger LJ said:

> "… in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are <u>necessary to the reasonable enjoyment</u> of the property conveyed, and have in fact been enjoyed during the unity of ownership…" (my emphasis through underlining)

168. In *Wheeler v J.J. Saunders Ltd* [1996] Ch. 19 the Court of Appeal was concerned with the test for implying a right of way under the rule in *Wheeldon v Burrows*. Staughton LJ said of the test that "*[O]ne does not want to chop words over fine*." Peter Gibson LJ said, at 31D:

> "It is plain that the test of what is necessary for the reasonable enjoyment of land is not the same as the test for a way of necessity and in *Cheshire and Burn's Modern Law of Real Property*, 15th ed. (1994), p. 541, note 14 "necessary" is said to indicate that the way "conduces to the reasonable enjoyment of the property."'"

169. The court probably cannot and should not attempt too much in expanding upon the meaning of 'reasonably necessary'. That plain language appears to me to make it clear that the onus upon someone in Mr Nunn's position is to establish something more than mere convenience and something less than absolute necessity. In another context (that of works preparatory to mineral extraction on another's land) I recognised that acts which were expressed to be "reasonably necessary" for the fulfilment of property rights need not be "absolutely essential" for that purpose: see *Morris & Perry (Gurney Slade Quarries) Limited v Hawkins* [2019] EW Misc 14 (CC), [61]-[64].

170. I drew counsel's attention to this decision (and the possible *Wheeldon v Burrows* analogy) before they made their closing submissions so that they might consider the point further.

171. Ms Stockley endorsed the approach in *Morris & Perry Ltd v Hawkins*. She said Mr Nunn did not have to establish that vehicular access to Woodside Bungalow over the Upper Track was absolutely essential. It was enough that such access was reasonably required by him.

172. However, Mr Adams, by reference to his analysis of the section 67(5) right addressed above, took a different approach which, if anything, sounded more generous to Mr Nunn, at least in general terms. His submission on this aspect was that the language of the section 67(5) should not operate to cut down the common law right which, on that analysis, it did no more than preserve. Applying the reasoning in *Marshall v Blackpool* about the potential for an increased user of the highway as a consequence of the common law right being exercised, Mr Adams said Mr Nunn would be able to use the Upper Track to the extent that his doing so did not conflict with the rights of the public.

173. For the reasons already expressed above, this submission proceeds on a flawed premise and I believe the result is confusion. My focus was and remains upon the justification for the creation of the right (of access) and not the consequences of its exercise. The question is not one of increased user of a public highway (which under NERCA is now otherwise restricted to the public footpath of Painswick Footpath 50 and any other non-MPV highway use) as a result of developments adjacent to it. Instead, the question is whether it is reasonably necessary for Mr Nunn and his family also to be able to drive along the Upper Track and turn off it into Woodside Bungalow. Nothing said in *Marshall v Blackpool* assists in answering that question.

174. In my judgment, the justification for a private right under section 67(5) of NERCA (in terms of the purpose served by it) is not that the use of an MPV is essential to obtain access to the land. Instead, it is that such use is reasonably required for that purpose having regard to the nature of the land in question.

175. I have raised a question above about the potential impact of the claimant, or then owner of the relevant land, not having exercised the public vehicular right over a longer period of time than that "*immediately before commencement*." On the basis that the court is not mandated to ignore it by the language of section 67(7), I regard any such non-exercise over a longer period of time before 2006 as potentially relevant to the application of the test under section 67(5)(a). If the evidence shows that the claimant of the private right (or his predecessor in title) did not use an MPV over the way when he might have done so as a member of the public, then, on the face of it, that would appear to weaken the case for saying that use of an MPV to gain access is reasonably necessary. Conversely, actual use of an MPV in exercise of the public right would appear to strengthen that case.

(2) Ownership of the Upper Track

176. It is clear that Mr Price's claim to ownership of the Upper Track, either the whole of it or up to its centre line, will first and foremost rest upon the evidence relating to the conveyancing history of the land surrounding it. Nevertheless, some legal principles are relevant and they include those applicable where land abuts a road.

177. Mr Price's primary case is that the Upper Track (over its full width) is included within the ownership of the Farm. As would be expected, this claim rests upon an analysis of his documents of title to the Farm. An ancillary part of this case, linked to the question of whether Route 3 was a former public highway which had been stopped up, Mr Adams relied upon the proposition that where a highway is lawfully stopped up the owner of the soil beneath it owns the land freed from the public right of passage: see *Halsbury's Laws* cited in paragraph 129 above.

178. In addition to the documents of title to which I refer below in addressing Issue 6, Mr Price relies upon the provisions of section 6 of the Conveyancing Act 1881 to say that the Upper Track was deemed to be included in the transfer of other land to his predecessors in title. Section 6 of the 1881 Act is the legislative predecessor of section 62 of the Law of Property Act 1925, which implies into a conveyance certain rights and privileges (as extensively defined therein) including "*ways ..... occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land .... conveyed*."

179. It is also relevant to mention the legislation under which the land on the other side of the Upper Track, of which Woodside Bungalow now forms part, was first registered.

180. The Farm was formerly part of the Manor of Painswick and, until 1919, part of the Grove Estate. That estate was in the ownership of the Capel Family.

181. Woodside Bungalow (standing on part of the former grounds of Woodside House) is part of the former Vatch Mills Estate. The Vatch Mills Estate, comprising Woodside House and other 'messuages' comprising that estate, was registered at the Land

Registry under Title No. 105 in accordance with the provisions of the Land Registry Act 1862 ("**the 1862 Act**").

182. The 1862 Act recited that it was "*expedient to give certainty to the title to real estates, and to facilitate the proof thereof, and also to render the dealing with the land more simple and economical.*"

183. To those ends, sections 2 and 3 established a registry of title to landed estates confined (bearing in mind the other estates in land that were recognised before 1925) to estates of freehold tenure and leasehold estates in freehold land. Section 4 made provision for applications for registration by certain classes of person and section 5 for any application for the registration of title as indefeasible to be examined by the registrar and examiners of title. The standard governing their acceptance for registration was that the title "*shall appear to be such as a court of equity would hold to be a valid marketable title*." Section 6 provided for questions, doubts or disputes over title to be determined by a Chancery judge.

184. Under section 7 of the 1862 Act, if the section 5 process was satisfied, the registrar was required to do a number of things for the purposes of registration of title. These included settling "*an exact description of the lands to be registered*" for delivery back to the applicant for potential objection and (if not accepted by the registrar) a decision by the judge. Section 10 provides as follows in relation to the identity of the land:

> "The identity of the lands with the parcels or descriptions contained in the title deeds shall be fully established; and the registrar shall have power by such inquiries as he shall think fit to ascertain the accuracy of the description and the quantities and boundaries of the lands; and, except in the case of incorporeal hereditaments, a map or plan shall be made and deposited as part of the description."

185. Section 14 of the 1862 Act addressed the completion of the registration process and section 15 provided that, once the title was entered in the registry books, those books could only be inspected by the owner of the estate or interest (or recorded mortgage or incumbrance) or his solicitor or agent. But first the notice procedure prescribed by sections 11 and 12 had to be observed. They required that, once the description of the land had been settled and the registrar was satisfied with title, that at least 3 months' notice of the intended registration should be given by public advertisement. The notice was required to be served on every adjoining occupier and to specify the manner in which any objection to registration should be made. Section 13 governed the position in the event of objection being made, by providing for a decision by the registrar or by the Chancery judge (either on a reference or appeal from the registrar).

186. Section 16 provided as follows:

> "In the record of title so made as aforesaid it shall be competent for the registrar to specify or define any exception or qualification or condition affecting the whole of the interests so recorded, or any of them, and also to reserve expressly the right of any person or class of persons, and to describe any outstanding right or possibility of claim or interest subject to which such registration is made; and if there shall be any disputed question of boundary between the applicants and any proprietor of adjoining land which shall not have been previously determined by any competent authority, it shall be competent for the parties or either of them to object in writing

> to the determination of such question by the registrar, or by a judge of the Court of Chancery, under this Act; and if any such objection shall be made, the registrar shall specify upon the record of title the existence of such disputed question of boundary, and that the registration is made subject thereto."

187. Section 33 of the 1862 Act provided:

> "Subject to the enactments herein contained, the estates and interests of all registered proprietors shall remain subject to the existing law."

188. On 17 March 1866 notice was given to William Capel, in accordance with section 12 of the 1862 Act, of the intended registration of the Vatch Mills Estate on the application of Robert Hastings. The notice included two plans in support. One of them is reproduced in Section G below for the purpose of addressing Issue 6.

189. Mr Price's alternative claim is to ownership of half of the Upper Track. In support of this alternative Mr Adams relied upon the following legal propositions:

1) In the absence of any evidence to the contrary, there is a presumption that the owner of each property fronting a road owns the soil underneath it up to its centre line. In support, Mr Adams cited *Emmet & Farrand on Title* (2023), at para. 17.036, and *Paton and another v Todd* [2012] EWHC 1248 (Ch); [2012] 2 EGLR 19. The passage in *Emmett & Farrand* cites authority which confirms that the presumption applies to private roads as well as public ones and also that the fact a private road leads only to the land of one of the adjoining owners will not be sufficient to rebut it.

2) Land conveyed generally includes appurtenant land, which is part and parcel of the property without the need to say so: Mr Adams referred to the decisions of Buckley LJ in *Methuen-Campbell v. Walters* [1979] QB 525, at 542E and 543A, and of the Supreme Court in *Settlers Court RTM Co Ltd and others v FirstPort Property Services Ltd* [2022] UKSC 1; [2022] 1 WLR 519, at [44].

3) There is a presumption that when the owner of a property conveys land adjoining a road he should be taken to have intended to convey his entire interest in the road: For this Mr Adams relied upon the decision of Neuberger J in *Commission for New Towns v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch); [2003] 2 P & CR 24, at [28] where he said:

> > "in the absence of a good reason to the contrary, where a vendor conveys land adjoining the highway and (as is usual) he therefore owns the land of the adjoining highway ad medium filum, he should be presumed to have conveyed away that land, which he owns under the highway, together with the land the subject of the express conveyance."

190. Mr Moore did not take issue with these propositions. As Mr Moore noted, and was explained by Morgan J in *Paton v Todd*, at [30]-[36] by reference to the decision of Brightman J in *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P&CR 978, the concept of ownership *usque ad medium filum viae* (or *ad medium filum*) rests upon two distinct presumptions, each of which is rebuttable.

191. The first presumption applies in certain circumstances where the conveyancing history of the land and the road is unknown. This is Mr Adams' first proposition (though in *Paton v Todd* the court was really concerned with the application of the second of the presumptions and the cited passage in *Emmet* also addresses the second as well as the first). If there is no direct evidence of the ownership of the road then it is presumed that the owner of the land abutting the road is also the owner of the road up to its middle line.

192. The second presumption (or canon of construction as Brightman J preferred to call it in *Giles*) applies when the conveyancing history of the land and the road is known from the time when they were in common ownership. Any later conveyance of the land abutting a highway passes with it the adjoining half of the highway. This embraces Mr Adams' third proposition. The presumption is said to be based on convenience and the avoidance of disputes between landowners on opposite sides or the road and it being unlikely that the grantor intended to reserve ownership of a narrow strip under the road *ad medium filum*.

193. The first presumption will therefore have no place where there is direct evidence of the ownership of the road and the second (which also applies to land adjoining a non-tidal river) may be rebutted by the language of the conveyance or the surrounding circumstances. In *Giles*, at 982, Brightman J said:

> "The presumption may be rebutted, but it is not rebutted by (i) the land being described as containing an area which can be satisfied without including half the road or river bed; (ii) by the land being described as bounded by the road or river bed; (iii) by the land being referred to as coloured on a plan, whereon the half of the road or river bed is not coloured; (iv) by the grantor being owner of the land on both sides of the road [or river; or (v) because subsequent events not contemplated at the time of the grant show it to have been very disadvantageous to the grantor to have parted with the half of the road or river bed, but which if contemplated would probably have induced him to reserve it."

194. In that case (on an application for interim injunctive relief to restrain the defendant from using a terrace roadway to access their property by vehicle) the presumption was rebutted. The court had doubts as to whether the presumption applied at all when the relevant conveyance was of a plot (and newly built house on it) on a building estate that had been developed by the grantor. Nevertheless, the combination of a precise description of the property conveyed in terms of its dimensions (down the last 6 inches) and its delineation through shading on the marginal plan, coupled with the grant of a right of way over the roadway in question, was sufficient to rebut plaintiff's claim to own half of the roadway.

195. On the right of way element of this dispute Mr Price's position is, of course, that the Upper Track is not a 'road' in the conventional sense of the word and is only a 'highway' for the purpose of members of the public using it as Painswick Footpath 50 (compare section 56(1) of Wildlife and Countryside Act 1981 quoted above).

196. In *Paton v Todd*, at [27], Morgan J considered it "*very odd*" that the claimants in that case were relying on the presumption of ownership *ad medium filum* when their position was that even the entry in the DMS of a footpath over the relevant way was a mistake which ought to be corrected. Mr Price is not walking a similar tightrope, or at least his

stance on the two elements of the proceedings is less obviously contradictory, but his position that the registered public footpath status of the Upper Track (and it being treated as a public highway only for pedestrians) should not be undermined does highlight another aspect of the decision in *Paton v Todd*.

197. Having said it was clear that both presumptions apply in the case of a public road, and having also referred to authority where it was common ground between the parties that the second presumption applied to a bridleway which was also described as a road or farm track, Morgan J said (at [35]): "*I was not referred to any case which discussed the possible application of either presumption to land which was subject to a right of way on foot only (whether a public or a private right of way).*"

198. The judge then said, at [46]: "*It seems to me that it is difficult to apply either highway presumption to a public footpath, and certainly to the public footpath in this case*."

199. The judge gave three reasons in support of that view. The first was that the footpath in that case was shown by the DMS to run across other land where there was no suggestion that it formed a boundary between land in different ownerships. I read this as a reason why the second presumption would not apply. The second reason given by the judge was that "*the way in which a public right of way on foot typically comes into existence is sufficiently different from the way that a public or even a private road comes into existence to produce the result that the purpose of the presumptions does not really apply to such a footpath*". As his language indicates, this is a reason against either presumption applying. The third reason was that, typically and in the case before him, the width of a fairly narrow footpath is such that "*it would be surprising if landowners or conveying parties would intend to define a boundary by reference to the mid-point of such an area of land*". This reason was further explained by reference to the fact that the footpath in that case was narrower than the blue land whose ownership was in issue (and over which blue land the defendant contemplated making a claim to a prescriptive vehicular right if that land was removed from his registered title), so that applying the presumptions to the footpath "*would at most give to Mr and Mrs Paton the soil of a fairly narrow strip*".

200. The judge's alternative ground for rejecting the application of the second presumption was (at [47]) because "*the nature of the blue land and the nature of the rights over it (being confined to a public right of way on foot) would not cause the second presumption to apply*."

201. The absence of any explanatory plan in the judgment in *Paton v Todd* leaves me in some doubt that I have an adequate understanding of the topography that was relevant to this reasoning. It seems reasonably clear the Upper Track is wider than the footpath under consideration in that case. The third reason relied upon by Morgan J would be very persuasive if (which is not the case) Mr Price was claiming ownership to one half of the Pitch. That said, it must not be overlooked that Painswick Footpath 50 (over the Upper Track) continues west beyond Woodside Bungalow towards Folly Lane (see Plan 2) and in doing so, first passes between land in the common ownership of Mr Price – 'Briar Field' (i.e. 6 Acres') and 'Part of Vatches' (i.e. 17 Acres) per Plan 1 – and then becomes narrow in the form of a true footpath (only). These factors prompt further reflection upon the first and third reasons given in *Paton v Todd* when considering Mr Price's case of ownership *ad medium filum* in relation to the Upper Track, as does the

more general scepticism expressed by Morgan J about either presumption applying to a public footpath.

202. It is Mr Price's case that the Upper Track, as a way, is primarily a public footpath over which vehicles used on the Farm can also pass. It is a paradox that it is Mr Nunn's position that the Upper Track is more of a 'road' in the ordinary sense of the word (supporting until 2006 a public vehicular right of way for the purposes of NERCA) which, if correct, appears to make Mr Price's alternative claim to own half of the soil under it less problematic.

G. ANALYSIS AND FINDINGS

203. I now turn to my analysis of the evidence and law by addressing each of the 7 Issues identified in Section D above in turn.

Issue 1

204. The essence of Issue 1 is whether or not Mr Nunn's claim to a private right under section 67(5) of NERCA is undone by the outcome of the 1976 Proceedings or the interlocutory decisions in this case. Mr Nunn's shift on this claim so far as it concerns the Lower Track, before the conclusion of the trial, obviously has a bearing on this issue though it does not in my judgment avoid it.

205. Mr Nunn's creation of the new access from the B4040 (points Y to B on Plan 2) has added a further twist to this question. His doing so rather sidelines the pleaded claim over the Lower Track which, as I have explained, was the focus of the 1976 Proceedings and the resulting issue estoppel which, as Morgan J has already found in these proceedings by reference to the pleaded case then under consideration by him, operates to prevent Mr Nunn from advancing a claim to a private vehicular right of way over the Lower Track for the benefit of Woodside Bungalow.

206. Therefore, if Mr Nunn is able to establish a private vehicular right of way under section 67(5) over the Upper Track, only, then his ability to drive up and down the Upper Track for the purposes of accessing the B road via the Paddock might mean that the existing limitation upon the already established private right over the Lower Track becomes largely irrelevant (so long, of course, as the Paddock and the Bungalow remain in the same ownership). The same can be said about the consequences of his recent acceptance that, subject to any alternative reliance upon Mrs Emrys-Roberts' evidence about the line of Route 3 perhaps including it, the NERCA claim does not extend to the Lower Track.

207. These recent developments, together with what section 67(7) of NERCA says about his actual exercise or non-exercise of the alleged public right, has also taken away much of the ground for the Chancellor's observation in 2013[5] that:

[5] [2013] EWCA Civ 1002, at [85].

> "It is not surprising that Mr Nunn's rights over the Lower Track have been put in issue. The most convenient means of vehicular access from the main road to the Upper Track is by use of the Lower Track. It is inevitable that, at the trial, examination of the use of the Upper Track as a public right of way will involve an examination of the user of the Lower Track for the same purpose."

208. By his order dated 15 June 2011 Mr Justice Morgan declared that:

1) Mr Nunn is bound by an issue estoppel which prevents him from asserting that Woodside Bungalow has the benefit of a private right of way over the Lower Track;

2) there is no cause of action estoppel, nor issue estoppel, preventing Mr Nunn from asserting the existence of a public right of way over the Lower Track (a) for the purpose of defending any claim by the Prices that Mr Nunn is trespassing on the Lower Track when he is using the Lower Track otherwise than pursuant to the express right of way granted by a Conveyance of 3 October 1960 ('the express grant') and (b) for the purpose of claiming a negative declaration that he is not a trespasser when using the Lower Track otherwise than pursuant to the express grant;

3) it is not an abuse of process of the Court for Mr Nunn to assert a public right of way over the Lower Track for the purposes identified in (2) above; and

4) Mr Nunn's claims that a future interference by the Prices with the claimed public right of way over the Lower Track would constitute a public nuisance ought not to be struck out.

209. The order went on to provide that Mr Nunn's "*pleaded claim that Woodside Bungalow has the benefit of a private right of way over the [L]ower [T]rack be struck out*."

210. In the light of that, the question for me, considering now the merits of the claim at trial rather than at an earlier strike-out application, is whether the claim to a private right of way under NERCA should also be rejected when it was not then pleaded, is not limited to the Lower Track but (since 2020) in fact has greater significance in relation to the Upper Track encompassed by it, and (if it is a good claim) finds its basis in a former public right of way. This question is also now conditioned by Mr Nunn's recognition, by the conclusion of the trial, that the NERCA claim is not maintained in relation to the Lower Track but instead is based upon the evidence about the Upper Track and the Pitch. The Lower Track which was the focus of the 1976 Proceedings has therefore moved out of the picture on the NERCA claim.

211. In Section D above I have explained why a determination of this Issue 1 is clearly required despite some vacillation over it on the part of Mr Price. By the end of the trial Mr Adams was submitting that the NERCA claim should not be upheld even if the requirements of section 67(5) were established in relation to the Upper Track.

212. Mr Adams referred to paragraphs 83 to 85 of the judgment of Morgan J in support of that submission[6]. Those paragraphs concerned Mr Nunn's ability to maintain claims

[6] [2012] EWHC 1251 (Ch)

for (1) a negative declaration that his use of the Lower Track as a member of the public did not amount to a trespass and (2) public nuisance, arising out of the Prices' obstruction of the Lower Track with gates, supported by the "special interest" required to be shown by a private individual (as opposed to the Attorney General) in bringing such a claim. The judge noted Mr Adams' acceptance that Mr Nunn had a special interest for the purposes of bringing the public nuisance claim (both for damages and injunctive relief) through his ownership of Woodside Bungalow. Mr Adams also drew my attention to paragraph 3(4) of the judgment of Morgan J on consequential matters where he directed that his order should make it clear that the public nuisance claim ought not to be struck out.[7]

213. Before me, Mr Adams' essential point was that Morgan J and the Court of Appeal had already decided that Mr Nunn could not pursue a private right of access over the Lower Track. And if he could not pursue it in relation to the Lower Track then that effectively prevented him from asserting one over the Upper Track. He said Mr Nunn did have to assert a private "*interest in land*" (Woodside Bungalow) for the purposes of section 67(5(a) and that put Mr Nunn on the wrong side of the line under the earlier judgments which found that he was bound by an issue estoppel which prevented him from asserting that Woodside Bungalow has the benefit of a right of way over the Lower Track.

214. In his judgment of 2013, Sir Terence Etherton C summarised the relevant principles underpinning the doctrine of *res judicata* and the related principles of abuse of process (under the rule in *Henderson v Henderson* (1843) 3 Hare 100) as follows:

> "[65] I consider that the applicable principles of estoppel and abuse of process are clear and can be shortly and simply stated. Their application in any particular case may, of course, not be straightforward and will be highly dependent on the particular facts.
>
> [66] The law in relation to res judicata has very recently been summarised by Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, [2013] 3 WLR 299. The other members of the Supreme Court agreed with his summary. Having regard to what was said there and the cases cited by Lord Sumption, it is sufficient for the purposes of this appeal to state the relevant principles as follows.
>
> [67] Cause of action estoppel is a form of estoppel precluding a party from challenging the existence or non-existence of a cause of action where that has already been decided in earlier proceedings. It arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, unless fraud or collusion is alleged such as to justify setting aside the earlier judgment, the bar is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of the cause of action. Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

[7] [2012] EWHC 1605 (Ch)

> [68] Issue estoppel is a form of estoppel precluding a party from disputing the decision on an issue reached in earlier proceedings even though the cause of action in the subsequent proceedings is different. It may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties or their privies to which the same issue is relevant one of the parties seeks to re-open that issue. In such a situation, and except in special circumstances where this would cause injustice, issue estoppel bars the re-opening of the same issue in the subsequent proceedings. The estoppel also applies to points which were not raised if they could with reasonable diligence and should in all the circumstances have been raised, but again subject to special circumstances where injustice would otherwise be caused.
>
> [69] *Res judicata* operates as a substantive rule of law. It is to be distinguished from the court's exercise of its procedural powers to control the court's processes from being abused. They are juridically very different even though there are overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. In the case of the exercise of the court's procedural powers to prevent abuse the court should take a broad, merits-based judgment taking account of the public and private interests involved and all the facts of the case, focusing on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

215. Given the comments in paragraph [11] of his judgment (quoted in Section B above) I think it fair to assume that the then Chancellor would be disappointed to learn that the potential application of these principles would fall to be considered once more against the particular (and developing) facts of the very same case.

216. It is obvious that cause of action estoppel can have no impact upon the NERCA claim. That claim has not been decided on its merits.

217. It is less obvious to me that the principles of issue estoppel, in its wider sense explained by the Chancellor, cannot apply. In *Virgin Atlantic*, at [25], Lord Sumption observed that, as is the case for the other related principles, underlying the principle of issue estoppel is the more general procedural rule against abusive proceedings; and the decision of the Supreme Court in *Test Claimants in the Franked Investment Income Group Litigation* (mentioned in Section A above), though directed to the rule in *Henderson v Henderson*, shows that it could be an abuse of process to re-visit claims that might have been raised and decided at an earlier stage in the same proceedings. Nevertheless, and giving due allowance for the fact that there is limit to which a party can plead injustice when reasonable diligence on the part of Mr Nunn's then legal team should have unearthed the point before 2011, I conclude that the special circumstances of this case do operate to take the NERCA claim beyond any estoppel that might otherwise arise.

218. Those circumstances are: (1) the fact that the NERCA claim finds its root in an alleged *public* right of way when Morgan J concluded that a claim to a public right of way (over the Lower Track) should proceed to trial; (2) the inclusion of the Upper Track within the scope of the NERCA claim when it is arguable (given the access route since created over the Paddock) that the claim in respect of the Upper Track can be sustained in isolation from that over the Lower Track; and (3) the fact that, so far as the creation of

that new access route in 2020 influences the question, both parties have been content to see this litigation trundle on when clearly they would otherwise have been concluded, including on any appeal from the trial judge, well before that date (it must be remembered that the NERCA claim is advanced by way of a counterclaim to Mr Price's claim and the pursuit of both has been dilatory).

219. It is also relevant to all three points to note again paragraph 85 of the Chancellor's judgment where he said the trial (which he obviously assumed would take place closer to 2013 than 2023) would involve "*examination of the use of the Upper Track as a public right of way*." At paragraph 103 of the first instance judgment, Morgan J also expressly noted that "*there was going to be a trial in any event as to a private right of way over the upper track.*" He mentioned that in contemplating that there might be said to be special circumstances (in the sense just applied by me) which operated to preclude an issue estoppel in relation to the pursuit of a private right of way over the Lower Track, before then concluding that there were none.

220. My conclusion that the NERCA claim is not barred by an issue estoppel would appear to accord with a more general notion of fairness. The "private" element of the claim under section 67(5) so far as the contentious basis of it is concerned for litigation (including any issue estoppel) purposes, is Mr Nunn's ownership of Woodside Bungalow. This is to be contrasted with the private right which might be established by a decision on a claim which has not previously been decided on its merits. Although Mr Adams submitted that, for issue estoppel purposes, this private element of the claim was sufficient to put Mr Nunn on the wrong side of the line under the judgments of Morgan J and the Court of Appeal, it would be surprising if Mr Nunn was precluded in this ongoing litigation from relying upon one fact that cannot be contentious: his ownership of Woodside Bungalow. His ownership having been recognised in those earlier decisions as the basis for his standing on the public nuisance claim, it would be perverse if they were now to be read as precluding him from relying upon it for the NERCA claim.

221. As for any argument based on an abuse of process, where the broader merits certainly are relevant, I have already said in Section A above that the proper time for considering this has probably passed. The court's processes have been used up to and including a trial on evidence and argument which focussed upon the NERCA claim. The rule in *Henderson v Henderson* was relied upon by Mr Price before Morgan J (so far as the claim to a private right of way over the Lower Track, only, was concerned). Had Mr Price relied upon it at the CCMC before DJ Woodburn in 2022, to preclude the NERCA claim going to trial, then I suspect he would have failed for the reasons given above in connection with a potential issue estoppel (which is now the more relevant principle so far as this judgment is concerned). Indeed, for the *Henderson v Henderson* analysis, I would add to those reasons the point that the cornerstone of the reasoning of Morgan J and the Court of Appeal was what had been decided in the 1976 Proceedings (and the 1980 Proceedings) when, of course, the NERCA claim was not available to Mr Nunn.

222. For these reasons I answer Issue 1 by saying that the earlier judicial decisions do not bar Mr Nunn from claiming a private right of way under section 67(5) of NERCA including (as was his pleaded case though not his final position at trial) over the Lower Track. Happily, this conclusion avoids the difficult and hazardous route of the court contemplating that the counterclaim should be determined on a ground which has not been pleaded and enthusiasm for which has fluctuated during the course of the trial.

Issue 2

223. Issue 2 arises out of the uncertainty over the location and line of Route 3 (as labelled in these proceedings) created by the language of the Turnpike Act. Mr Nunn bears the legal burden of proof on this issue and the uncertainty leaves him needing to establish *aliunde* that the route followed Upper Track and the Lower Track and/or the Pitch.

224. This issue raises a more basic question than that identified by section 32 of the Highways Act 1980. The present question is not whether a way has or has not been dedicated as a highway (which is more a matter for Issue 3) but instead what "the way" – Route 3 - actually was in 1800. However, as well as considering the language of the Turnpike Act on this question, it is necessary to consider the types of map, plan and historical records mentioned in that section and to weigh up their evidential impact against the surrounding circumstances, including by reference to the "*antiquity*" (per section 32) of the document in question. The absence of any record book kept under the Turnpike Act, which might have been made in respect of Route 3 and which is directly relevant to Issue 3, means that no light is cast upon Issue 2 from that potential source.

225. This is the first of the issues on which the evidence of the experts, Mrs Emrys-Roberts and Mr Carr, was central and where the difference in their views was most prominent.

226. I have set out in Section F above the language by which the Turnpike Act identified Route 3. It was not suggested by either party that there was any significance in the order in which it was identified alongside the other three routes mentioned when it came to identifying the course of the route. All four routes are referred to as crossing or going to Wickeridge Hill. As Mrs Emrys-Roberts observed, and Plan 1 bears out, this is a reference to an area rather than a specific geographical point.

Summary of the Evidence on Issue 2

227. The Turnpike Act did not incorporate a plan. Neither had the experts identified a map dating back from earlier than 1800 which assists in identifying Route 3. Taylor's Map of 1777 and Smith's Map of 1800 (both early commercial maps) only recorded a ridgeway route running along Wickeridge Hill. Similarly, the later Greenwood's Map of 1824, which stated it was based on a survey undertaken in 1823, only showed a higher level ridgeway route indicating Folly Lane.

228. In his Report, Mr Carr said this (with my changes to make reference to what is now Plan 2):

> "I am of the opinion that The Pitch (A-B on Plan 2) and the Upper Track (B-C on Plan 2) formed the original line of the "*Road though* (the) *Field called Vatches*" down to the Turnpike Road. The Pitch (A-B on Plan 2) is however rather narrow and very steep therefore it is entirely possible and, I believe, probable, that the Lower Track (D-B on Plan 2) was provided as an alternative route. This would be entirely consistent with its exclusion from the 1910 Finance Act valuation process

> and reference as a "Right of Way" on the map attached [to] the 1865 Land Registration Act documents."

229. This evidence from Mr Carr laid emphasis upon the Pitch, rather than the Lower Track, having provided the connection to the turnpike road prior to 1800. His belief that the Lower Track providing an "*alternative*" connection is supported by reference to documents from after that date. I have already mentioned that Mr Nunn's Amended Counterclaim (paragraph 43(2)) relies upon the language of the Turnpike Act to say that the Upper Track and Pitch (but *not* the Lower Track) were recognised to be roads and common highways.

230. In his testimony Mr Carr explained his view that the Lower Track was probably built as a more usable route to the quarry ('*Pit (dis)*' on Plan 2) which would have been used to provide stones for the building of the turnpike road. His Report had referred to sections XXII and XXIII of the Turnpike Act which made provision for the taking away of "*any Materials out of any Pit or Quarry which shall have been made or opened for the Purpose of getting Materials for the said Road*." Mr Carr's evidence was that the Lower Track probably came into existence as a consequence of the building of the turnpike road and that the Upper Track may also have been widened (in order that the quarry could be accessed) so that both became wider than the Pitch. He also said that, unless the Farm existed before 1800, there would have been little purpose behind the Lower Track providing the connection to the road. I clarified with Mr Carr that his view was that, as at 1800, the connection of Route 3 to the turnpike road would have been at point D on Plan 1 (or point A on Plan 2) and not also at point C on that plan (or point D on Plan 2).

231. Mr Carr's evidence that Route 3 ran between Points C and A on Plan 2 was consistent with his observation, made by reference to four published articles on the history of the local roads in the area and which described a three-tier system of roads before the construction of the turnpike road, that Route 3 was within the category of "*vertical routes linking the ridgeways down to mills and settlements*".

232. In addition to the language of the Turnpike Act, Mr Carr relied upon Bryant's Map of 1824 in support of his view that Route 3 included the Upper Track and the Pitch (in his Report he had also relied upon this map to show the Lower Track was included within Route 3). Mr Carr also relied upon two sets of index plans held as part of the records kept under the Finance Act 1910.

233. Bryant's Map is a commercial map drawn to a scale of 1:43,700 (or about 1.45 inches to the mile). Mrs Emrys-Roberts and Mr Carr both explained that Bryant was a well-known map maker at the time and that such maps were aimed at the travelling gentry to show the roads they might use. Bryant's Map is stated to be based upon a survey undertaken in 1823-1824 (so around the same time as the survey undertaken for Greenwood's Map of the same date which did not show the route) and therefore almost a quarter of a century after the Turnpike Act. Nevertheless, the date of Bryant's Map is sufficiently close in time to the Act to potentially be of probative value, making allowance of course for the fact that the turnpike road had been made in the intervening years.

234. I accept Mr Carr's observation that the omission of the route from Greenwood's Map (and Taylor's Map and Smith's Map) does not mean it did not exist. Although, as Mrs Emrys-Roberts noted, Bryant's Map also appears to show a route which only broadly approximates to part of Route 1 (as shown on Plan 1) it does show Routes 2 and 4. Yet those other routes are also not shown on those other maps (and, yet, again, as with so many initial thoughts in this case that are triggered by wading through the thicket of historic information, the reason for their omission from any other map after 1800 *might* be because they were stopped up while the Turnpike Act was in force).

235. Mr Carr's evidence was that Bryant's Map clearly showed a road down to the turnpike road via the Upper Track and both the Lower Track and the Pitch. So far as the connection provided by the Pitch is concerned, he said that, prior to the Turnpike Act, there was a continuous route coming down from the "*spinal route*" of Folly Lane down to Slad Mill which was shown on the map. He said it would have gone "*down the Upper Track, it would then have gone down the Pitch, across, and then down to Slad Mill*." The "*across*" in that observation is all important to Mr Carr's evidence on this point as he was at pains to point out that the line of Route 3 at the bottom of the Pitch before 1800 had to be envisaged without the turnpike road as shown on Bryant's Map. Therefore, before 1800, the Pitch would have come out opposite or almost opposite the road shown on Bryant's Map on the other side of the turnpike road as leading to Slad Mill. It would have been part of a continuous route leading to the mill.

236. When asked by Mr Adams in cross-examination about a suggested discrepancy between Bryant's Map and the 1839 Tithe Maps (which showed a route down from the Upper Track joining the turnpike road but not doing so opposite the route shown on those maps as passing between parcels 1228 and 1229 on the southern side of the turnpike road[8]) Mr Carr said this not only involved overlooking the impact of the later turnpike road on what previously would have been the continuous route between Folly Lane and the mill but also the considerable difference in scales between the two maps. He said the question involved a corresponding misinterpretation of what he had described as "*the schematic version*" of routes in Bryant's Map. Making due allowance for such factors and also what might have been different methods employed by the surveyors, Mr Carr said Bryant's Map supported the case for saying the relevant connection point of Route 3 was at point D on Plan 1.

237. Addressing Mrs Emrys-Roberts' rival case (see below) for saying that Route 3 would instead have joined at Point E on Plan 1, Mr Carr said that point was significantly further south than the bottom of the Pitch and (unlike his continuous route) would have involved the need to zigzag back to make the connection with the road shown on Bryant's Map as leading to Slad Mill.

238. Mr Carr also addressed Mrs Emrys-Roberts' suggestion (again, see below) that in running "*through a Field called Vatches*" Route 3 departed from his Investigation Route. He relied upon Bryant's Map and the evidence of a road in the vicinity of Point F in the 1820 and the 1839 Tithe Books, which I address below, to say he had seen no evidence to support a case for a "*horizontal*" route as opposed to his own suggested "*vertical*" route. He said Bryant's Map showed there to have been a route (between

[8] I have not here reproduced the 1839 Map for the purpose of explaining this aspect of the evidence but the reader will see the route in question also shown on the 1820 Tithe Map (which is reproduced in paragraph 275 below) as passing across parcels 207 and 205 on that earlier map.

Points C and F on Plan 2) in 1824 and it was also shown on an Ordnance Survey Map of 1884. There was the physical evidence of it today in the form of Painswick Footpath 50.

239. The Finance Act 1910 plans were drawn over a century after the Turnpike Act. This greater distance in time necessarily qualifies their value in establishing the position on the ground as it was before 1800. The plans were prepared by reference to a survey carried out for the purpose of ascertaining the value of all land as at 30 April 1909 so that a tax (Increment Value Duty) could be levied on any increase in value of a particular 'hereditament' when it subsequently changed hands. Mr Carr said the legislation never fully came into effect but it had resulted in a "*wonderful set of documents*" which, allowing for certain limitations, is so comprehensive "*it's often referred to as a second Domesday survey*."

240. Section 35 of the 1910 Act provided for the exclusion of public vehicular roads from adjoining landholdings. Section 25 provided that, in assessing the value of a piece of land crossed by a footpath or bridleway, a deduction should be made for "….. *the amount by which the gross value would be diminished if sold subject to any public rights of way* ……"

241. The experts agreed that the exclusion of a route from the plan of assessable parcels of land, by it being shown uncoloured, could be good evidence of highway status. But they also agreed that this was not conclusive evidence of the existence of a public vehicular right. There were examples of routes with flights of steps being excluded and of examples (which Mr Carr said were limited in number) of ways set out in enclosure awards as private roads also being excluded from valuation.

242. Two sets of Finance Act 1910 plans were in evidence. The first was the working copy of the plans held at Gloucestershire Archives. The second was the final record copy held at The National Archives which Mr Carr said was the copy relied upon by the Inland Revenue for taxation purposes and therefore should take precedence over the working copy.

243. The two sets of plans differ in material respects. Both plans show Routes 1, 2 and 4 as forming part of the adjoining hereditaments by being colour shaded accordingly (apart from one section between Wickeridge Farm and Folly Lane which Mrs Emrys-Roberts identified as now being Stroud Footpath No. 83). The working copy showed the Pitch and the Upper Track as uncoloured, with both the Lower Track and what is now Painswick Footpath 50 (marked '*F.P.*' on both sets of plans at the northern corner of 17 Acres) being coloured and shown as part of the adjoining hereditaments. However, the final record copy showed the Pitch, the Lower Track, and the Upper Track (save for a shaded section near point A on Plan 1) as uncoloured.

244. Mr Carr had identified a Field Book entry (prepared by the valuer acting under the 1910 Act) which related to 6 Acres and 17 Acres. He said there was no such entry for the Pitch, the Lower Track or the Upper Track as they were excluded from valuation.

245. Mr Carr said that he was aware of instances where unenclosed carriageways running through open fields had been included within an assessable hereditament, which would have left it to the landowner to claim any deduction under section 25 of the Finance Act. In other words, not all public carriageways would necessarily be excluded from

the initial valuation process, especially if they were not physically segregated. Although the plans recorded the route between points C, E and F (on Plan 2) in a manner consistent with public footpath status, Mr Carr said this was not evidence against the existence of higher public rights over 100 years before.

246. That was his response when asked by Mr Adams about the deduction that William Capel (then owner of the land which included 17 Acres shown as parcel 883) was shown by the Board of Inland Revenue Valuer's Field Book to have claimed in respect of "*Footpath from Slad Rd. by S. side of Worgans Wood to Folly Lane.*" Mr Carr was prepared to accept that, in 1910, the section of his Investigation Route running between points C and E on Plan 2 probably did have the physical appearance and characteristics of a public footpath in that there "*wasn't a well bounded stone track or wheel ruts, or anything of that nature*." He emphasised that a landowner was not obliged to apply for a section 25 deduction and would have been careful not claim a section 35 exemption if there was doubt any about the basis for doing so which could expose him to the charge of making a false declaration. He also said he had seen plenty of examples where landowners had chosen not to make such a claim "*because they didn't want the burden of the rights*."

247. So far as the Upper Track, the Pitch and (per the final record copy) the Lower Track were concerned, their apparent exclusion from the adjoining hereditaments was in Mr Carr's opinion good evidence of public highway status and was entirely consistent with public carriageway status.

248. Mrs Emrys-Roberts accepted in cross-examination that the reference to "*a field called Vatches*" in the description of Route 3 could support the conclusion that the road went through 17 Acres. She recognised that the description of 17 Acres as 'Part of Vatches' (Parcel 222, at 14 acres and 18 perches) in an 1820 Tithe Book and Plan supported this view. However, she said there was no indication of where the road through 17 Acres might have been and did not accept it was more likely than not that it connected with the Upper Track. Her supposition was that Route 3 might have been an extension of Route 4 (compare Plan 1) and not have followed the Upper Track and Pitch.

249. So far as Bryant's Map was concerned, Mrs Emrys-Roberts said this did not show whether Route 3 (as described by the Turnpike Act) went *"through a Field called Vatches"* by running north towards Route 1 or east towards Route 2. She also said Bryant's Map depicted the Upper Track and the Lower Track but not the Pitch. Her view was that, instead of the Pitch, the map showed a track identified in her Report as the '**Woodside Track**' (between points B and E on Plan 1). She pointed out that in contrast to the line of the Pitch shown on Plans 1 and 2, which show it running straight down the side of the Paddock from where the Upper Track and the Lower Track meet, Bryant's Map appeared to show a connection to the turnpike road on a track running south-east from that junction (broadly matching the track shown in the grounds of Woodside House on Plan 2).

250. Mrs Emrys-Roberts said the material under the Finance Act 1910 did not support Mr Nunn's case. The Valuer's Field Book indicated only a 'footpath' over 17 Acres (it also stated "*There is a public footpath over one field but it is little used*") and did not support the existence of a public vehicular right. She agreed with Mr Carr that the depiction of the Upper Track, the Lower Track and the Pitch as uncoloured on the final record copy of the plan could be good evidence of highway status but said (on the basis that the

Pitch was uncoloured but unsuitable for vehicular access) that this was also consistent with private and not public vehicle rights. She pointed out that the Upper Track and the Lower Track provided the only means of private vehicle access to 17 Acres, 6 Acres and the old quarry.

251. Three old Ordnance Survey maps were also in evidence before me. The experts agreed that they provided good evidence of the physical features shown upon them but that such maps are and should be regarded as silent on matters of legal status.

252. The Ordnance Survey Map of 1811 (on a scale of 2 inches to the mile) shows the Upper Track and the Lower Track but not the Pitch and not any part of what is now that part of Painswick Footpath 50 between the quarry and Folly Lane. By her Addendum Report (made by reference to a better copy of the 1811 map than that relied upon for her initial report) Mrs Emrys-Roberts pointed out that the map showed a route connecting the south-western corner of 17 Acres to the north-western point of Route 4 (as depicted on Plan 1). She said this could match the description of Route 3 "*through a Field called Vatches*" when 17 Acres was then known as 'Part of Vatches'. The 1811 Ordnance Survey Map shows what appears to be part of Route 1, also Route 2 (a point to which I return in addressing Issue 3) and Route 4 (with the spur off its north-western corner mentioned above).

253. The Ordnance Survey Map of 1817 (scaled at 1 inch to the mile) shows the Lower Track but not the Upper Track or the Pitch.

254. The Ordnance Survey Map of 1884 (on the much larger scale of over 25 inches to the mile) shows the Upper Track and the Pitch as a road or track bounded on both sides whereas the Lower Track is shown being bounded on its eastern side but open to the west. The remainder of what is now Painswick Footpath 50 to Folly Lane (points C to F on Plan 2) is shown with dotted lines as an unbounded footpath ('*F.P.*').

Decision and Reasons on Issue 2

255. In my judgment it has not been established on the balance of probability that Route 3 followed the path of the Upper Track and, importantly, then either the Lower Track or the Pitch so that, prior to 1800, it would have connected with the turnpike road at either point C or point D on Plan 1. That said, I have concluded that the evidence does show to that standard of proof that the Upper Track was part of Route 3.

256. As this is a conclusion about a point not made good, in relation to the key limbs of Mr Carr's Investigation Route, it is probably better to express it in terms of being informed, rather than established, by one or more relevant evidential matters.

257. However, before identifying those matters it is appropriate to address the question over the age of Woodside House which I have flagged in Section B above. I raised a question about this in advance of the parties' closing submissions and in doing so I noted that one version of the 1839 Tithe Map (the copy from The National Archives) referred to Woodside House as 'New House'. In cross-examination Mr Carr had indicated he had no basis for disagreeing with Mr Adams' suggestion that it was built around the 1850's. I could see the date of construction of Woodside House might be relevant to the

disagreement between the experts as to whether, before 1800, the Upper Track would have connected to the turnpike road via the Pitch or the Woodside Track, as highlighted by their different interpretations of Bryant's Map. If the connection was at the point suggested by Mrs Emrys-Roberts, and Woodside House and its gardens was subsequently built over the track providing that connection, or part of the track, then this would also be relevant to the issue of stopping up addressed by Issue 3.

258. In his closing submissions, Mr Moore referred to a witness statement signed by Mr John Simon. Mr Simon did not give evidence at trial. His statement on behalf of Mr Nunn had focussed upon vehicular use of the Lower Track and the Upper Track going back to 1949 on the claim not pursued at trial. Mr Simon was aged 5 at that time and his father had bought Woodside House and Woodside Bungalow three years before. In his statement he said: "*The rear part of Woodside House was built in approximately 1760 -the date is carved into one of the stones in the rear wall that was covered by plaster until around 1960*."

259. Although the requirements of CPR 33.2(2) had not been complied with, Mr Adams did not suggest this hearsay evidence should be ignored. However, he made the sound point that it had not been tested in cross-examination and it was unclear what Mr Simon meant by the rear part of Woodside House. I note that even this evidence appears to hold out the possibility that some of Woodside House (closer to the turnpike road) was built later.

260. Mr Adams relied upon the absence in the 1820 Tithe Map of any building marked on the site of Woodside House and the description '*New House*' in one of the 1839 Tithe Maps to say that Woodside House was likely to have been built between the dates of those maps. He pointed out that the construction of the turnpike road would have facilitated its construction. Mr Adams also referred to the dating of the boundary stones - 1853 (possibly 1858) and 1854 - in the boundary wall for Woodside House and its grounds as an indication that Woodside House was built after the date of the Turnpike Act.

261. In my judgment, the evidence supports the conclusion that Woodside House was more likely than not to have been built well after the date of the Turnpike Act. It is a substantial property. The 1866 sales particulars mentioned below show an image of it, standing above the turnpike road behind a substantial retaining wall, and said it "*contains Thirteen Rooms and Offices, Stable and Coach-house, and stands in its own Grounds of about Three and a half Acres, which comprise a Larch and Beech Plantation, and Wooded slope of considerable extent*." Yet, despite its size, it was not shown in the maps closer to 1800 (the 1820 Tithe Map not showing it and the 1817 Ordnance Survey appearing to show only the Star Inn which is to the south of Woodside House and now a private dwelling) and in the 1839 Tithe Book was described as "*New House and Gardens*" (which was then "*vacant*").

262. With this post-1800 development within the grounds of what is now Woodside House in mind, I can now address the material points that make up the evidential mix on Issue 2. The nature of the task involved in addressing this issue is such that they do not all form part of some coherent theme which points only one way. Nevertheless, when taken overall, in my judgment they support the conclusion that Mr Nunn has not proved that Route 3 connected to the turnpike road at either point D or point A on Plan 2.

263. I identify the following points in support of that conclusion:

1) The language used in the Turnpike Act to describe Route 3. It is the only one of the four roads which, as a "*common Highway*", is not referenced by a starting point whereas the others are described as starting from a particular location or place. The absence of an identified starting point for the road which, through a field, led to Wickeridge Hill introduces a degree of initial uncertainty over its course. Allowing for the point that 'Wickeridge Hill' cannot be identified by reference to a specific geographical point on any map, the identification of the other routes benefits from the naming of termini, as Plan 1 illustrates. If, for example, and looking now at Plan 2, Route 3 had been identified as a road from 'Painswick Slad Farm' (assuming the Farm then existed) or 'Upper Vatch Mill' to Wickeridge Hill, through a field called Vatches, then that would have provided a clearer pointer that Route 3 included the Lower Track or the Pitch.

2) The physical characteristics of Painswick Footpath 50 between points F and E on Plan 2. Between these two points the way has the character of a footpath only. However, Mr Carr made the point in cross-examination that the recent video evidence did not assist much in considering whether it would have been possible to take a horse and cart over this section before 1800. He also made the point that trees now growing there would not have been as big in 1800 and some may not even have been planted by then. Mr Carr also said that the marking of this section as a footpath in the 1884 Ordnance Survey Map did not reveal the rationale behind that decision and whether "*it was to do with conditions underfoot or whether it was to do with gradients and things*". Those points are well made but the video evidence and the 1884 map do leave me in some doubt over its suitability before 1800 for horse and cart traffic. In paragraphs 275 and 276 below, in connection with a submission made by Mr Adams about the location of Route 3 in the vicinity of the Upper Track, I address what Mrs Emrys-Roberts said about the potential alternative line of Route 3 over 17 Acres. I recognise that, for the purposes of Mr Nunn's claim under NERCA, questioning whether or not a track which meets Folly Lane at point F on Plan 2 had the characteristics of a "*common Highway*" before 1800 is not directly relevant to the question of whether or not Route 3 joined the turnpike road at point D or point A. However, this section of track is part of Mr Carr's Investigation Route so that any doubt over its status as highway may carry with it similar doubts over other parts of it. This is particularly so when the physical characteristics of the Pitch bring with them the same kind of doubt about suitability for 19th Century vehicular traffic (see below) and such doubts are relevant to my overall assessment of the rival expert evidence.

3) The description, 20 years after the Turnpike Act, of the greater part of 17 Acres (some 14 acres) as 'Part of Vatches' in the 1820 Tithe Book and Plan. This clearly supports the conclusion that Route 3 ("*through a Field called Vatches*") ran either very near or indeed across 17 Acres. With allowance for the possibility of change over a couple more decades, I also note that the 1839 Tithe Book (as later transcribed in 1859) also refers to what was by then Parcel 1238 as '*Part Vatches and Road*' (at 14 acres 3 roods and 10 perches). This supports the inference that the 'road' accounted for approximately ¾ acre more of land than that recorded in the 1820 Tithe Book and its inclusion alongside the

remainder as arable land, on which a tithe would be paid in the absence of an exemption, also indicates that it ran through the field. I have already mentioned Mr Carr's evidence about the later claim made by William Capel, recorded in the Inland Revenue Valuer's Field Book for rating purposes under the Finance Act 1910, in respect of "*Footpath from Slad Road by S. side of Worgans Wood to Folly Lane*", about such routes not necessarily being demarcated by physical boundaries.

4) The 1820 Tithe Map and the different versions of the 1839 Tithe Map. None of these indicates the line of a road through 17 Acres and, even if they did, things might of course have been different prior to 1800. However, the 1820 and the 1839 Tithe Books, for Parcels 243 and 1240 respectively, do refer to 'Clay Pit Piece' and 'Clay Pit Close'; and both descriptions include reference to a 'road'. The accompanying maps show this to be reference to a parcel of land to the south of points F to E on Plan 2 (i.e. to the west of 17 Acres). When explaining his video evidence Mr Price said that this land is now known as 'Folly Acres' but used to be known as 'Clay Pit'. The 1820 map contains no indication of the road but the version of the 1839 Tithe Map from The National Archives does show a dotted line on the Clay Pit Close side of the boundary with Worgans Wood which matches the route of Painswick Footpath 50 (from Folly Lane) between points F and E on Plan 2. This is an indication that, at least by 1839, the 'road' through Clay Pit debouched into 17 Acres at Point E on Plan 2.

5) The different versions of the 1839 Tithe Map in showing the Upper Track (and possibly the Pitch too – see below). The maps do not show any road over 17 Acres (Parcel 1238 being marked on the map as 'Part Vatches & Road') and Mrs Emrys-Roberts noted that, on The National Archives version, the top and bottom of the Upper Track are shown with lines across them (at the points A, B and D shown on Plan 1) which suggested it might have been gated. As she also observed, on another version the Upper Track appears to exit in Worgans Wood (rather than 17 Acres). [The 1884 Ordnance Survey Map appears to the first map showing what is now the route of Painswick Footpath 50 going from the Upper Track into 17 Acres as shown on Plan 2. As Mr Price explained, his use in 1985 of a dumper truck to and from the quarry has served to confirm the unbounded nature of the footpath (on the field side) at this point.]

6) The inference that, in 1800, Route 3 connected the road through 'Clay Pit Close' and the Upper Track (as shown in the 1839 Tithe Maps) by running between points E and C on Plan 2, as Painswick Footpath 50 now does. This inference is also supported by Bryant's Map of 1824. However, Mrs Emrys-Roberts described both the Upper Track and the Pitch as being shown as "enclosed routes" on the tithe map produced some 40 years later than the reference date. Her highlighting of a potential alternative route "*through a field called Vatches*" (as opposed to 17 Acres) in the earlier 1811 Ordnance Survey Map is a further reason to question the soundness of this inference. The potential alternative route is highlighted by the map reproduced in paragraph 274. below.

7) Mr Carr's evidence that (in his opinion) Route 3 connected with the turnpike road via the Pitch rather than the Lower Track, which he said probably came into existence *as a result* of the Turnpike Act. Whereas there is little doubt that the Lower Track, at all times since its creation, has been able to support

vehicular traffic the question arises as to whether the same holds true for the Pitch.

8) The natural characteristics of the Pitch are that it is very steep and narrow. Mr Price said in cross-examination that he did not believe the steepness of the pitch would have altered over time and, looking at the video evidence, I agree. The landscape over which it passes (the steep side of a valley) is such that its gradient cannot have changed significantly even over a period as long as two-and-a-quarter centuries. As to narrowness, older plans such as the Finance Act 1910 plan, the Land Registry plan reproduced below in connection with Issue 6 and (perhaps more importantly given their focus upon features and characteristics of the mapped land) the Ordnance Survey maps from 1884 onwards all show the Pitch as being narrower than the Upper Track. That said, the various tithe maps do not show this and neither does Bryant's Map (though the experts disagreed as to whether it records the Pitch) but both Mr Carr's observation about relative widths (for the transport of quarry materials) and the topography indicate those maps may not have been accurate in suggesting the Pitch was as wide as the Upper Track. I also accept the evidence of Mr Price and Mrs Emrys-Roberts that until quite recently the entrance to the Pitch from the turnpike road would have been narrower than it is now. I am also in the good company of Megaw LJ in expressing the view that the Pitch is clearly not suitable for motor vehicles, though, for my purposes of contemplating the kind of traffic that might then have passed over Route 3, the kind he was talking about did not exist before 1800. Correspondence passing between Painswick Parish Council and the County Surveyor in June 1970 (written in connection with the obstruction of vehicular access through the installation of the gates at the bottom of the Lower Track) referred to the Pitch as "*narrow and steep and quite unsuitable for motorcycle or pram or any supplies to be delivered*."

9) The language and purpose of the Turnpike Act. The experts agree that the language of the Act *suggests* that Route 3 was a public vehicular highway and (as explained in Section F above) I agree. In my judgment and with that in mind there is real doubt as to whether the Pitch can be regarded as having the physical attributes of one even if it existed and connected to the turnpike road at the time of the Turnpike Act and even by reference to the vehicular traffic of the 18th Century. As Mr Carr rightly observed "*We're not talking about modern vehicles …. We're talking horses, horses and carts.*" However, the steepness and constricted width and what, on the evidence, would have been an even narrower entrance than present where it joins the turnpike road raise real doubt about its suitability even for use by a horse (or mule or donkey) and cart. Mr Carr's evidence that the Lower Track was probably built so that stones from the quarry could be transported down the Upper Track to the turnpike road highlights this point. Although Mr Carr said in cross-examination that he would not rule out the idea that the Pitch could have taken smaller carts of 3 to 4 feet width, carrying lighter loads such as paper and cloth, I was unpersuaded by that evidence. That said, in addressing the meaning of a "*common Highway*" in Section F above I have recognised that the Pitch, assuming it existed at the time, might perhaps have been within the purview of the Turnpike Act on the basis that it could have taken packhorses and driven cattle or livestock for which the Act also specified a range of tolls. It might have been a 'highway' for those

purposes. However, as a candidate for being a part of Route 3, the Pitch should not be presenting such significant doubts over its actual suitability for the *vehicular* traffic of the age when the preferred interpretation of the statute is that Route 3 it was a carriageway. Although the point goes to Issue 3, and it concerns modern traffic, I have already noted that paragraph 27B of the Amended Counterclaim sensibly does not include the Pitch within the claim under NERCA based upon vehicular use over it being reasonably necessary for access to Woodside Bungalow.

10) The present-day signs of the Woodside Track which Mrs Emrys-Roberts identified in her report as having run down though the grounds of Woodside House from the Upper Track. At the outset of his closing submissions, with the aid of the 'street view' facility in Google Maps (2023) and with the agreement of Ms Stockley and Mr Moore, Mr Adams highlighted the view from the B4070 of the exit point of a still discernible track running down from behind Woodside House. The 1820 Tithe Map shows such a track (but not the Pitch) within the grounds of present-day Woodside House. In the light of my finding that Woodside House was built after 1800 (and after the 1820 map) there would have been no building or domestic garden landscaping work at the date of the Turnpike Act to obstruct the use of such a track down to the turnpike road. Mr Simon's hearsay evidence referred to the construction of the house and garden necessitating the use of the Lower Track for vehicular access to the grounds of Woodside House (through the pillared gateway created by Dr Green in the 1920's). Although Mr Simon correctly identified the ground to the right of Woodside House as now being very steep and not suitable for vehicles, the line of the Woodside Track on the 1820 Tithe Map indicates that (assuming the Pitch existed at the time) it would probably have been more suitable than the Pitch for the vehicles of the 18th Century.

11) The debate about Bryant's Map 1824. The experts agreed that this was the type of map produced for the benefit of the travelling gentry and I therefore accept Mr Carr's point that that it would show routes that could be used by the public. However, without more, that does not establish that every route shown was suitable for vehicular use. Bryant's Map shows (a quarter of a century after the date of the Turnpike Act) the Lower Track connecting the Upper Track to the turnpike road. It shows this with parallel dotted lines. As noted above, the experts disagreed as to whether or not it continued down the Pitch (per Mr Carr) or instead joined the turnpike road at a more southerly point below Woodside House via the Woodside Track (per Mrs Emrys-Roberts). On this point of difference I bear in mind that the 1811 Ordnance Survey Map does not show the Pitch but it does show the Upper Track and the Lower Track. It is less obvious to my eyes that the 1811 map also does not show the Woodside Track but the quality of the map is such that, even when enlarged, it is much too bold an assertion to say that the map does show it. The experts agree that an Ordnance Survey map is good evidence of the existence of the physical features shown upon it. In my judgment it must follow that it can be evidence of the absence of a physical feature (in this case the Pitch) that one would otherwise expect to be shown on it. Both versions of the 1839 Tithe Map refer to Woodside House as '*New House*' and the dated boundary stones indicate that the property's boundary wall may not have been completed until some time after the date of

Bryant's Map. This indicates that, when Bryant's Map was made, there was no barrier, of the kind which the boundary wall and the landscaping of the grounds of Woodside House now present, to a track running down from 17 Acres turning south-eastwards (to point E on Plan 1). That is what the 1820 Tithe Map indicates was its course within what are now the grounds of Woodside House. I also note that a small plan on a much later Conveyance of 1919, which I address below under Issue 6, also lends some support to the Upper Track having connected to the turnpike road by taking a south-easterly turn rather than via the Pitch (even though Woodside House had been built by then).

12) Although it might be thought that the dispute between the experts (over Bryant's Map and the rival connection points D and point E on Plan 1) could be resolved by considering the track on the other side of the turnpike road, which a modern map and the naked eye now reveal to be directly opposite the bottom of the Pitch on the other side of the B4070, the need to view things through an historical lens complicates matters. Any temptation to assume that the layout of routes in this immediate vicinity of what became the turnpike road was the same before 1800 as is now the case must be tempered by contemplating the impact that the building of the turnpike road could have had upon how they previously connected. On this issue of the connection point, Bryant's Map has to be considered alongside the other old maps, even though the only helpful ones also post-date 1800. As to that, the 1811 and 1817 Ordnance Survey Maps, the 1820 Tithe Map and the two 1839 Tithe Maps all show the existence of a track on the other side of the turnpike road but which no longer exists. This track is also shown on Bryant's Map. On the other old maps this track is closer to Mrs Emrys-Roberts' point E, below where Woodside House now stands. They show, as does Bryant's Map, a track on the other side of the turnpike road which then led either to or towards Vatch House (the location of which appears on Plan 2, with most of the old mill buildings that surrounded it having since disappeared). Mr Adams also highlighted a plan within some 1866 sales particulars for the sale of The Vatch Mills Estate (including Woodside House and its grounds) also showed an indentation in the eastern boundary of the turnpike road at the point where the former track shown on those older maps, on the opposite side to Woodside House, met the road.

13) The other historic maps therefore appear to support Mrs Emrys-Roberts' interpretation of Bryant's Map. Whereas Plan 2 shows the Pitch dropping down from the Upper Track in a perpendicular fashion towards the B4070, Bryant's Map shows the relevant track taking more of a south-easterly curve so as to come out opposite what was the track leading towards Vatch House and Vatch Mills. A comparison of Bryant's Map with the 1811 Ordnance Survey Map and the 1820 Tithe Map (which do not show the Pitch but on which its perpendicular line might be imagined with a connection to the former track on the other side not resulting) illustrates this point clearest of all.

14) The limited evidential value of the material under the Finance Act 1910. This is inconclusive and heavily qualified by its distance in time from the reference date of 1800. Mr Carr made some persuasive observations that the material in relation to Points C to E on Plan 2 did not rule out the case for saying it was a vehicular right of way but, likewise, the experts agreed that the exclusion of

(most of) the Upper Track and of the Lower Track and the Pitch was not conclusive evidence of a public vehicular right (in 1910). My conclusion about the unsuitability of the Pitch for vehicular traffic reinforces this point.

264. It should be clear from the above that, in reaching my conclusion on this issue, I have been strongly influenced by the physical characteristics of the Pitch and my conclusion that these cannot have changed much over time since it was created (whenever that was). The experts' agreement that the terms of the Turnpike Act is indicative of Route 3 (as a "*road*" and "*common Highway*") having been a public *vehicular* highway forms a significant part of my reasoning as to why the Pitch has not been proved to be part of it. This is particularly so when the Woodside Track offers up a viable alternative for the 18th Century vehicular route. If the Pitch did exist before 1800 then, using the other language of the Turnpike Act, it would be described more aptly as a "*lane*", "*path*" or *"way"* rather than a road or highway. In including the Pitch within Route 3, Mr Carr described the position as one of Hobson's choice for those facing the difficulties presented by steep and challenging routes that the turnpike road was built to overcome. However, in my judgment, it is as least as likely that the Woodside Track offered them a vehicular route up to Folly Lane.

265. Looking at the detail shown on the 1820 and 1839 Tithe Maps, in particular, I am also unpersuaded by Mr Carr's point that Bryant's Map shows the Pitch in a schematic way and drawn to a different scale. Mr Adams was right to submit that Mr Carr's case for saying that the Pitch formed part of Route 3 involved too much reliance upon his own interpretation of Bryant's Map.

266. It must be noted that Mrs Emrys-Roberts relied upon Bryant's Map to support the inference that the current route of the B4070 (and the "loop" between points C, D and E on Plan 1) was the result of a diversion created when the road was turnpiked. She pointed out that the Turnpike Act enabled the trustees to divert as well as improve the turnpike road and observed that the existence of a such loop was perhaps consistent with certain descriptions in the 1820 tithe records and with Route 3 not being described as starting from a particular point. Mrs Emrys-Roberts' 'loop' theory therefore pointed to the Lower Track (and, therefore, the Upper Track) being part of Route 3.

267. However, Mrs Emrys-Roberts expressly acknowledged the degree of speculation behind this theory, albeit that she was contrasting that with a desire for "*certainty*" over the line of Route 3. Ms Stockley was correct to observe that is not the standard of proof expected of Mr Nunn but, even so, Mr Carr's evidence that the Lower Track was likely to have come into existence as a result of the Turnpike Act leaves me very uncertain about it. If correct, it would appear to follow that before 1800, and the creation of such a loop, the mill buildings at Vatch Mills were less well served by a local road along the valley than New Mills (Route 2) and "Hazle" (or Hazel) Mill (Route 4). And Mr Carr was in my judgment right to question why the Lower Track would have provided the connection when it is unclear that the Farm buildings existed at that time. Nevertheless, this aspect of Mrs Emrys-Roberts' evidence further clouds the case for saying the Pitch provided a connection with the turnpike road at point D (on Plan 1) before 1800 and over Mr Carr's evidence that Bryant's Map shows that connection.

268. It is possible that, before 1800, Route 3 was a vehicular highway which passed between points F and B and then between point B and either point D or A on Plan 2. However, mere possibility is not enough for Mr Nunn who bears the burden of proof on this issue. My assessment of the above 14 points taken together is that he has not established on the balance of probability that it did so. The claim that it passed over the Lower Track is undermined by the evidence of Mr Carr and I have explained the basis for having real doubt that the Pitch provided the relevant connection to the turnpike road before that date. At this distance in time there is simply too much uncertainty for the court to be sufficiently confident that Route 3 and Mr Carr's 'Investigation Route' are one and the same.

269. Although I think it is too facile a comment in the circumstances of this case and the resources devoted to it, it might be said that so much should be obvious from the vague language of the Turnpike Act (and lack of identifying plan) and the fact that the only old maps which assist in casting light on the line of Route 3 are ones which post-date the Act. Each of those maps does so by a period of time which was sufficient to allow for the creation of the Lower Track (per Mr Carr's evidence), the stopping up of Route 3 (if that is what happened) and, perhaps, the creation of (or commencement of use of) the Pitch as a footpath off the turnpike road to reflect any such stopping up of Route 3.

270. In my judgment it is more likely that Route 3 connected to the turnpike road via Mrs Emrys-Roberts' Woodside Track, shown on Bryant's Map on her interpretation of it, which I prefer. The connection was therefore more likely to have been at or near point E on Plan 1 and not at point D. However, the uncertainties surrounding this question in 2023 (and the absence of any burden on Mr Price to show positively that it did) leave me in doubt as to whether that connection has been shown on the evidence to be more likely than not: compare the cessation of the dotted line at the bottom of the Upper Track in the annotated map at paragraph 275 below. In any event, for the reasons explained in my decision on Issue 3 (unpleaded) reliance upon the Woodside Track would in any event not assist Mr Nunn in his NERCA clam.

271. However, I have already explained in Section A above why, on a practical level, Mr Nunn's counterclaim now requires particular focus upon the Upper Track (points B to C) and yet a large part of my reasoning against him on this issue rests upon consideration of the nature of the footpath between points A to B (the Pitch) and also between points E to F on Plan 2. I am also conscious that the Upper Track was described in the 1976 Proceedings as forming part of a "*public right of way*" when the court was not required to analyse the nature of that right.

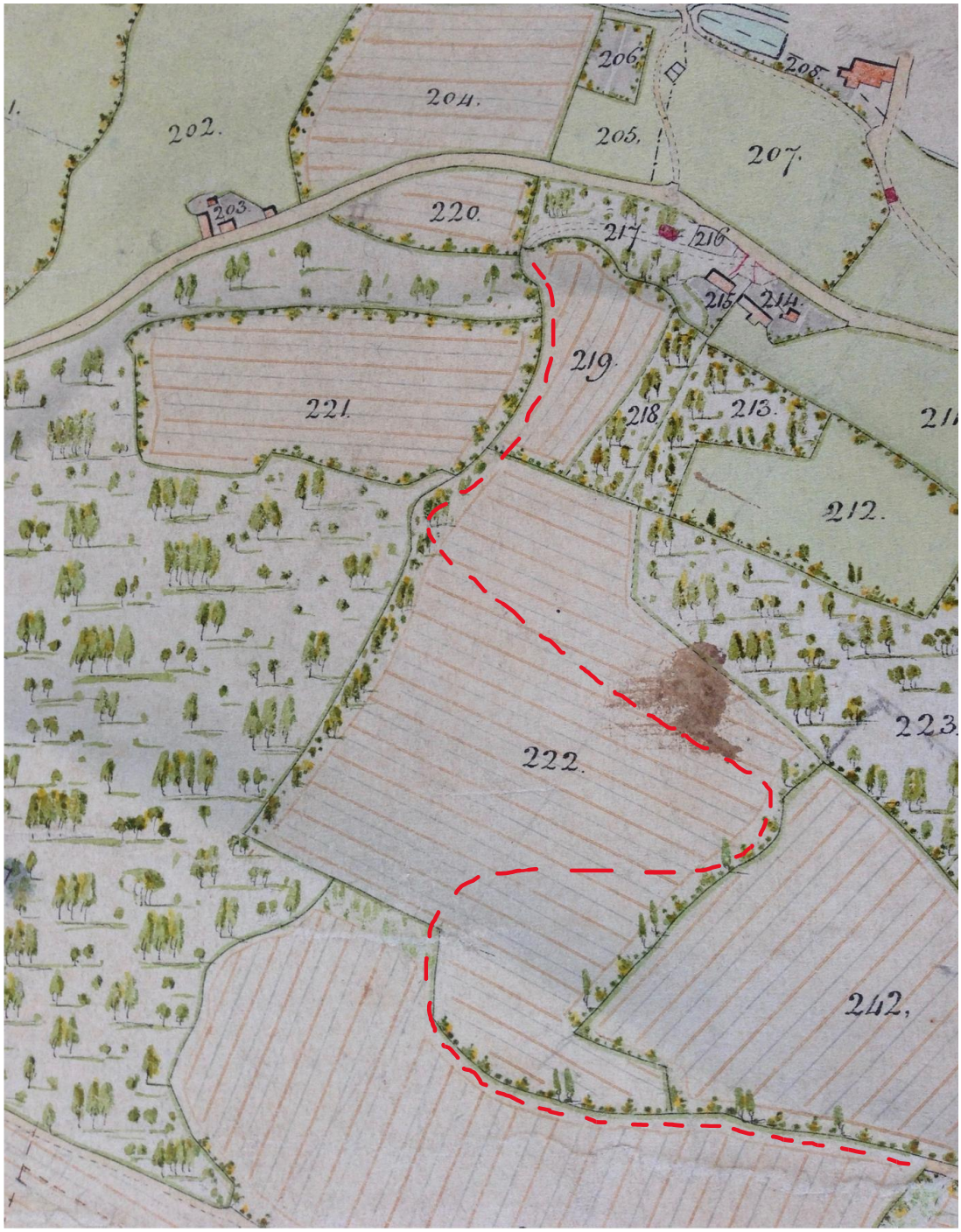
272. These matters which bear upon any consideration of the Upper Track in isolation from the remainder of the Investigation Route are best addressed in the context of Issue 3. There is, however, one particular aspect of the evidence and argument relating to the Upper Track which I should consider before turning to that issue. It concerns the likely location in 1800 of what (allowing for any subsequent change to its present location) I have been referring to as the Upper Track.

273. I have already noted Mrs Emrys-Roberts' evidence that Route 3 was likely to have included the Lower Track and, within the same series of answers in cross-examination, she said the same about the Upper Track. She was, however, careful to point out that one cannot be "*100% certain that track on the ground as we see it today is the route that was there in 1800*" but, taking the expert evidence as a whole, Ms Stockley was

correct to submit that there was agreement between the experts that the most likely line of Route 3 included the Upper Track.

274. However, the element of doubt introduced by Mrs Emrys-Roberts as to the precise location of what is now the Upper Track led Mr Adams to make a point about the Upper Track in his closing submissions which had not emerged clearly before. I recognise that it is a point which involves the idea of shift to the present location in the years since 1800 but, subject to that, it is not a point that appears to sit entirely comfortably with Mr Price's alternative case on ownership of the Upper Track (Issues 6 and 7) and, as with the pleading point, it may well be that it has surfaced in order to fend off a suggestion that Mr Nunn may succeed on establishing a vehicular right of access to Woodside Bungalow by focussing now only upon the Upper Track.

275. The point goes to the possible location of Route 3 (in the vicinity of the Upper Track) before 1800. It is best illustrated by me now reproducing an annotated version of the 1820 Tithe Map included within Mr Adams' written closing submissions:



276. This annotated version of the 1820 map was included in those submissions to illustrate what Mrs Emrys-Roberts said about the possible alternative line of Route 3 across 17 Acres ("*through a Field called Vatches*"), as compared with the line of Mr Carr's Investigation Route up to Folly Lane shown on Plan 2. In the light of what I have said in Section E above about the difficult terrain in the way of any public vehicular use between points Z and F on Plan 2 (including what Mr Price said about the steep banking at the top of 17 Acres) there is much to be said for Mrs Emrys-Roberts' alternative route. Nevertheless, this alternative route suggested by her does also show this

alternative line of Route 3 running east towards the turnpike road in the vicinity (at least) of the Upper Track.

277. On this aspect, Mr Adams submitted that the road described as Route 3 did not follow what is now the Upper Track but instead traversed what are now the grounds of Woodside House (and, to a relatively modest extent, of Woodside Bungalow too). For these purposes he relied on a boundary agreement reached between Mr William Capel and Mr William Fluck on 30 April 1846; the boundary wall of Woodside House with its boundary stones dated 1853 (or possibly 1858) and 1854 (both bearing the initials of Mr Fluck); and the registered description of the boundary between the Capel Estate and the Vatch Mills Estate in 1866 (by reference to the plan drawn for the purpose of giving notice of the boundaries which is reproduced in paragraph 360 below in connection with Issue 6).

278. I deal with the 1866 materials concerning the boundary between the two estates in addressing Issue 6 below. For present purposes, Mr Adams' submission that the Upper Track shifted to its present location (beyond the 1854 boundary wall of the Vatch Mills Estate) in the period between the end of the 18th Century and the middle of the 19th Century is based upon what was said in 1846.

279. Mr Capel's field diary contained an entry for 30 April 1846 which recorded that "*The disputed strip of land lying between Brier* [Sic] *Land"* – [see parcel 221 on the 1820 map showing 6 Acres] - "*and the road leading to Vatches was also given up to me Mr Fluck having written to me a letter to that effect in Mr Croome's presence*" at the same time a parcel of land was sold to Mr Fluck for the purposes of enlarging his mill pond.

280. As I understood it, the argument is that this shows that, before 1846, Route 3 (as the experts consider it was likely to have existed in this vicinity) was over land within the reputed ownership of the Vatch Mills Estate, represented by Mr Fluck. Only at some point after 1846, most obviously after the mid-1850's and the building of the dated boundary wall between the two estates, was the Upper Track created on the land belonging to the Capel Estate (so Mr Adams submits for the purposes of Issue 6).

281. In my judgment this diary entry provides scant material for the idea that the line of the track shifted northwards from its position at the time of the Turnpike Act. Clearly, the line of Route 3 before 1800 must be envisaged without the later boundary wall acting as a blinker. However, prompted by Mrs Emrys-Roberts' observation about The National Archives version of the 1839 Tithe Map showing the Upper Track entering Worgans Wood rather than 17 Acres (see paragraph 263(5) above) I think it just as likely, indeed more likely given the language of the diary entry, that the disputed land was a segment in the north-eastern corner of 17 Acres where the Upper Track enters the field: see the 1820 plan above where parcels 221 and 222 are contiguous.

282. Subject to that observation, the most the 1846 diary would seem to support is the inference that, before 1846, the owner of the land on which Woodside House and Woodside Bungalow now stand considered his boundary to embrace (what for present purposes is assumed to have been) Route 3. On any interpretation of the diary entry, having regard to the geography, the "*road leading to Vatches*" appears to have been within the scope of a disputed territorial claim by the Vatch Mills Estate which was relinquished by Mr Fluck in 1846. When no clear boundaries had previously been set, I do not see how a dispute between those predecessor neighbours about ownership of a

road in the vicinity of a road assists in determining the actual location of the road in 1800.

283. In saying this I bear in mind that Mr Price suggested in his evidence that William Capel was likely to have sacrificed part of his Briar Field (i.e. 6 Acres) to make a better roadway to serve between Vatches Field (i.e. 17 Acres) and the Paddock which was used as a rickyard. By reference to the video evidence, he referred to the Upper Track as having been cut into the edge of 6 Acres (opposite Woodside Bungalow) so as to create a 3 to 4 feet stone-faced bank up to 6 Acres when there would otherwise have been a more gradual contour down towards Woodside Bungalow. He speculated that a wider roadway would have enabled the corn stalks harvested from 17 Acres to be taken to the Paddock and made into ricks.

284. Mr Price's evidence must, I infer, be based on his historical research as he would have no direct knowledge of these matters. Even though he may well be right, I do not believe this suggestion supports the idea of post-1880 shift in the line of the track. Instead, at best it supports the idea that the track, along its existing line, was widened. Route 3 *may* have been somewhat narrower at this point than the modern-day Upper Track (though by how much is unclear) but it was not otherwise a different track.

285. I therefore approach Issue 3 on the basis that the evidence shows that the line of Route 3 followed what is now the Upper Track.

Issue 3

286. Issue 3 is directed to establishing whether or not the Upper Track was, at 2 May 2006, an existing public right of way for MPVs within the meaning of section 67(1) of NERCA.

287. I should say at the outset that my conclusion on Issue 2 means that, in my judgment, Issue 3 falls away. If Mr Nunn cannot establish that Route 3 connected with the turnpike road via the Pitch or the Lower Track then the grounds for suggesting that *any part of the route* was a public vehicular highway before 1800 (within the purview of the Turnpike Act) disappear. The experts' point, with which I concur as a matter of statutory interpretation, was that the Turnpike Act was concerned with a vehicular highway connected to the turnpike road. Yet a vehicular highway connection to that road before 1800 through either the Lower Track or the Pitch has not been established on the balance of probability.

288. Nevertheless, it is appropriate that the other questions I have formulated within Issue 3 are addressed. I have concluded that the Upper Track has been proved to be part of Route 3 and the parties have presented evidence and argument on the issue of the stopping up of Route 3 (both on the assumption that it included the Lower Track and/or the Pitch). Further, Mr Nunn's ability to access the Upper Track by vehicle from the B4070 provides sufficient reason to explore the position of the Upper Track alone (and separately from the connecting limbs of Route 3 as pleaded) as Ms Stockley submitted it should be.

Summary of the Evidence on Issue 3

289. I have noted above the experts' agreement upon the absence of any clear documentary evidence to show that the stopping up power was exercised in relation to Route 3 after 1800.

290. On the basis that the court accepted Mr Nunn's case that Mr Carr's 'Investigation Route' delineated Route 3, Mrs Emrys-Roberts said the absence of consistent evidence of the route's existence in the various maps and plans post-dating 1800 showed it was likely that the trustees had exercised their stopping up powers over it. Essentially, her point was that there was a lack of evidence identifying the alleged public vehicular highway after the date of the Turnpike Act. She also remarked that it would be unlikely that the Capel family (two of which were trustees under the Act) would, as owner of the adjoining land, have permitted a "*cul-de-sac*" highway to have remained so that it might be used by those wishing to evade paying the tolls.

291. Mrs Emrys-Roberts was also able to make one particular point about the caution to be applied when considering the implications of a route being shown on a map and it related to Route 2 ("*the Road from New Mills to Wickeridge Hill aforesaid"*). She referred to an 1807 Indenture, which she described as a feoffment, by which the trustees under the Turnpike Act sold for ten pounds part of Route 2 (some "*eighty perches in length and half a perch in breadth of thereabouts*" from its connection to the turnpike road) to John Partridge who was the adjoining landowner. The terms of this indenture made it clear that the trustees had power to stop up the road and to sell it and the plan in its margin identified the relevant part of Route 2 as 'Old Road' (with the section marked 'New Road' illustrating the trustees' power to divert as well as improve the toll road). Mrs Emrys-Roberts pointed out that, despite this, the relevant part of Route 2 was still shown in some of the later maps (including the Bryant's Map and the 1839 Tithe Map). She said this demonstrated the flaw in assuming that the inclusion of a route – including Route 3 – in a map after 1800 was an indication that it was still a public vehicular highway.

292. Mr Carr's position (on the basis that Route 3 was as he suggested with the connection to the turnpike road prior to 1800 being via the Pitch) was simple. He said that as no evidence of the stopping up, extinguishment or diversion of Route 3 had been located, despite a comprehensive search, the legal principle of "*once a highway always a highway*" meant that the same rights that existed over Route 3 in 1800 still exist today.

Decision and Reasons on Issue 3

293. It is appropriate to emphasise again that Mr Nunn cannot succeed on his pleaded case by relying upon the common law principle so that it applies, for the purposes of NERCA, to the Upper Track in isolation from the Lower Track and/or the Pitch. On the basis of my decision on Issue 2, the Upper Track has not been shown to have been (as at 2 May 2006) part of the public right of way for MPVs asserted by him.

294. Had I been persuaded on the balance of probabilities that Route 3 and Mr Carr's 'Investigation Route' were one and the same then it would have been necessary to address the subsidiary questions identified within Issue 3. The fact that I have not been

so persuaded means they must be approached on an entirely hypothetical basis. I should also explain a little more fully the reasons for rejecting the basis of a claim (which now reflects the reality on the ground rather than any hypothetical case) to a private vehicular right of way under NERCA over the Upper Track alone. And it is also necessary for me to address the issue of stopping up because of an argument Mr Moore developed about the consequences of any such stopping up for Mr Price's claim to ownership of the Upper Track.

Route 3 as a right of way for MPVs

295. In explaining the provisions of the Turnpike Act in Section F above I have concluded that Route 3 was described in language which supports the conclusion that, before 1800, it was a public vehicular highway. By 'Route 3' I mean (as I have already just emphasised) all of it, along its entire length.

296. In my judgment, this means that Mr Nunn could rely upon the common law maxim "*once a highway always a highway*", even though the analysis of the authorities in Section F above shows that the application of that principle begs a question as to nature of the highway that "always was" (until May 2006). I have already rejected the notion that the physical attributes of the Pitch support it being regarded in modern times as part of a public right of way for MPVs. The resulting risk of fallacious reasoning on the stopping up point, addressed next, is therefore obvious when my comments above about the unsuitability of the Pitch for vehicular traffic in the first place (particularly when its entrance at the B4070 was in the past a narrower one) are borne in mind.

Stopping Up

297. I have also explained in Section F above my reasons for concluding that the burden of showing that Route 3 was stopped up (independently of any stopping up of the other routes) would have been upon Mr Price. Had it been necessary to do so to defeat Mr Nunn's claim, Mr Price would have to have established as much on the balance of probability.

298. My consideration of the exercise of the stopping up power under the Turnpike Act proceeds on the *assumption* that either the Lower Track or the Pitch provided a connection to the turnpike road before 1800 that called for the power to be exercised (in relation to either of them and, therefore, the Upper Track).

299. The issue of stopping up would have been a little less hypothetical but still a heavily speculative one when applied to what I have decided under Issue 2 to have been *a more likely* route by which the Upper Track connected to the Turnpike Road. I have said the Woodside Track was a more likely candidate for being part of Route 3 than the Pitch.

300. If that had been Mr Nunn's case then the answer to Issue 3 would not have been entirely straightforward even in the light of my finding that Woodside House was built after 1800. The building of the house and creation of its gardens clearly had the effect of stopping up any vehicular access over the Woodside Track to the Upper Track.

However, there would have been a question over whether this reflected a regular decision of the trustees made within the 21 years or so when the Turnpike Act remained in effect. On the interpretation of Bryant's Map which I prefer the Woodside Track was still shown on a survey carried out in 1823 to 1824. It may be that here the *maxim omnia praesumuntur rite et solemniter acta* principle could properly have come into play on Mr Price's response on this point. The position on the ground in modern times is clearly at odds with the Woodside Track supporting a case that the Upper Track was an existing right public right of way for MPVs within the meaning of section 67(1) of NERCA.

301. But that is not Mr Nunn's case. Allowing for his alternative reliance upon what Mrs Emrys-Roberts said in cross-examination about the Lower Track, Mr Nunn is pressing the case for saying that the pre-1800 connection was via the Pitch.

302. Even having regard to the physical attributes of the Pitch, on the hypothesis that Mr Nunn had made good that case, I have already noted reasons why the trustees under the Turnpike Act might have wished to have considered exercising their power to stop up the Pitch. This would have been on the basis that it might have taken not only pedestrians but also the toll-paying traffic of horses or mules (laden or unladen) or (with obvious limitations of space) driven livestock. However, for the reasons given in my decision on Issue 2, I have difficulty in drawing the inference that the Act would have been addressing the stopping up of the Pitch on the basis that it was also suitable for carriages: the other type of toll-paying traffic identified by the Act (and the 18th Century equivalent of MPVs).

303. There is no equivalent doubt over the basis on which the trustees would have wished to exercise their power over the Lower Track if (in accordance with what became Mr Nunn's fall-back case) it was the Lower Track which was part of Route 3. On that assumption, the Lower Track was suited to taking all forms of toll-paying traffic identified by the Act.

304. The Turnpike Act remained in force for some 21 years or so after 1800. Any stopping up of Routes 1 to 4 would have been effected, if at all, within that period (as the 1807 Indenture in relation to Route 2 illustrates).

305. The first point I would make on the issue of stopping up is one prompted by consideration of Mr Nunn's reliance upon the common law principle of "*once a highway always a highway*". The point was relied upon by Mrs Emrys-Roberts, though I recognise it only provides some insight on the issue.

306. The point is that it has not been established in these proceedings that there has been *actual* public vehicular use of the Upper Track and the Lower Track (or the Pitch) in a way that would have been at odds with (this presumed) Route 3 having been physically stopped up. Mr Nunn abandoned his claim that a public right of way for MPVs propelled vehicles had been created by 20 years' user before 1 December 1930 (section 67(2)(e) of NERCA) and this is not a case where extinguishment of a right of way under section 67(1) of NERCA is said to be avoided because the main lawful use during the 5 years before May 2006 was public vehicular use (per section 67(2)(a)). Therefore, the absence of such public use is consistent with Route 3 having been stopped up.

307. However, I recognise that observation cannot be relied upon to *presume* Route 3 was at some stage stopped up without offending the principle. As recognised in *Harvey v Truro RC*, mere disuse or abandonment of the highway by the public (assuming that is what has come about) as opposed to some form of due legal process cannot lead to loss of its highway status.

308. Had I been persuaded of Mr Nunn's case on Issue 2 (which would have involved acceptance of Mr Carr's evidence that Bryant's Map shows the Pitch and/or reliance upon Mrs Emrys-Roberts' evidence to say the Lower Track was part of Route 3) I would have found that Mr Price had not discharged the burden on him to show Route 3 was stopped up. I say that for the following reasons:

1) No safe conclusion can be read into the fact that Route 3 has not been repaired by the local parish or (now) the Highway Authority on the basis that it has remained a public vehicular highway. Although Mr Adams pointed to the absence of any recognised responsibility on the part of the council, there is no evidence to suggest that Route 3 has fallen into disrepair (or, if it has, that any complaint has been made that might have led to the kind of proceedings in *R v High Halden (Inhabitants)*). Mr Carr, who explained that Route 3 could be one of the 17,000 or so unrecorded highways at the time NERCA was enacted, said "*there's a big difference between something that's maintainable and something that's actually maintained*." Mr Carr explained that in his experience (which included having been a highways officer himself) Highway Authorities, when asked about whether or not a highway had a certain status, tend to provide a yes or no answer as to what their records reveal, without conducting any further research as to whether or not a different status might be supported. He also pointed out that, even as a footpath, the Upper Track and the Pitch are a highway which is maintainable at public expense.

2) The Upper Track and the Lower Track are shown on the 1811 Ordnance Survey Map); the Upper Track, the Lower Track and (on this hypothesis) the Pitch are shown on Bryant's Map; and the Upper Track and the Pitch are shown on the 1839 Tithe Map. Although I bear in mind Mrs Emrys-Roberts' point about Route 2 being shown on some maps despite it having been stopped up at an earlier date, this is some indication that Route 3 (as presumed for present purposes) was not stopped up.

3) In contrast to the 1807 Indenture, there is no evidence of a sale by the trustees under section XXXI of the Turnpike Act of any part of Route 3. This last reason must be qualified, however, by my reservation about the application of section XXXI to Route 3 expressed below in my decision on Issue 7.

The Upper Track (alone) as right of way for MPVs

309. Developments in 2020 (in relation to access to and from the Paddock) and at trial (turning attention away from the Lower Track as a limb of the public vehicular way) have focussed attention upon the Upper Track irrespective of the status of the Lower Track and the Pitch. The question as to whether or not the Upper Track (only) was an

existing public right of way for MPVs, within the meaning of section 67(1) of NERCA, has accordingly assumed greater prominence.

310. As I already indicated in my introductory remarks and decision on this present Issue 3, I do not regard a claim under section 67(5) of NERCA to be sustainable in relation to the Upper Track alone. The Upper Track cannot properly be taken in isolation from what have been pleaded as and, for the purposes of the other questions within this Issue 3, have been assumed to be the other limbs of Route 3.

311. The point is illustrated by asking a rhetorical question with Plan 2 to hand. Could points C to B on Plan 2 realistically be said to have been, immediately prior to May 2006, a public vehicular highway when the tracks either side of it were either only a public footpath (E to C and A to B) or subject only to a private vehicular right of way (D to B)?

312. My decision on Issue 2, in relation to Route 3 generally, means that I have not been persuaded that the Upper Track is subject to any public right of way above and beyond that recognised by its designation as Painswick Footpath 50 and any non-MPV public use which the section 67(1) has not extinguished. As Mrs Emrys-Roberts said in connection with the final record copy of the Finance Act plan, its suitability for vehicular use is also consistent with there being only a private vehicular right over it. There is of course no reason why the public at large would have had need to pass over it in vehicles, which is why so much reliance had to be placed upon the maxim "*once a highway always a highway*".

313. The point made in my opening remarks on this Issue 3 about the substratum of the issue disappearing as a result of the outcome of Issue 2 is reinforced by the language of paragraph 27B of Mr Nunn's counterclaim. The case for saying the Upper Track was a public right of way for MPVs within section 67(5) of NERCA only works if the same can be said of whatever connected it to the turnpike road.

314. I have already addressed the pleading point that the same paragraph does not allege that, as at May 2006, the Pitch, as opposed to the Lower Track, was subject to an existing public right of way for MPVs which extended to the Upper Track. The significance of this lies not in some technical, procedural knock-out (of the kind I have rejected when dealing with the pleading point) but instead in the reflection of the reality that the Pitch is not suitable for MPVs for the reasons I have explained in my decision on Issue 2. There is good reason why paragraph 27B of the Amended Counterclaim did not allege the Pitch to have been a right of way for MPVs.

315. The relative width and moderate incline of the Lower Track mean that no similar difficulty arises in relation to the Lower Track. It is clearly capable of being used by cars and other vehicles and the 1976 Proceedings addressed it on that basis. Mr Nunn has included it within the scope of his NERCA claim in paragraph 27B. If I had found that the Lower Track was part of Route 3 then there would have been the connection to the turnpike road to support the claim to a private right under NERCA over the Upper Track. However, as with the Pitch, the necessary supporting connection is missing for the Upper Track to qualify for section 67(1) status.

316. The creation in 2020 of a new point of access to the B4070 through the Paddock obviously cannot be treated as a substitute connection to the turnpike road. This is so

whether the relevant statute-based date of inquiry is 1800 (under the Turnpike Act) or 2006 (under NERCA).

317. For these reasons, I reject the argument that the Upper Track was an existing public right of way for MPVs within the meaning of section 67(1) of NERCA.

Section 67(7) of NERCA

318. Although also now immaterial, I had identified within Issue 3 a final question about the impact of section 67(7) of NERCA. The prospect that the Upper Track might be considered in isolation from the other (presumed) limbs of Route 3 also prompted this question.

319. I had in mind (particularly so far as the other limb(s) of presumed Route 3 are concerned) that section 67(7) provides that it is irrelevant whether, before May 2006, the claimant of the private right of way under section 67(5)(a) was exercising the existing public right of way or was able to exercise it.

320. For reasons just explained the point is now academic. If the Upper Track is not within the scope of section 67(1) of NERCA then it cannot properly be within the scope of any consideration of the effect of 67(7). There is strictly no need for or purpose behind consideration of Mr Nunn's use of a right of way that has not been established.

321. However, the history of this long-running dispute is such that the terms of section 67(7) caused me to wonder what the impact of the injunctive relief in the 1976 Proceedings might be on the NERCA claim if I had reached a different conclusion on the last question above. In particular, in that scenario, whether it might be said that Mr Nunn was not only "*in fact*" (per s. 67(7)) but also "in law" (i.e. lawfully) precluded from exercising a right of way for MPVs before 2006. As his own pleaded case indicates, the issue of the exercise or non-exercise of a public vehicular right (before May 2006) only sensibly relates to the Lower Track (and the Upper Track) and not the Pitch (and the Upper Track). It was the Lower Track that was in issue in the 1976 Proceedings.

322. I have explained how the relief granted by the Court of Appeal in 1979 perhaps assumed that no public right of way would have enabled Mr and Mrs Close (and now Mr Nunn) to continue their journey by car beyond the Lower Track (and its access to the Paddock) by using the Upper Track. The court enjoined them from using the Lower Track (and, necessarily, the Upper Track) to gain access beyond the Paddock to Woodside Bungalow. That injunctive relief (and the obstacles of farm machinery which Mr Price has placed at the top of the Paddock in reliance upon it) is the reason why, immediately before 2 May 2006, Mr Nunn was not using the Upper Track as a vehicular right of way. Although the Court of Appeal in 1979 does not appear to have directly considered the scope of what was described as a public right of way over the Upper Track, and the court could not have foreseen the different entry point to it later created by Mr Nunn in 2020, his use of any MPV over the Upper Track would have been unlawful under the terms of the injunction.

323. Nevertheless, although the grant of the 1979 injunctive relief (which of course remains effective) explains Mr Nunn's 'inability' to use the Upper Track for vehicles before

2006, I would have concluded that the outcome of the 1976 Proceedings had no impact upon his claim under NERCA. In particular, the 1979 injunctive relief cannot be read as qualifying his right to rely upon the terms of section 67(5) which was enacted much later. Although the judges in the 1976 Proceedings referred to the Upper Track as being subject to a "*public right of way*" they did not directly address whether it extended beyond a right of way on foot to one supporting vehicular use, or (using the language introduced by NERCA some 17 years later) use by MPVs. Their decisions addressed the extent of the private vehicular right enjoyed by the owner of the Paddock and Woodside Bungalow. If the decisions did not and, back in 1978 and 1979, could not address the question of whether there was an "existing" public right of way for MPVs within the meaning of NERCA (i.e. as at May 2006) then in my judgment the resulting relief, even though of continuing effect in 2006, should not be regarded as having any significance on the question of whether Mr Nunn was actually exercising it or able to exercise it. Things might be very different if section 67(7) had instead made the actual exercise of the public right relevant to the claim to a private right and there were grounds for categorising the claimant's particular exercise of it as prohibited and unlawful: compare the argument in *Bakewell Management v Brandwood* mentioned in paragraph 153 above.

324. If my conclusion is right then it may be unsurprising that a judicial decision in 1979 should not impact upon a cause of action which, if valid, only arose much later. That observation on this particular aspect of Issue 3 accords with the wider conclusion on Issue 1. The then Chancellor in the current proceedings expressly recognised that the nature of the public right of way over the Upper Track would fall to be determined at the trial of Mr Nunn's counterclaim. By then the claim under NERCA had of course accrued, though he had no more inkling of it than the Court of Appeal could have in 1979.

Issue 4

325. Issue 4 is (or, rather, was) whether a private vehicular right of access to Woodside Bungalow arose under section 67(5) of NERCA on the basis that the exercise of a vehicular right of way over the Upper Track before May 2006 was reasonably necessary to obtain access to that property. I have explained in Section F that the focus should be upon whether or not access to Woodside Bungalow at that time was reasonably required rather than essential.

326. As with Issue 3, the determination of this issue is academic in the light of my decision on Issue 2 (as reinforced by reflection upon the further conclusions I have reached in relation to the Upper Track, alone, within Issue 3). Nevertheless, it is sensible to address Issue 4 when there has been argument as to whether Mr Nunn's use of a vehicle over the Upper Track is 'reasonably necessary' to obtain access to Woodside Bungalow.

327. The evidence of both Mr Price and Mr Nunn shows that Mr Nunn was in fact using the Upper Track for vehicular access under the "shuttle service" from the Paddock, at least for the first 10 years or so of his ownership of Woodside Bungalow. That said, I have explained how this probably involved the flouting of the Court of Appeal's 1979 injunction in a way which led Mr Price to protest and react. The shuttle service came to

an end no later than 2004-5 when Mr Price placed his obstructions at the top of the Paddock.

328. I have also already addressed in the context of Issues 1 and 3 above the point that, by reason of section 67(7) of NERCA, both Mr Nunn's actual exercise (or not) of any public vehicular right of way, at least immediately prior to 2 May 2006, and his ability to exercise it at that time are irrelevant to the answer required by Issue 4. I have also explained within my determination of Issue 3 how the decision behind the 1979 injunction cannot be taken to have addressed any of the legal issues raised by the language of section 67 more generally.

329. That said, even though the court in the 1976 Proceedings did not and could not address the question of what is meant by obtaining access on the basis that it is 'reasonably necessary', the fact that the injunction has (at least since around the turn of this century) in fact operated to prevent Mr Nunn driving a vehicle over the Upper Track does bear upon that question. The position is that, immediately before May 2006 and for a number of years previously, Mr Nunn and his family were accessing Woodside Bungalow otherwise than by MPV.

330. Despite that, if the other building blocks in his case had been there for Mr Nunn, I would have concluded that the use of an MPV over the Upper Track was reasonably necessary to obtain access to Woodside Bungalow.

331. The evidence at trial supports that conclusion. Mr Nunn bought Woodside Bungalow in the belief (albeit mistaken) that he would be able to drive a car up to his property. Indeed, he did so for a number of years using the shuttle service to and from the Paddock until he realised that the 1979 injunction did not permit that. However, the court in the 1976 Proceedings was not concerned with the question of whether vehicular access over the Upper Track was reasonably required to gain access to Woodside Bungalow and, on the test under section 67(5), I regard Mr Nunn's wish to drive a car over it being of more significance than the injunction which prevents him from doing so.

332. In my judgment Mr Nunn's wish to do so is based on something more than mere convenience. Looking at the position as at 2 May 2006 (when he had the "old" vehicular access up to the Paddock over the Lower Track but not the new 2020 access) I consider that vehicular access to Woodside Bungalow over the Upper Track was reasonably necessary. Using the language of Peter Gibson LJ in *Wheeler v J.J. Saunders Ltd*, access to Woodside Bungalow by MPV was conducive to the reasonable enjoyment of it. The property was the home of Mr Nunn and his family. Although the 1979 injunction permitted vehicular access to the Paddock, which avoided the need to park on the B4070 and a walk via the Pitch and the Upper Track, the use of a car (especially in the winter months or bad weather) to transport people, goods and shopping up to Woodside Bungalow was reasonably required even if it might not have been absolutely essential.

333. Had it been material to the outcome of the case I would therefore have decided Issue 4 in favour of Mr Nunn. Doing so on the basis of favourable decisions on Issues 2 and 3 (in relation to his vehicular use of the Upper Track) would have prompted the need to consider whether I would have been competent to vary the 1979 injunction or whether an application under the provisions of CPR 52.30 (as flagged by Mr Adams in his

submission on *res judicata*) would have been required to avoid the "real injustice" of it having the effect I have explained in paragraph 53 above.

Issue 5

334. As explained more fully in addressing Issue 1 above, advancing a claim which amounts to a collateral attack on a previous judgment may be an abuse of process which should not be countenanced by the court. Paragraph 17 of Mr Nunn's Defence says that Mr Price's claim to ownership of the Upper Track (or part of it) amounts to just such an attack upon the 1978 judgment of Judge Cridlan and is an abuse of process. This defence is therefore relied upon by Mr Nunn to forestall any success for Mr Price under Issue 6 or Issue 7.

335. As with any such abuse of process challenge to the pursuit of the NERCA claim, one might have expected the argument of 'collateral attack' to have been raised for determination at an earlier point than the trial. The Defence was served in 2011. In addition to alleging abuse of process, it says Mr Price is "*estopped from alleging [ownership] such estoppel arising by reason of issue estoppel, litigation estoppel and Res Judicata*." I read "litigation estoppel" as meaning the rule in *Henderson v Henderson*. So far as I can see, the reference to "*res judicata*", as a portmanteau term, adds nothing to the other two mentioned.

336. In contrast to the developments at trial over Mr Nunn's NERCA claim, Mr Price's claim to ownership of the Upper Track (either the whole of it or half of it up to its middle line) has remained unchanged throughout the proceedings. Accordingly, Mr Nunn's opposition to the pursuit of the claim on estoppel grounds has wavered less. If anything, his reliance upon this pleaded defence was more prominent by the end of the trial than before. Whereas the written opening submissions served on behalf of Mr Nunn on the question of ownership (which were in fact settled by other counsel but adopted by Mr Moore) addressed only the merits of Mr Price's alternative claims to ownership, Mr Moore began his closing submissions with this point.

337. Using language which again prompts thought about the proper stage in proceedings at which such arguments ought to be addressed (see my general observations about the NERCA claim in Section A above) Mr Moore submitted that Mr Price is "*precluded from bringing the claim as to ownership by reason of an issue estoppel or advancing the claim being an abuse of process*" (with my emphasis by underlining). Mr Moore relied upon paragraphs [68] and [69] of the Chancellor's earlier judgment in this case which I have already quoted in paragraph 214 above in addressing Issue 1.

338. Mr Price's ownership claim having been pursued to a trial, the submission that this judgment should not now engaged with it on its merits was based upon things said in evidence before HHJ Judge Cridlan and also what the judge said in his 1978 judgment. I have already referred in Section B above to some of what HHJ Cridlan said about the ownership of the Upper Track. In drawing my attention to this evidence and to the judge's observations Mr Moore highlighted that counsel for Mr Price's parents was Mr Colin Sara who later became the author of a recognised textbook on the law of boundaries and easements.

339. In his evidence in the 1976 Proceedings, Wing Commander Price said:

> "*I had known that the upper part of the lane did not belong to me since I purchased the farm but even so I found it hard to accept the fact. I accept it now and have since I was told so by my solicitors and before that by the Country Landowners Association whom I went to in about 1976.*"
> and
>
> "*My deeds show that I own the lower lane: that is the red lane. The upper lane got left off my deeds at some time.*"

340. In his judgment, Judge Cridlan said:

> "*The particulars drawn up by Bruton Knowles and Co. and the Solicitors for the Vendors were admirably specific as you would expect and on Page 4 of the particulars they give a guide as to the ownership of the boundaries of SLAD FARM. They accepted no responsibility for it. Boundaries are sometimes a little difficulty to gauge the ownership of, but they marked them where they were not certain of them with a "T"; and it is agreed by Counsel for both parties and the parties accept that SLAD Farm, owned as it is by the PRICE', ceases at the northern boundary of the wide right of way between where it merges with the red lane and the 16 or 17 acre field, and so it follows from that that as WOODSIDE HOUSE certainly cannot extend beyond the Cotswold wall that the ownership of the footpath is not known and has become, as it were, public property.*
> *Consequently nobody has any right to order anybody off it because there is no known owner. That must follow – subject to any guidance a person might think fit to give to another person as to the type of uses to which the road was being put."*

341. Mr Moore submitted that the issue of the ownership of the Upper Track was therefore raised, canvassed, conceded and decided in the 1976 Proceedings and there was nothing unjust in holding Mr Price (who was a party to the 1976 Proceedings and is his parents' successor to the Farm) to a concession made nearly 50 years ago in circumstances where he has previously had parts of Mr Nunn's case struck out on *res judicata* principles.

342. However, although the ownership of the Upper Track was clearly raised in the 1976 Proceedings, what I have said in Section A above about the subject matter of the 1976 Proceedings and the scope of the judicial decisions in those proceedings leads me to conclude that what Judge Cridlan said about it was clearly obiter dicta.

343. No declaration was made, or required to be made, in the 1976 Proceedings about ownership (or non-ownership) of the Upper Track. If one had been required, I imagine that Judge Cridlan would have wanted some firmer evidential basis for it than some agents' particulars which, as he expressly recognised, did not purport to be determinative of boundaries. Reading his judgment confirms that he did not address the first Conveyance (of 1919) on which Mr Adams now relies in addressing Issue 6 and he only referred to the second (of 1928) to focus upon the Paddock and the adjoining Lower Track. The judge offered up in rather speculative language the view that the Upper Track had become public property. The process by which that might have happened is not clear to me when the public's interest was in use, not ownership, and the Upper Track has not been adopted by the Highway Authority. The judge then referred to the absence of knowledge about its ownership.

344. Therefore, I cannot accept that the 1978 judgment supports an issue estoppel or that Mr Price needs to attack it, in any meaningful way, in proceedings in which he does offer up evidence to establish the knowledge required for the grant of declaratory relief.

345. There remains the concession made by Mr Price's father in evidence, and noted in the judgment, that the Farm ceases at the northern boundary of the Upper Track. Wing Commander Price recognised that the Upper Track "*got left off my deeds at some time*" and also what others had said about that.

346. The first point to note about the potential impact of this is that it cannot, on any view, operate to knock out Issue 7 from these proceedings. Mr Price's alternative claim to ownership of the Upper Track up to the median line is advanced on the basis that the Farm's boundary is where Judge Cridlan thought it was. The same goes for Mr Nunn's express averment that he owns the other half where the Upper Track abuts the boundary of Woodside Bungalow on the other side.

347. Further, in my judgment, the previous evidence cannot operate to preclude Mr Price from pursuing his case on Issue 6.

348. As I explain next, that case is advanced in full recognition that the Upper Track was indeed "left off" the deeds, at least so far as the shading of it on the relevant conveyancing plans was concerned. I cannot see how the evidence of Mr Price's father on that point (or what cannot now safely be assumed to be anything more than that point) estops Mr Price from pursuing a legal argument which recognises the same thing. The point recognised in that evidence of long ago does not necessarily determine the outcome on Issue 6.

349. The father's statement was made on oath and referred (albeit in the vaguest of terms) to legal advice on the point but, again, no declaratory relief about ownership of the Upper Track was made in reliance upon it. I cannot see how such an oral statement, without more, can be treated as dispositive given that it related to the ownership of land. This is not a case where someone other than Mr Price is claiming or has claimed rival ownership in reliance upon the statement having been made. In addition to the estoppel defence, Mr Nunn asserts his ownership of one half of the Upper Track adjacent to Woodside Bungalow but he does so by reference to the *ad medium filum* principle and not because of anything said by Mr Price's father or by Judge Cridlan.

350. That said, I recognise that Mr Moore's argument requires me to address either what is or should be regarded as determinative for litigation purposes (at least Mr Nunn's defence to the ownership claim if not his own rival assertion) as opposed to 'dispositive' in the land-dealing sense of that word: a litigation estoppel rather than a proprietary estoppel.

351. The argument amounts to saying that Mr Price should not be permitted to assert the ownership of the Upper Track which, it is to be assumed for present argument, he would have but for the evidence previously given by his father. To pose the question that way is almost to answer it.

352. As Mr Price said in cross-examination, when his father's concession in the 1976 proceedings was put to him:

> "*Yes, but don't forget that Judge Cridlan didn't have all the information that we're looking at now. As I said in my statement, he was only looking at …. the plans of the farm and also Woodside Bungalow. I don't think he even had the … plans of Woodside House. So, and it was, that's all it was, just looking at the plans.*"
>
> And:
>
> "*And as I said in my statement, he wouldn't have considered anything like a presumption of ownership.*"

353. In my judgment, that response completes the answer to the estoppel point. Not only is there no issue estoppel but neither is there any basis for concluding (on a "better late than never" approach) that the ownership claim should be categorised as an abuse of process.

354. It is because Judge Cridlan was only being asked to determine the extent of the private right of way over the Lower Track enjoyed by the owner of the Paddock and Woodside Bungalow that it cannot now be said that Mr Price and his parents should then have advanced the claim to ownership of the Upper Track that he would now like to prove. Even applying (at this very late stage of the current proceedings) the principle in *Henderson v Henderson*, that claim cannot be categorised as abusive and duplicative.

355. Therefore, in my judgment the answer to Issue 5 is that Mr Price is not estopped or otherwise barred from pursuing his claim to ownership of the Upper Track, or half of it, by reason of the judgment of HHJ Cridlan or things said in the 1976 Proceedings. A decision on Issue 6, and possibly Issue 7 in the alternative, is therefore justified and required in these proceedings.

Issue 6

356. Issue 6 is whether Mr Price has established ownership of the Upper Track, by which I mean over its entire width.

357. Mr Price's case is that the historic records relating to the registration of the Vatch Mills estate under the 1862 Act show (through its exclusion from that estate) that the Upper Track is included within the ownership of the Farm. Mr Adams submitted that, as the Farm previously formed part of the neighbouring Grove Estate, Mr Price's ownership of the Upper Track derived from Conveyances dated 10 December 1919 ("**the 1919 Conveyance**", of the Farm) and 21 August 1928 ("**the 1928 Conveyance**", of part of Worgans Wood adjoining the Lower Track and the Upper Track). It is not disputed that Mr Price owns the Lower Track.

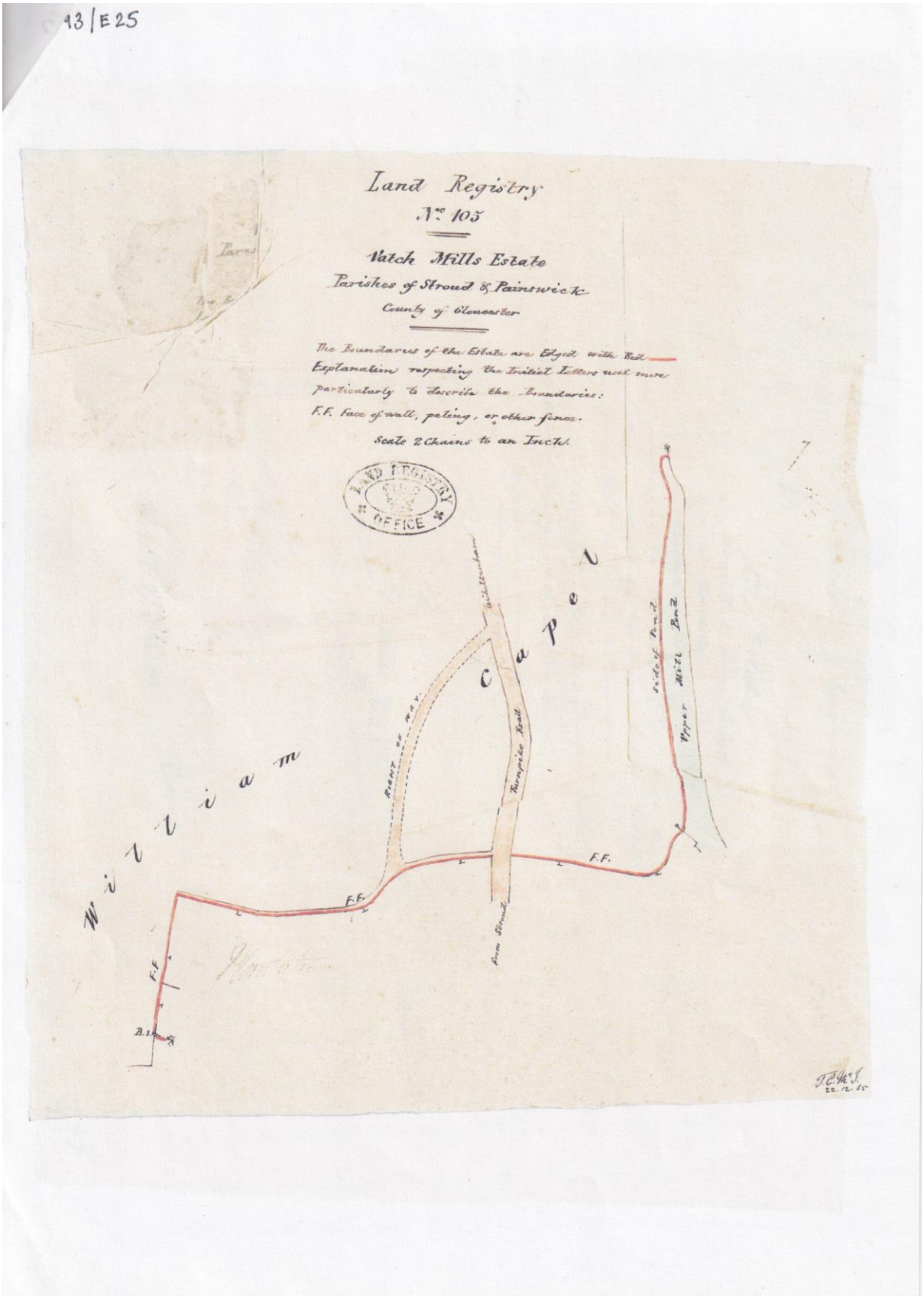
358. In his opening submissions, Mr Moore pithily summarised Mr Nunn's competing case by saying that the evidence showed that Mr Price either owned half the Upper Track (see Issue 7 below) or none of it. The same went for Mr Nunn and the owner of Woodside House on the other side of the Upper Track. By the end of the trial Mr Moore relied upon a provision of the Turnpike Act to say that, if the Upper Track did form part of Route 3 and it had been stopped up under it, then ownership of it had vested in the

trustees under the Act. As this further argument impinges upon Mr Price's case for owning even half of it, I address it in the context of Issue 7.

Summary of the Evidence on Issue 6

359. I referred in my concluding remarks on Issue 2 above to a diary entry from 1846 which sets context for the identification of the Vatch Mills Estate, in the location of the Upper Track, for the purpose of its later registration under the 1862 Act (see also Section F above and the legal principles governing ownership). I have already expressed the view that this probably related to a previously disputed claim to ownership of a segment of 17 Acres. I do not regard it as being of evidential significance on the question of ownership of the Upper Track.

360. One of the plans lodged in support of the 1866 application for registration (which features the Pitch, the Lower Track and the Upper Track) is reproduced below:


13/E25
Land Registry
No. 105
Vatch Mills Estate
Parishes of Stroud & Painswick
County of Gloucester
The Boundaries of the Estate are Edged with Red
Explanation respecting the initial Letters used more
particularly to describe the Boundaries:
F.F. face of wall, paling, or other fence.
Scale 2 Chains to an Inch.
LAND REGISTRY OFFICE
William
Capel
Turnpike Road
F.F.
B.S.

361. The quality of this image reflects its appearance in the trial bundle from which I have copied it. The writing states that it was drawn to the scale of "*2 Chains to an Inch*" (i.e. 132 feet to the inch) – the above image not necessarily being to that scale - with the relevant the boundaries of the estate being edged with a red line and an "*Explanation respecting the Initial Letters used more particularly to describe the boundaries: F.F, face of wall, paling or other fence*."

362. The notice of the application for registration dated 17 March 1866, addressed to William Capel, concluded by stating:

> "*A tracing of the boundaries shown on such map, of that part of the property comprised therein, adjoining the land of which you are the owner, is attached hereto*."

363. On this relevant plan (if the dotted line marking the western side of the Lower Track is continued to what becomes the northern edge of the Upper Track marked by a continuous black line) the "F.F." adjacent to the Upper Track appears on the northern edge of the Upper Track but, allowing for an obvious blurring of lines as it then tracks west, the red line is drawn on its southern edge. [A similar observation can be made about the markings of the boundary of the Vatch Mills Estate adjacent to the Pitch.] It will also be noted that the 'T' marks - which still today normally indicate ownership of a boundary structure or the liability of repair and maintenance (see '*HM Land Registry plans: boundaries (practice guide 40, supplement 3*' (Updated 9 March 2020)) – appear on the southern edge. On the copy of this plan in the trial bundle (as opposed to the above image) it is possible to discern a little more easily that there is a sliver of uncoloured Upper Track – continuing from what is shown as the wider, uncoloured Lower Track – between the solid line on the northern side and the red line.

364. On the basis that it was only the southern side of the Upper Track (the side of Woodside Bungalow and Woodside House) which was bounded by a wall – shown by the video evidence to exist today – Mr Adams submitted that the ownership of the Vatch Mills Estate, of which Woodside House and its grounds formed part, did not include the Upper Track (not even *ad medium filum*). On that basis, he said that the only question then was whether ownership of the Upper Track can be shown to be included within the ownership of the Farm.

365. The 1919 Conveyance to one John Mailes identified the following parcels of land as its subject matter:

> *"All that Farm known as Painswick Slad Farm situate in the Parish of Painswick in the County of Gloucester and containing seventy three acres one rood and thirteen and two thirds perches or thereabouts as the same were lately let to Mr and Mrs Ayers with the appurtenances thereof and are now in the occupation of the Purchasers which premises are more particularly described in the First Schedule hereunder written and delineated on the plan drawn in the margin of this Indenture and thereon coloured pink such plan being copied from the Ordnance Survey Map of the said parish of Painswick and the numbers in such schedule referring to the corresponding numbers in such map."*

366. The pink colouring did not extend to the Upper Track, or to the Lower Track. The conveyance plan appears to have been drawn by reference to an Ordnance Survey Map of 1902 (drawn to a scale of 25.344 inches to the mile). The Ordnance Survey Map showed the footpath between the Upper Track and Folly Lane as passing over 17 Acres (described in the 1919 Conveyance as 'Vatches') rather than falling on the Worgans Wood side of its boundary; and, on that basis, the footpath over 17 Acres was shaded pink in the conveyance plan.

367. The subject matter of the 1919 Conveyance comprised more than one of the 28 lots identified in auction particulars prepared by Knight, Frank & Rutley for the sale of the Grove Estate, either as a whole or in lots, at an auction on 5 June 1914. I note the auction therefore took place three weeks before the trigger event for the First World War and I assume that tumultuous times played their part in the conveyance not taking place until after the war was over.

368. Part of Lot 18 at the 1914 auction ('*Painswick Slad Farm'*) was a spur of Worgans Wood lying east of 6 Acres (some 1.931 acres of Worgans Wood which abutted both the Lower Track and the lower end of the Upper Track) but that part was not conveyed by the 1919 Conveyance. It was not conveyed (by those representing the Grove Estate) until the 1928 Conveyance in favour of Percy Teakle.

369. The plan accompanying the 1914 auction particulars and the 1919 Conveyance plan show a dotted line between this part of Worgans Wood and lower end of the Upper Track. On both plans this becomes a solid line (on each side of the Upper Track) where the Upper Track abuts 6 Acres. (In this respect they are similar to the plan prepared in accordance with the 1862 Act and reproduced above.) Whether the auction plan also shows the Lower Track shaded in light green (i.e as part of Lot 18) is less easy to discern but it would not be surprising if it was so shaded when, as marketed, Lot 18 included that part of the Worgans Wood on the western side and the Farm and the Paddock on the eastern side of the Lower Track. In contrast to the doubt over the possible shading of the Lower Track, no part of the Upper Track (up to the entrances to 17 Acres) was shaded in the auction plan.

370. The parcels clause in the 1928 Conveyance is as follows:

> *"ALL THAT piece or parcel of woodland part of Worgans Wood containing one acre three roods and twenty nine perches or thereabouts situate in the Parish of Slad formerly in the Parish of Painswick in the County of Gloucester and for identification only and not by way of grant or restriction delineated and coloured pink in the plan drawn hereon"*

371. The plan on the 1928 Conveyance is both small and drawn to a small scale but it does clearly show the Lower Track as shaded along with the part of Worgans Wood being conveyed. As was the case with the 1919 Conveyance plan, no part of the Upper Track was shaded.

Decision and Reasons on Issue 6

372. In my judgment, Mr Price has failed to establish that he owns the entirety of the Upper Track.

373. There is nothing in the conveyancing material which indicates that the Upper Track was included in the land conveyed in 1919 and 1928. The absence of evidence to support the inclusion of the Upper Track within the property of the Farm is highlighted by the contrasting way in which the Lower Track was dealt with by those conveyances.

374. Before the 1928 Conveyance Percy Teakle had already acquired about 71 of the 73 odd acres that were the subject matter of the 1919 Conveyance. He did so under a Conveyance dated 29 September 1925 made in his favour by Samuel Maddy (to whom Mr Mailes appears to have transferred the Farm in 1922). However, the Paddock was excluded from that conveyance as Mr Maddy had already sold it to a Mr Brown by a Conveyance dated 26 March 1923. Allowing for the element of doubt introduced by its language ("*so far as the Vendor can lawfully grant the same*"), Mr Maddy granted the purchaser of the Paddock a right of way over the Lower Track as if he owned it. Mr and Mrs Close relied upon the right of way over the Lower Track to the Paddock, conferred by this 1923 Conveyance, in the 1976 Proceedings. When Mr Maddy sold the Farm to Percy Teakle in 1925 he did so on terms that the Lower Track was (with the same conditional language used) subject to that right of way. [The point never came to be tested but Mr Maddy might have built a claim to ownership of the Lower Track *ad medium filum* under the terms of the 1919 Conveyance.]

375. If there was any doubt about Percy Teakle's ownership of the Lower Track from September 1925 then the 1928 Conveyance put an end to it. Not having sold the adjacent part of Worgans Wood to Mr Mailes in 1919, the shading on the 1928 Conveyance plan indicates that the Grove Estate intended to include the Lower Track within that conveyance. [It should be noted that (on this basis) the Lower Track was conveyed "*free from encumbrances*", and with no mention of the right of way purportedly created in 1923, but it is perhaps unsurprising that those representing the estate would not have wished to concern themselves with the effectiveness of Mr Maddy's grant. Again, it is quite possible that the Grove Estate considered it owned at least one half of the Lower Track after 1919.]

376. Mr Adams submitted that there would have been no reason for the Grove Estate to retain any interest in the Upper Track and there is no evidence to rebut the presumption that the entirety of the estate's interest in the Upper Track would have been conveyed by the 1919 Conveyance. His alternative submission was that, if ownership of the Upper Track was retained by the Grove Estate after 1919, then for the same reasons it is deemed to have passed to Percy Teakle in 1928.

377. These submissions, in support of a claim to ownership of the entirety of the Upper Track, again invite a comparison between the Upper Track and the Lower Track. In particular, they beg the question as to whether the Upper Track was either then regarded or can now be assumed to have been exclusively within the ownership of the Grove Estate.

378. Doubt on this point emerges from consideration of the plan accompanying the 1914 auction particulars showing the extent of the Grove Estate. I have already remarked that the shading on this plan *perhaps* covers the Lower Track whereas the Upper Track is clearly not shaded. However, even assuming that neither was in fact shaded (nor intended to be shaded) on the plan, the obvious difference between the two tracks, evident from the auction plan and 1862 Act plan, is that the Lower Track was bounded on both sides by the Grove Estate whereas (save at the lower end of it) the Upper Track

was bounded by the Grove Estate on one side and the Vatch Mills Estate on the other. I have also already noted how a dotted line along the edge of the part of Worgans Wood, later sold to Percy Teakle in 1928, becomes a solid line in both of those plans where the Upper Track runs alongside 6 Acres. In contrast to the Lower Track below and the footpath above (which is shown as part of 17 Acres on the 1919 Conveyance plan) the Upper Track lay between two neighbouring estates, not within one single estate.

379. In my judgment this distinguishing feature undermines Mr Adams' submissions built on an assumption that the Upper Track lay within the sole ownership of the Grove Estate prior to 1914. It therefore follows, at least so far as Mr Price's claim to ownership of the entire width of the Upper Track is concerned, that I do not see the consequence of this to be one where, after 1928, the Grove Estate retained ownership of an isolated and useless strip of land.

380. That would have been the consequence if the Grove Estate had retained ownership of the Lower Track after 1928, the adjoining part of Worgans Wood (which was described by the 1914 auction particulars as being 'in hand' rather than tenanted) having then been sold off. The retention by the Grove Estate of the whole (or one half) of the Lower Track after 1928 would have been at odds with the legal propositions relied upon by Mr Adams (not that the 1928 Conveyance appears to be unclear in its delineation of the land conveyed) in circumstances where the estate had sold off its land on either side of it. But, again, this simply highlights that it did not own land on either side of the Upper Track.

381. Mr Adams made an alternative submission that the 1919 Conveyance of the Farm "*with the appurtenances thereof*" operated to include within it the ownership of the Upper Track. I do not regard this as a good point. Things that are appurtenant to ownership, such as ancillary buildings or services which are part and parcel of the property conveyed, or the right to enter Worgans Wood for the purpose of examining and cleaning the water supply to the Farm (which was noted in the auction particulars for Lot 18 and for which the 1919 Conveyance made provision) cannot determine the physical extent of such ownership. In *Commission for New Towns v Gallagher* (referred to in paragraph 189(3) above on the *ad medium filum* principle) Neuberger J said, at [64]: "*Authority suggests that, at least so far as its normal meaning is concerned, land cannot be appurtenant to other land*." The physical extent of the land conveyed was instead addressed by the words in the 1919 Conveyance which followed the phrase quoted at the beginning of this paragraph.

382. For the same reasons I conclude that Mr Price's claim to ownership of the Upper Track is not assisted by reference to section 6 of the Conveyancing Act 1881. There is insufficient evidence to support the conclusion that the Upper Track was "*reputed or known as (being) part and parcel of or appurtenant to*" the Grove Estate (exclusively).

383. It is implicit in what I have so far said in rejecting Mr Price's claim to ownership of the whole of the Upper Track that I do not share the assumption that the Vatch Mills Estate could have no claim to ownership *ad medium filum* because of what is shown on the plan lodged in support of its registration under the 1862 Act. Allowing for a certain indistinctness of lines and colouring, that plan appears to show that both the Vatch Mills Estate and the Grove Estate each had boundaries which fronted the Upper Track. On the basis that, from the early part of the last century, the Upper Track can be considered to have been a private road leading from the Farm to 17 Acres (an assumption which

is justified by the evidence of Mrs Emrys-Roberts despite what was otherwise her position on Issues 2 and 3) it would follow in my judgment that, subject to the other considerations addressed in Issue 7 below alongside Mr Moore's submission against any such neighbourly ownership which I have reserved for that issue, the Vatch Mills Estate should be presumed to have owned the Upper Track up to its middle line.

Issue 7

384. Issue 7 is an alternative to Issue 6 and raises the question whether Mr Price owns half of the Upper Track (throughout its length) if not the entirety of it. Mr Price has relied in the alternative upon the *ad medium filum* principle so that he might maintain a claim for trespass should Mr Nunn use the Upper Track otherwise than as a footpath.

385. Mr Moore recognised in his opening submissions that there was a lot to be said for invoking the *ad medium filum* presumptions in order to avoid what would otherwise be a vacuum in title. Mr Moore said that this would be a pragmatic solution. He highlighted that those presumptions should apply equally in favour of Mr Nunn (the Amended Defence pleads that Mr Nunn owns half of the Upper Track adjacent to Woodside Bungalow) and, on the basis that Mr Nunn had established a private right to use an MPV over the Upper Track, he cautioned the court against reaching any further conclusions about the effect that Mr Price's ownership of half would have in restricting Mr Nunn's vehicular access to Woodside Bungalow.

386. However, that observation (and averment) about split ownership came to be qualified by Mr Moore's position in closing submissions that, if the Upper Track were found to be part of Route 3 which had then been stopped up under the Turnpike Act then it was owned by the trustees under the Act.

387. The lengthy provisions of section XXXI of the Turnpike Act included confirmation that:

> "…. The Lands constituting any former Roads, in lieu whereof some new Road shall be made by virtue of this Act, unless leading over some Common or Waste, or to some Village, Town, or Place, to which the respective new Road doth not lead, shall be vested in, and shall and may be sold and conveyed by the said Trustees, or any Five or more of them, for the best Price that can be gotten for the same, or may be exchanged for other Lands used for the Purposes of this Act ….."

388. Mr Moore said this provision should be given its plain meaning. As illustrated by the exercise of their power of sale under the 1807 Indenture, concerning part of Route 2, on Mr Price's own case the ownership of the Upper Track remained with the trustees.

389. In response to this submission and relying upon the principle governing ownership of the subsoil of any lawfully stopped up highway mentioned in paragraph 129 above, Mr Adams said the trustees had probably sold too much under the 1807 Indenture. He said the trustees should probably have sold only the surface materials of the relevant part of Route 2.

Decision and Reasons on Issue 7

390. Allowing for Mr Moore's final submission, it might be thought that the inevitable result of my decision on Issue 6 is that Mr Price does own the Upper Track up to its middle line, with Mr Nunn and the owner of Woodside House, through their own roots of title back to the Vatch Mills Estate, respectively owning certain lengths of its other half.

391. That is the conclusion I have reached because my decision on Issue 2 (and my finding within Issue 3, on the alternative hypothesis, that Mr Price has not made good his case on the stopping up of Route 3) means that there is no traction for Mr Moore's submission against Mr Price having any ownership interest in the Upper Track.

392. Had I concluded otherwise then further reflection on the point in the course of preparing this judgment has led me to conclude that, rather than being left to my own (quite possibly misguided) devices, I would have needed further assistance from counsel on a submission which marks a departure from Mr Nunn's own pleaded case and where, if Mr Moore will allow me, the basis for it and implications of it being right would need to be more fully thought through.

393. For example, there is firstly the question of whether or not the Upper Track was unlike the part of Route 2 which was sold to Mr Partridge in 1807 in that, for the purposes of section XXXI, it was a road to a place – Wickeridge Hill – to where the turnpike road "*doth not lead*". Reference to Plan 1 reveals the potential for distinguishing Route 2 on the basis that it could be said to lead to Stroud. Then there is a question as to the true interpretation of the 1807 Indenture, in favour of the adjoining landowner, and what the trustees were selling to Mr Partridge. Mrs Emrys-Roberts described it as "feoffment" (i.e. feudal speak for transfer of freehold ownership), and the parties were content to treat it as such, but the dispositive language of "*bargain sell aliened enfeoff release convey and confirm*" in relation to that part of Route 2 (and in particular the word "*release*") causes me to wonder whether it might have related to the surface materials only on the basis that the transferee, as adjoining landowner, already owned the subsoil.

394. Finally, and to my mind most significantly as an illustration of the complexities within Mr Moore's submission, there is the point that one would have expected any trusteeship under the Turnpike Act to have come to an end not too long after the mid-1820's (compare section LVII). Mr Moore submitted that authorities addressing the transfer of interests between highway authorities (and the potential limitations upon the 'vertical plane' of their ownership) are of little relevance: compare *Southwark LBC v TFL* mentioned in paragraph 145 above. That case concerned the meaning of a 'highway' in the sense of the extent of the real property transferred to a successor highway authority. However, if Mr Moore is correct, then it leads one to wonder who owns the "*The Lands constituting any former Roads*" if (when I have no grounds to doubt and every reason to assume) the trustees gave up a couple of hundred years ago on the exercise, under section IX of the Turnpike Act, of replenishing their number as one or more of them died. Thoughts, which I fully recognise might well be misguided, therefore arise of the land passing to the Crown, or the Crown Estate, by escheat and/or as *bona vacantia* on the basis that the trust created by the statute is defunct. If the modern Highway Authority (funded by sources other than those identified in the Turnpike Act) would not be both interested and responsible, the object of the statutory trust established to keep the turnpike road in repair is not easy to identify in 2023.

395. This is one aspect of the case where the absence of a clearly pleaded case has therefore hindered the development of a mature argument for and against the submission. As it is, there is no need to trouble the parties further about the implications of Mr Moore's argument that the Turnpike Act trustees own all of the land under the Upper Track.

396. In deciding that Issue 7 is to be answered in the affirmative I should make it clear that it follows further consideration of what Morgan J said in *Paton v Todd.* I have already explained that he expressed doubt about the application of the *ad medium filum* presumptions to a public footpath, especially a narrow one.

397. Although I can see the reservations expressed by Morgan J would have real force in relation to the Pitch, it seems that they do not undermine the application of the presumptions in relation to the Upper Track. The Upper Track is wider than the Pitch (and wider than Painswick Footpath 50 between Points Z and F on Plan 2) and is also used for farm vehicles. The Upper Track can therefore be regarded as a private road for the purposes of the *ad medium filum* principle. Even though the Pitch *might* be outside the ownership of its neighbouring landowners, I am also conscious that any contrary conclusion would produce an incongruous gap in the private ownership (within the Farm) that is established by the 1919 Conveyance and the 1928 Conveyance in relation to the Lower Track and that part of the footpath/private road which crosses 17 Acres.

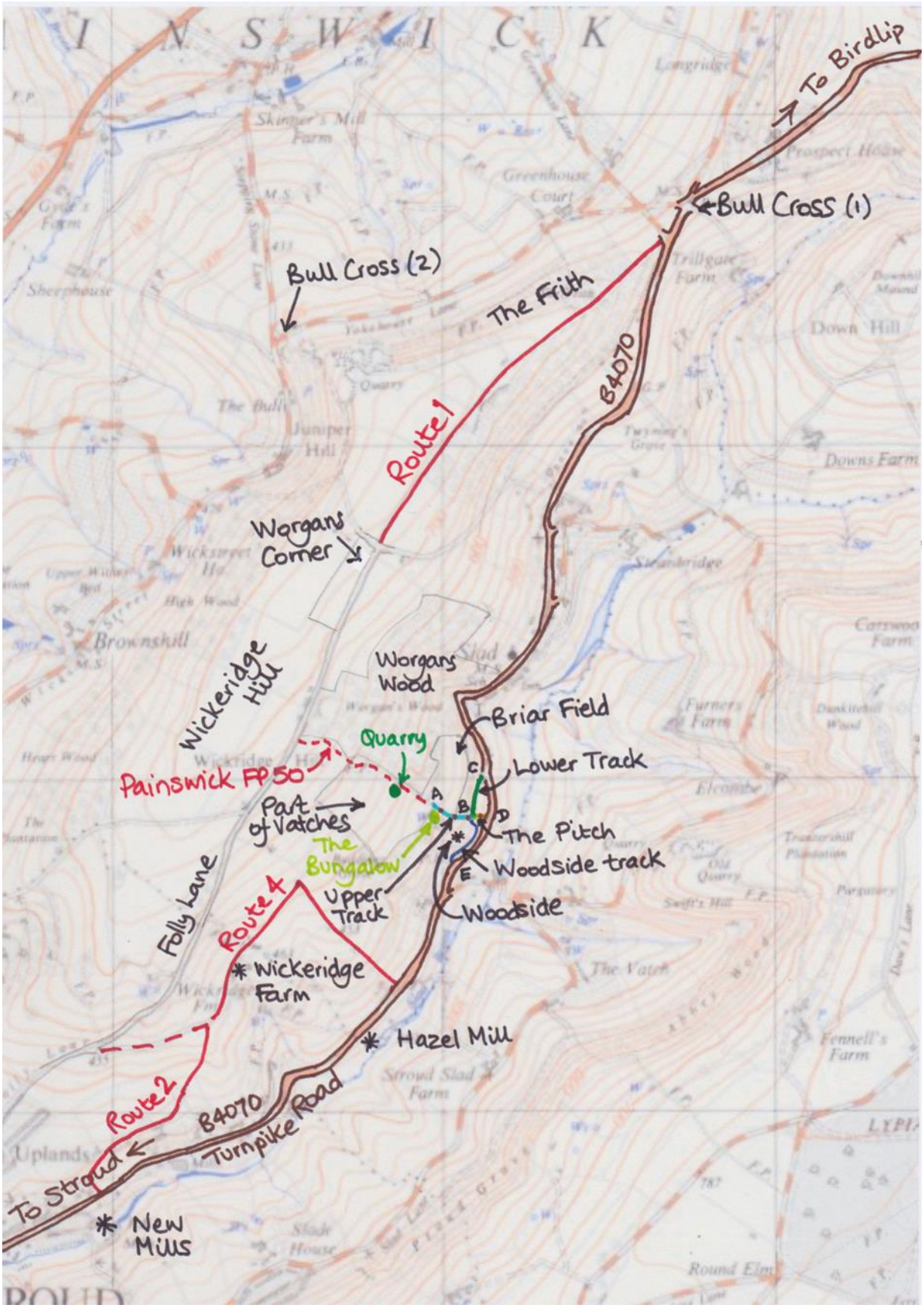
H. DISPOSAL

398. The determination of the 7 issues and the subsidiary questions within each one therefore results in the decisions that Mr Price owns half of the Upper Track, up to its middle line, and that Mr Nunn does not have a private right of way over it for MPVs.

399. I would ask the parties to agree the appropriate declaratory relief which will give effect to those decisions and also to identify for my determination at a further hearing any consequential matters that cannot be agreed. In view of the stance adopted by the current owners of Woodside House (see paragraph 79 above) it is probably sensible that the order addresses all adjacent owner interests in the Upper Track as well as Mr Price's.

400. As this judgment has been handed down remotely, the handing down is adjourned for the purpose of extending the period for filing an appellant's notice. Any application for permission to appeal should be made at that further hearing and, if one is made, I will as part of my decision on the permission application make a direction under CPR 52.12 in relation to the time for filing an appellant's notice.

Appendix 1: Annotated Ordnance Survey Map (Mrs Emrys-Roberts)



Appendix 2: Location Plan (Mr Carr)

1