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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case No: QB-2019-000855

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 29 September 2021

Before:

MASTER DAGNALL

B E T W E E N :

KEVIN ALAN BROWN — Claimant

- and -

(1) MICHAEL FISK
(2) SOTERIA INSURANCE LTD
(3) MOTOR INSURERS BUREAU
(4) SECRETARY OF STATE FOR TRANSPORT — Defendants

MS L. NELSON (instructed by George Ide LLP) appeared on behalf of the Claimant.

MR S. GRIME QC (instructed by Weightmans) appeared on behalf of the Second Defendant.

THE FIRST, THIRD AND FOURTH DEFENDANTS were not present and were not represented.

APPROVED J U D G M E N T
(**via Microsoft Teams**)

MASTER DAGNALL:

1 This is my judgment on an application made by the second defendant, by an application dated 15 December 2020, for reverse summary judgment against the claimant in relation to this claim, brought by the claimant following his allegedly being wrongfully injured by a car driven by the first defendant in an area of land at Ham Lane, Lewes, Sussex ("the yard"), the event taking place on 16 September 2016.

2 It seems to be common ground that a collision did occur between the first defendant's car and the claimant who was on foot, although the precise circumstances are in dispute.

3 The second defendant was the first defendant's insurer, but for reasons which are unknown to me, and of no concern to me, it has been declared that the relevant policy has been avoided. The claimant therefore claims against the second defendant under section 151 and other sections of the Road Traffic Act on the basis the yard was, at the material times, "a road or other public place", and therefore that the second defendant is liable notwithstanding the avoidance of the insurance policy.

4 The claimant claims against the third defendant on the basis that the policy has been avoided and the first defendant is uninsured and the third defendant should be liable under the Uninsured Drivers' Agreement, and seeks a declaration under section 152 of the Road Traffic Act. However, that, too, may depend upon whether the yard is "a road or other public place."

5 The second and third defendants, in fact, dispute that the yard is a road or other public place, and they say, and it would appear to be common ground, that if they are right on that point then neither of them is liable.

6 The second defendant's case is effectively based on a contention that I can, and should, summarily resolve that point against the claimant on the basis the claimant has no real prospects of success on it.

7 The claimant is also suing the fourth defendant in the alternative on the basis that if the claimant loses against the second and third defendants on this point, and as a result does not have a claim against either of them in relation to the injuries which he says that he has suffered; then that legal result, the claimant says, is because the Government has failed to transpose into the law of England and Wales a European Union Directive, and that since the relevant accident and the claim pre-dates Brexit the Government is liable for *Francovich* damages in relation any failure by the claimant to be able to actually recover his alleged losses against the first defendant.

8 Although this may be somewhat surprising – although it does not seem to me that it matters whether it is surprising or not – the third and fourth defendants have each informed the court that they are content to be bound by the result of this summary judgment application, albeit that the application is between the claimant and the second defendant. Both have chosen not to make any submissions of their own. Also, the first defendant has provided a substantial witness statement in support of the second defendant's case, but has not taken any substantive part himself.

9 In legal theory, it seems to me correct that the outcome of the claim as between the claimant and the second defendant is irrelevant to the first defendant, but it is a little surprising that the first defendant appears to be so assisting the second defendant, an insurer who has avoided the insurance policy taken out by the first defendant, but there it is.

10 As I said, the application is for summary judgment. It is in the context that the issue as to whether or not the yard was, at the material time, a road or other public place is listed for a trial as a preliminary issue, by order of Master McCloud of 20 September 2019, which trial has been listed to take place in December of this year. It was somewhat unfortunate that the application was only heard in July 2021 owing to pressure on the Queen's Bench Division, especially in Covid times, and where the long vacation was about to take place, with the result that I have only become in a position to give judgment now, especially as there may be some desire, potentially, to appeal my judgment; but, nonetheless, that is the situation in which the court has found itself. However, what is of importance is that the time for serving witness statements has passed, and on that basis alone (although I will return to the matter) it can be said that it is unlikely that there will be any further witness evidence adduced.

11 In view of the fact that it seems to be common ground that the effect of the provisions of the Road Traffic Act 1998 render the question of whether the yard was a road or other public place determinative of the potential liability of the second defendant to the claimant, it seems to me that there is no need to describe the various sections in detail, save that I agree with that common ground that the claimant's case under sections 141, 143 and 151 of the 1988 Act do require the yard to have been "a road or other public place" at the relevant time, and that if it was not then the second defendant, having avoided the insurance policy, cannot be directly liable to the claimant for the alleged wrongs of the first defendant.

12 Section 143(1) of the 1998 Act reads:

> "(1) Subject to the provisions of this Part of this Act—
>
> (a) a person must not use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance as complies with the requirements of this Part of this Act . . ."

13 Subsection 2 provides that if somebody contravenes subsection 1 then they have committed a criminal offence. The result of this and other provisions in the Road Traffic Acts relating to other criminal offences which use, as part of their definition, the same words "road or other public place" is that the relevant case law often has concerned criminal trials; and I do note that this particular wording, even in this particular context as a result of section 143(2), leads to a potential criminal responsibility, which is, of itself, an argument when construing the wording, to construe it either restrictively or, at least, with care; albeit that this is balanced by the need in a criminal case for the prosecution to prove matters beyond reasonable doubt, rather than simply on the civil balance of probabilities test. I do note that it is relevant to various of the case law that a judge presiding over a criminal trial may well withdraw the matter from the jury if they conclude that no jury could properly find the relevant factual circumstance, namely, here 'road or public place', to be satisfied on the level of the 'beyond reasonable doubt' test.

14 What is before me is a summary judgment application, and it is common ground that the tests and approach of the court, when considering a summary judgment application are as set out in Civil Procedure Rule 24.2. In order for the court to grant summary judgment in this

case in favour of a defendant, it is necessary for the applicant (here the defendant) to show first that the claimant has no real prospect of succeeding on the relevant claim or issue; and, secondly, that there is no other compelling reason why the case or issue should be disposed of as a trial.

15 As far as the 'no real prospect' element is concerned, the well-known case law principles are set out in the *White Book* at paragraph 24.2.3 which I read generally into this judgment.

> "**"no real prospect of succeeding/successfully defending"**
>
> 24.2.3
>
> The following principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)* at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301* at [24]:
>
> i)The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 1 All E.R. 91*;
>
> ii)A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472* at [8];
>
> iii)In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv)This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v)However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that

can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550*;

vi)Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 63*;

vii)On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*.

In respect of points of law and of construction the notion of "shortness" does not appear to relate to the length of the document to be construed or the length of the material passage in that document but may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider: see the comments of Chief Master Marsh in *Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd [2021] EWHC 863 (Ch)*. He further commented that there was an overlap between the idea of a point of construction not being "short" and the second limb of CPR r.24.2: there may be some points that the court is capable of grappling with that, nevertheless, due to the context in which they arise or other factors, are best left to be dealt with at a trial.

In some cases the disputed issues are such that their conclusion by settlement or trial largely depends upon the expert evidence relied on by each side. In such cases, an application for summary judgment will usually be inappropriate unless it is made after the exchange of the experts' reports and, in most cases, after the experts have discussed the case and produced a joint statement (*Hewes v West Hertfordshire Hospitals NHS Trust [2018] EWHC 2715 (QB)*, a clinical negligence claim).

In *King v Stiefel [2021] EWHC 1045 (Comm)* Cockerill J held as follows:

"21.The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

22.So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

16 The question for me is: does the claimant have no real prospect of proving the facts which persuade the trial judge to find in favour of the claimant on the legal test of what constitutes a road or other public place? The court is able to decide matters of law as long as those matters are not dependent on the claimant having failed to prove facts where the claimant has a real prospect of actually persuading a trial judge that those facts exist.

17 I also bear in mind that the court is not to in any way to carry out a mini-trial. It is not to resolve genuinely or properly disputed questions of fact, but that that does not prevent the court considering what the evidence actually is and, in an appropriate case, coming to the conclusion that it is simply clear as to how particular factual matters would be decided at a trial, and proceeding on to that, to the conclusion that it is clear what the court will find as the facts then the court should not necessarily be afraid of achieving the desirable finality of litigation if those facts can give rise to only one legal conclusion and outcome.

18 However, I also bear in mind the sentence in (vii) of that section which states that:

> "If it is possible to show by evidence that although material in the form documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction".

Although those sentences exist in the context of the court construing documents, it seems to me that they apply generally to factual circumstances that - while the court does not conduct a mini-trial and that while it is open to a claimant in a situation in a case such as this to argue that there is potential for further material of an evidential nature, which is not presently before the court to arise before, or even during a trial - the court should

bear the facts that all witness statements have been served, time for service of further witness statements is past, and that the court has before it all the evidence to be adduced at trial (prior to any cross-examination, and where the Defendant does not have to call witnesses or cross-examine) in mind. The court should be asking itself as to whether or not there is a real basis for such a submission, or whether it lacks substance – it is often said in the case law it is a matter of mere "Micawberism" - and is a mere hope that something may turn up without substance for such a hope.

19 As far as the yard and the surrounding location and circumstances are concerned, I have been taken to a plan, photographs and witness statements, all of which would be before a judge at trial. These, in any event, demonstrate – and which it seems to me to be common ground, which I find to be clear – a number of particular matters:

(1) that the yard is part of a larger area ("the site") owned by what is called the Nevill Juvenile Bonfire Society, which appears to be a private, unincorporated association, that is to say a members' club, based in and around Lewes in Sussex, and which is dedicated to organising community events, principally bonfire and fireworks celebrations centred, but not confined, to the period around 5 November in each year. The site, including the yard, is actually held in the name of the first defendant, but by him on trust for the Society and thus its members.

(2) The Society has other premises in Lewes ("the Lewes premises") which it uses to actually stage its various events. The Society uses the site more for storage and its own meetings and internal operations. The Society has about 400 members and a number of officers.

(3) Ham Lane is a public highway road which runs from the southeast of Lewes towards, and terminates at, the local river. It has woodland and fields on each side together with some farm and Council buildings. The further it approaches the River Ouse from the town, the closer there comes, on the East side, a railway, and on the South a main road, up to neither of which there is an access from Ham Lane. Effectively Ham Lane becomes, in this region, part of a fairly narrow tapered cul-de-sac with woodland and farmland on either side.

(4) Coming from the town of Lewes, a user of Ham Lane would pass some farm buildings on their left, and then an entrance on their right to a Council Recycling Centre. They would turn right on a bend and come, on the left hand side, to the entrance to the site and the Society's premises. If they did not enter the site, they could continue along Ham Lane and bend left to reach, within a relatively short distance, the River itself. They would, in those final stages, have woodland on both sides. On their route towards the River, shortly after the site, there is on the same side a public footpath leading into and across the neighbouring woodland. That woodland appears to be common ground and as evidenced is used by public, both walkers and for dog walkers, and to reach the general area of the River.

(5) As I have said, the site is owned beneficially by the Bonfire Society.

(6) At the relevant time first, there was an exterior fence around the site. Its precise substance and state of repair is potentially in dispute, but it is common ground and clearly appears to be a very real (of substance) fence. Secondly,

there were double gates at the entrance to the site. Again, their substance, and whether they bore any and, if so, what notices forbidding trespass or otherwise warning visitors at the relevant time, is unclear. However, it is common ground and clearly evidenced that they could be locked at least by placing a padlock across the double gates.

(7) The entrance on both sides of the gates is a surface of gravelled hardcore, resulting in a laid surface, but not of a high quality. Once through the gates, that hardcore gravelled surface ran for a fairly short but real distance as an entrance track, wide enough for at least a lorry, to a substantial wider area of the same nature. All of this entrance track and wider area is what I have called "the yard".

(8) The yard is then bounded by a high quality security fence and gates, beyond which are a number of buildings owned by the Bonfire Society in which they keep fireworks, explosives and combustibles, and can store other items.

20 Those matters, it seems to me, are clear and are common ground. I have also, as part of the bundle before me, been provided with the various witness statements which have been served by each side under Master McCloud's directions for trial order, and the relevant parts of which appear to me to be as follows: There is a statement of the claimant of 5 December 2019. In it he says a number of particular matters:

(1) First, that he accepts that the gates to Ham Lane would be padlocked unless they had been unlocked by one of the 20 or so keyholders of the Society.

(2) When the gates are open he says that the public would be able to access the yard, and would actually do so for a number of purposes: first, to buy programmes for Society events, secondly, to drop off jumble for jumble sales, which were conducted by the Society; third, if the relevant person was a member of another Bonfire Society, they might call in to this Bonfire Society to have some dealing or conversation with its members or officers.

(3) The Society regularly collected jumble and, indeed, that the particular accident had occurred at a time when he and the first defendant, and others, were there to offload jumble which was being brought to the Society by others. He says that there were some seven to eight jumble sales per annum.

(4) The gates were always open when members were present at the site, and that that would occur on a weekly basis between 9 and 12 on Sunday mornings, between 6 and 9 on Tuesday and Thursday evenings and perhaps also at other times.

(5) The Society would distribute newsletters in the local community, and which newsletters would say when the Society, particularly wanted donations of jumble for an impending jumble sale. He says that those newsletters expressly or impliedly invited members of the local community to come to the site and drop such jumble off in the yard.

(6) When the gates were open there might be up to 40 or 50 people there who would not only be some of the 400 members, but also potentially also non-

members who were there to help whatever activity of the Society was going on at that time.

(7) The general public would always be able to come in when the gates were open to drop off jumble or other material for the Bonfire Society, or just to come and enquire of members as to what the Society was about or doing.

(8) Others came in for purposes unconnected with the Society, in particular people who were looking for the recycling site but had passed it and dog walkers who were looking for somewhere to park. He says there was nothing to prevent such people coming in to make such particular enquiries.

(9) When the entrance gates were open, the yard area looked like a small car park with nothing beyond the fact that there was a fence and gates to show that it was not a public car park.

21 That is what the claimant says, however, there are numerous other witness statements which I have read and with which I need to deal. The first is a witness statement of Keith Brown, the claimant's brother. He confirms his view that:

(1) when the gates were open the yard looked just like any other car park.

(2) the Bonfire Society would drop leaflets 'round the local community when it wanted donations of jumble, and the public would call in to deliver such jumble to the yard.

(3) People would come to the site for curiosity as to what the Society was doing or from other Societies.

(4) Dog walkers would come into the yard, although they would then have to leave the yard because there was no way through it into any public area, but only to the security fence securing the Society's buildings and store of fireworks, explosives, etc.

22 The next evidence is from Andy Brown, another brother of the claimant. He confirmed what his brother, Keith, had said. His witness statement says that members might be at the site for all sorts of purposes of the Society. He said that other people came in, first, to ask for the way to The Recycling Centre, secondly, because they were curious about the Society; and thirdly, maybe because they were walking dogs. He also confirmed that people came in from time to time to offer jumble to the Society.

23 The next witness statement was from Darren Parker, an officer of the Society. He also confirmed that the gates would be open when members were there, and confirmed that people came in for the reasons I have already listed.

24 The next witness statement is from the first defendant, and is substantial in length. He confirmed that:

(1) When gates were unlocked for a Society morning or evening, then they would remain open while any members were at the site.

(2) The public would be unlikely to come in for tickets and programmes because those were sold elsewhere, although he does not say that they would not do so.

(3) The opening times were as set out by the claimant being on Sunday mornings and Tuesday and Thursday evenings.

(4) Members of other Societies would visit even though he said it was generally the same individuals each time.

(5) If members of the public visited then they would be monitored, and he was not aware that anybody had ever parked simply to be able to go and walk elsewhere, or treated the yard simply as a public car park.

(6) Jumble would be requested from the local community by leaflet drop. The public were not invited generally to drop jumble off at the site, but it was possible that if they rang up they would be asked to do so.

(7) On 16 September 2016 what had happened, amongst other things, was that members had collected jumble on what he called the Nevill Estate, and driven it to the yard, and that there they had offloaded jumble in order to store it, in order to be able to take it eventually to a jumble sale which would take place at another location than the site itself.

25 The next witness statement is that of Norma Thompson, a member of the Society. She said that she attended the site weekly, and that the number of members who would be there at any one time would depend on the time of year. She said that there was a set of keyholders

who held the keys and were responsible for locking and unlocking. She confirmed that some people, looking for The Recycling Centre, would come into the yard to pose their question. She said that there was no intention that non-members should be able to use the site for any reason unconnected with the Society.

26 The next witness statement was from Michael Stevenson, another officer, who confirmed the role of keyholders. He confirmed the regular openings on Sundays, Tuesdays and Thursdays, and he said that the site was restricted to members, external suppliers, and members of other Societies who had come to borrow material or equipment. He says that:

> "Any other non-members who came on to the site were either uninvited or came only by mistake."

27 Lastly, there was a witness statement from Sofia Dimoglou. She said that she was a member of the community who had received the leaflet drop; she was not a member of the Society. She had telephoned the claimant to say that she had jumble which she wished to donate to the Society, and the claimant had invited her to come to the yard on 16 September 2016, and she had done so. She had driven her van, laden with jumble, into the yard and that the subject accident had occurred while her van was being unloaded.

28 I do also bear in mind that in the amended particulars of claim, it is stated by the claimant, in paragraph 5.2, that the gates to the car park were opened and left open from time to time and that there were members of the public who were permitted to, and did, use the yard car park to park their motor vehicles in. Paragraph 5.5 states:

> "There is a footpath alongside the yard and members of the public park their cars in the yard car park and walk their dogs along the path."

Paragraph 5.7 states that:

> "Members of the public attended the site *inter alia* to buy tickets for firework displays, to drop off jumble, to share information or chat and other social activities."

And Paragraph 5.10 states that:

> "Members of the Firework Society will give evidence that the yard car park was treated as a public place when the gates were open."

29 There are also two notices to admit facts, which the claimant has responded to. In the first, at paragraph 5.5 the claimant said the dog walkers were an example of the public parking in the yard. In the second, at paragraph 19, the claimant says there was no express permission for the public to access the yard, but some people would park and go for a walk.

30 As far as those particular matters which I have referred to above in Paragraph 5 of the amended particulars of claim, and the answers to the notices to admit facts, are concerned, and in particular with regards to the stated facts of members of the public being permitted to use the yard as a car park to park and go elsewhere, it does not seem to me, having considered the claimant's witness statement, that the witness statement – or, indeed, any of the other witness statements – actually say that that had taken place. It seems to me that what is said is in the witness statements is considerably more limited, and is as I have gone through them in the previous section of this judgment.

31 I do remind myself, again and again, that I am not here to conduct a mini-trial, but that the preliminary issue trial has been listed with directions that witness statements were to be filed within a particular period of time, and has occurred. While it is true that statements in a

statement of case, verified by a statement of truth, can amount to evidence, it does seem to me that the claimant here has had an opportunity to set out his evidence and that which he adduces in his own and other witness statements, and that at first sight at least, it is those witness statements, and not the assertions which are made in a statement of case, which amount to the claimant's evidential case. Nonetheless, I do have to bear in mind that it is possible for a party to put what is in their statement of case to the other side's witnesses (assuming that they are called to give evidence) to see whether or not they agree with it, even if they have not adduced any evidence of their own to the effect of the particular factual allegations. On the other hand, I have to think about this carefully in my own mind as to whether I think there is any real basis to think that those witnesses, in cross-examination, will, in some way or other, add to the evidence which the claimant has sought to adduce from himself and his own witnesses. It seems to me that all of that is important in relation to what, under the case law, are distinctly important questions of, first, whether there is evidence that the yard was used by the public as car park where they would park cars and leave to go elsewhere, other than the site itself; and secondly, as to whether the yard was being treated as a public place, as distinct from simply a place related to the Society and its distinct activities.

32 In any event, it does seem to me to be common ground and the claimant has a real prospect of establishing the following matters:

(1) That the gates were unlocked for at least three hours every Sunday morning and Tuesday and Thursday evenings, as well as at other times.

(2) That there was no control, in the sense of someone standing at the entrance, as to who came in and that those who came in would include:

(i) members – possibly as many as 40 or 50 at any one time

(ii) other people who were coming in on Society business, that is at the request of the Society for its purposes, including to supply hardcore and other materials.

(iii) And also:

(a) Members of other Societies who were coming to converse with the members of this Society.

(b) Various types of non-member being:

a. first, people who were curious to find out what the Society was and was doing;
b. Those who are coming with some sort of supply of goods, or possibly services, to the Society.
c. At least occasionally, people who were enquiring and wishing to buy tickets.
d. Members of the public who were responding to the Society's call for jumble made by leaflet drop, even if, perhaps, as in the case of Ms Dimoglou, only following a phone call asking to where the Society wanted the jumble brought.

e. Non-members who came in for purposes wholly unconnected with the Society, in particular those who were seeking directions to The Recycling Centre and dog walkers who had come in through the gates but who then were unable to progress further through the site owing to the inner security fence.

33 What is in dispute before me is as to whether or not:

(1) there would be many members of the public who had come to purchase tickets or programmes,

(2) there would be any dog walkers who would have parked their cars in the yard in order to walk their dogs outside the site,

(3) there would be any members of the public who would park their cars on the site in order to walk without dogs outside; and

(4) if such occurred, the degree to which the Society permitted it.

34 In that context I turn to the case law on various uses of the expression "road or other public place" in the Road Traffic Act and other statutory history. The start of the case law to which I was taken was the decision in the Scots Courts of *Harrison v Hill* [1932] J.C. 13. Although it is a Scottish case it is considering road traffic legislation which was in similar terms throughout the United Kingdom, and has been referred to without apparent disapproval in

the English case law. There the court was considering section 121 of the Road Traffic Act 1930, which defined a road as being: "any highway and any other road to which the public has access." The court there was concerned with a private road within a farm which did not have an exterior gate, where in the summer it did have a pole to bar cattle. The evidence was that the public often walked on it not going to the farm, although the farmer would turn them off on various occasions, particularly when crops were growing in adjoining fields.

35 In considering the question of whether the road was one "to which the public has access" Lord Clyde, at page 16 of the report said:

> "It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it.
>
> I think that, when the statute speaks of 'the public' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways. I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed – that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matters known in right of way cases is the tolerance of a proprietor. The statute cannot be supposed to have intended by public 'access' such unlawful access as may be had by members of the public who trespass on the property of either individuals or corporations."

It seems to me that those paragraphs stress such matters as: the need for the public actually to enjoy access, and to do so legally, although that lawfulness may merely result from tolerance by the proprietor; and that it needs to be access by persons who can be termed public rather than their being there simply for a particular reason connected with the owner - I will return to that distinction in due course. Lord Sands, in his judgment, emphasised the fact that there should be no physical hindrance.

36 I was next taken (in date order) to the decision in *Paterson v Ogilvy* [1957] J.C. 52, another Scots case, again concerning the definition within the Road Traffic Act 1930. This was a criminal case regarding alleged drunk driving in a private field, which was, at the relevant point in time, being used as an official car park for the Royal Highland Show with a parking price of 10 shillings for the privilege of parking. Notwithstanding that the field was ordinarily simply a private field, it was held in those particular circumstances that it was a place to which the public had access. At page 44 it was said:

> "It seems to me that this field was used by the public. Indeed they were invited to use it. It is quite true that they had to pay for the use, but that meant no more than that the invitation to the public to use the field was not unrestricted but was to a certain extent selective, and I cannot see that the fact that a payment was made makes any difference to the case. In any event not everybody paid but only the actual car owner, and no doubt, although perhaps the case is not very specific about this, there were other people about, passengers and so forth, in addition to the actual car owners, and certainly there were several attendants, and it would appear from what happened that the police were there directing or assisting to direct the traffic, a feature which may be not without significance when one is considering whether it was a public place. No doubt the field was ordinarily a private field, but it ceased to be private and was converted into a public place when the public were invited to use it and it was not restricted in any way to the private friends of the owner of the field. The fact remains that certainly any member of the public who was prepared to pay the fee and possibly others were free to enter the field. I cannot see that it was any the less a public place because it was frequented by a special section of the public."

On page 45 Lord Mackintosh said:

> "In these circumstances I agree with your Lordship that it is really a false distinction to draw between the public in general and the more or less selective class of the public who were entitled to use this field, namely, those who were motorists and were attending the Show and were ready to pay the necessary fee. As I have said already, these persons could be any member of the public who was attending the Show and was willing to pay the necessary charge for parking his car in the field."

Lord Blades also said that in these particular circumstances there was no real restrictions certainly to a particular class, it was the public generally.

37 Next in order I was taken to the decision in *R v Waters* 47 Cr.App R 149 where there was a public house car park, but where the landlord had permitted members of the public to park even though they were not using or solely using the pub but going elsewhere, walking elsewhere, from their cars, and where, again, that was held to be sufficient for the car park to be a public place.

38 Following that I was taken to *Pugh v Knipe* [1972] R.T.R. 286. That was a case under section 1(1) of the Road Safety Act 1967 and a question of alleged drunk driving "on a public place". Here the relevant land was part of the premises of a private members' club outside the front entrance of the club's building next to their own private car park. The relevant area was such that any vehicle was allowed to drive into and through it in order to pick up or set down passengers, and there was no physical obstruction to the public. Nonetheless, the court held that this was not a public place. At page 291 Lord Widgery referred to a decision *Elkins v Cartlidge* [1947 J 1 All ER 829 which seems to have been similar to the *Waters'* decision as relating to a public house. He said in relation to that:

> "Members of the public come to the house in order to secure refreshment. The car park attached to a public house is on the face of it one would think a place to which the public are invited, and which the public use as part of the facilities offered. But in the present case we are not dealing with the public house, we are dealing with a private club, and on the face of it the club buildings and the club grounds are available to the members of the club and their guests but are not open to members of the public. Accordingly, in order to turn what on the face of it is a piece of private land, namely, the private car park as I have described it, into a public place, it is necessary in my judgment to show that the public have access to that place. The best way of showing that the public have access to that place is to show that they actually go there, because, unless it is shown that the public do in fact use the place and do in fact enjoy the right of access to it in that sense, it is very difficult to my mind to support an argument that that which on the face of it is private has in some way acquired a public character."

He then went on to say that on the relevant evidence there was not any evidence that the public used that particular area, or accessed that particular area at all.

39 There is, of course, evidence in the case before me that non-members of the Society did access the yard at relevant times for particular purposes, and thus to that extent this case is distinct from *Pugh v Knipe*. However, I do have to consider carefully as to what actually were the purposes for which any permitted, or any real number of permitted members of the public did access the yard.

40 These various decisions were also applied in *Bowman v Director of Public Prosecutions* [1991] R.T.R 263, which was a case of drunk driving in an NCP car park. That case, it seems to me, turned on the fact that there was evidence that even though the relevant time was late at night, members of the public did go to and access that car park and with the result that it was held that was open to the Criminal Court to conclude that the car park was a public place. Those persons who were accessing the car park were obviously accessing for their own purposes rather than some particular purpose connected with National Car Parks' own operations.

41 Ms Nelson took me to and relied on the decision in *Cawley v Frost* [1976] 1 WLR 1207. There, the claimant was a spectator at a football match to which the public had paid to come. However, the layout of the football ground was that between the stands and the pitch there was a fenced off area which was used at other times as speedway track. The claimant and others invaded the track and were charged with offences under the Public Order Act 1936 where the question was whether the track was a public place as defined by section 9 of that Act, a definition which stated that a public place includes any highway and any other premises or place to which the public have or are permitted to have access. The claimant argued that since the speedway track was fenced off the public were effectively excluded, or intended to be excluded, from that area and therefore that the place where he had allegedly committed public disorder was not a public place. That was rejected by the court at page 121 between letters E to H, Melford Stevenson LJ said that it was necessary to look at the area as a whole, that is the entire premise area of the football stadium and that he saw that the entire area as a whole was within the Statute and, therefore, that rendered the entire area a public place, even if there was some parts of that area from which the owner sought to exclude the public. The other members of the Divisional Court came to the same conclusion that in this particular context the premises could not be divided into particular parts and sections for the purposes of the Statute; either the entire area was a public place, or none of it was.

42 It seems to me that, first, this was in a different statutory context of public order. Secondly, it related to a different statutory wording. Thirdly, it related to a different factual context and question, where the real question was if the wide area is a public place, does that extend to each and every part of it, including elements to which the public are not intended to have

access. It seems to me that those were very real points of distinction from the case before me, and I therefore do not find the authority of any particular assistance.

43 Ms Nelson, however, placed greater reliance on the decision of *May v Director of Public Prosecutions* [2005] EWHC 1280. There, the appellant had been charged with and convicted of careless driving in a public place within section 3 of the Road Traffic Act 1988, where again the question was whether or not the relevant area was a public place, with the Crown having to show that beyond reasonable doubt. The area in question was a car park within a Volvo franchise situate on a main road. There was a barrier to that car park, but it was opened each day at an early time, remaining open until the evening. There was a sign indicating "Customers' parking". In paragraph 4 of the judgment it was recorded that it was common ground that case-law authority supported five propositions:

> "(i) The burden of proving that a particular location is a 'public place' rests on the Crown to prove beyond reasonable doubt.'
>
> (ii) There must be evidence that the public actually utilised premises before a court can conclude that they are a 'public place'. It is not sufficient to say that the public could have access if they were so inclined: *R v Spence* [1999] RTR 353;
>
> (iii) Premises will be private where they are entered for reasons beneficial to the occupier: *DPP v Vivier* [1991] 4 All ER 18, or where they are visited for business purposes: *Harrison v Hill* [1932] JC 13, 16;
>
> (iv) However, even business premises will be 'public' if the location is a public service, a railway station, a hospital or other public utility: *R v DPP (ex parte Taussik* (unreported, 7 June 2000), paragraph 20. This will include a pub car park during licensed hours: *R v Waters* (1963) 47 Cr App R 149,154;
>
> (v) It is submitted that the distinction is to be made where premises are occupied by a large number of people – even if there has been a condition of entry for those people, the premises will be a 'public place': *Planton v DPP* [2002] RTR 9, para 17 (explaining *DPP v Vivier*). It is submitted that this is because a potentially large number of individuals need to be caught or protected by the umbrella of the legislation."

In paragraph 5 it was recorded that these matters were common ground.

44 It seems to me that those various propositions were supported by the authorities which I have already mentioned, although, of course, each case is to be considered on its own particular facts,

45 In paragraph 5 the court went on to set out the Magistrates' reasoning, which included a reference to the *Spence* case where it had been held that a car park area had not been a public place as being a factual situation where it was a small yard attached to a small office building, and the Magistrates had held that the case before them was distinguishable on the basis that there the public were being invited to come and park at a retail commercial enterprise. In paragraph 6 the court cited passages from *Harris,* to which I have already referred. In paragraph 7 the judge summarised the *Vivier* decision concerning an accident in a car park in a caravan park, and where Simon Brown J had said about *Harrison v Hill* that what had been said there could really be summarised thus:

> "A road is one to which the public have access if (a) it is in fact used by members of the public and (b) such use is expressly or implicitly allowed -- or, putting it the other way round, not achieved by overcoming physical obstruction or defying express or implied prohibition.
>
> Factor (b) presents no problem. But factor (a) does. In particular, as it seems to us, (a) essentially begs rather than answers the other crucial question whether those who use the road <u>are</u> members of the public. Take our case. We have not the least hesitation in accepting that the only material use of this caravan park was by those who had complied with the various site requirements and been properly admitted, in short those who had been expressly or implicitly allowed into the caravan park, either as caravaners or campers or as their bona fide guests. We think it right to ignore both the few trespassers who escaped the security controls and also the users of the bridleway (which in any event could not affect the character of the park as a whole) . . .
>
> What that leaves outstanding, however, is the critical question: are the caravaners, campers and guests to be regarded, within the park, still as

> members of the general public, or are they instead, as the justices found, at that stage a special class of members of the public?
>
> Upon that question, *Harrison v Hill* helps but little: there is simply Lord Clyde's reference to 'the special class of members of the public who have occasion for business or social purposes' to use the farm road."

46 The judgment goes on with further authority being considered, and then it is stated that Simon Brown J had then said:

> "How then, in some particular road or place is used by an identifiable category of people, should justices decide whether that category is 'special' or 'restricted' or 'particular' such as to distinguish it from the public at large? What, in short, is the touchstone by which to recognise a special class of people from members of the general public?
>
> Some light is thrown upon the problem by the passage already cited from Lord MacDermott CJ's judgment in *Montgomery v Loney* [1959] NI 171 at 177: one asks whether there is about those who obtain permission to enter 'some reason personal to them for their admittance'. If people come to a private house as guests, postmen or meter readers, they come for reasons personal to themselves, to serve the purposes of the occupier.
>
> But what of the rather different type of case such as the present where those seeking entry are doing so for their own (rather than the occupier's) purposes and yet are screened in the sense of having to satisfy certain conditions for admission. Does the screening process operate to endow those passing through with some special characteristic whereby they lose their identity as members of the general public and become instead a special class?
>
> Our approach would be as follows. By the same token as one asks in the earlier type of case whether permission is being granted for a reason personal to the user, in these screening cases one must ask: do those admitted pass through the screening process for a reason, or on account of characteristic personal to themselves? Or are they in truth merely members of the public who are being admitted as such and processed simply so as to make them subject to payment and whatever other conditions the landowner chooses to impose?
>
> In approaching the matter in this way we have, we confess, been influenced by the decided cases on closely analogous language in the law of public entertainment . . ."

And there is then a citation from *Panama (Piccadilly Ltd v Newbury* [1962] 1 All ER 769, [1962] 1 WLR 610:

> " 'there being no evidence whatsoever of any selective process and indeed a rule which enables [election of] members without knowing anything about them .... no sufficient segregation has occurred which would prevent the members from continuing to be members of the public'."

47 The judge in *May* then went on at paragraph 8 saying:

> "In the present case there are no restrictions whatever upon the access of members of the public generally to the inner park during its opening hours. There is no selective process. A member of the public need not demonstrate or even harbour any particular reason for going there, albeit that the car park is intended for the use of customers of the premises. The car park adjoins a public road. In my judgment those factors are in this case sufficient to justify the lower court's conclusion that this was a public place."

In paragraph 9, the judge went on to warn about the danger of seeking to resolve cases of this nature as if the various decided cases on their facts demonstrate matters of hard-edged law, stating that: ". . . a number of considerations are likely to be in play when a court has to decide whether a particular area is a public place". He went on to say that much guidance was found in the authorities but it is the facts of the particular case which have to be looked at against the authorities' guidance. In relation to *Spence* though, he said that the facts before him were very different from those in *Spence*:

> "There the premises were a foundry on an industrial estate. There was no evidence of any reason why any member of the general public should go there as opposed to those having pre−ordained specific business".

He then held that the Crown Court was right to hold that that car park was a public place at the relevant time.

48 I have borne those various statements very much in mind although they go in a number of different directions. There are other statements, following the citation of *Vivier* as authority with apparent approval, to the effect that if members of the public are simply attending for a reason which is part of the owner's business and operation as opposed to merely the owner's desire to attract them or to take money from them, then they are accessing in a private, rather than as members of the general public, character. The decision also suggests on its own facts that where there is a car park, even with a sign stating "Customers' parking" where the owner intends that it is only the owner's customers who will park there, that it is, nonetheless, a public place, though again I bear in mind that the property in that case was being used as a commercial retail business, rather than as here a private members' club.

49 *May*, however, was itself followed by the decision in *Richardson v DPP* [2019] 4 WLR 46. This was again the question of alleged drunk driving, in this case under section 4(2) of the Road Traffic Act 1988, and which uses the expression "road or other public place" as part of the constituent elements of the criminal offence. This was a car park which provided parking spaces for a number of businesses, and where there were a number of signs to the car park that stated that public parking was not allowed, and that the car park was private. In paragraph 23 Julian Knowles J referred to the statutory definition and said that *Spence* and *Vivier* required the words "public place" to be construed as representing a place to which the public had access. In paragraph 24 he stated that that question was largely a matter of fact and degree, although properly a matter of law, and so that in order to come to the legal answer there had to be evidential material which justified it. In paragraph 25 he cited *May* and the various common ground propositions of law which I have been through. In paragraph 26 he set out that any access by the public needed to be lawful, and he cited the

relevant section of *Harrison v Hill*. In paragraph 27 he said that that passage had been cited with approval by the Court of Appeal in *Spence*, and that they had said:

> ". . . In that case there was no use by members of the public generally. True, there was no physical obstruction to keep the public out, but no evidence of any use – unsurprisingly in our view – other than that special class of those with business there. There was here no use by members of the public generally. True, there was no physical obstruction to keep the public out, but no evidence of any use – unsurprisingly in our view – other than that special class of those with business there. 'In the absence of evidence of any such user, there was no case to go to the jury: see the citation from *Harrison v Hill* above; *Pugh v Knipe* [1972] RTR 286 and *Deacon v AT* (A Minor) [1976] RTR 244. Those cases emphasise that the fact there is neither physical obstruction nor any sign forbidding entry to those with no business there does not itself mean the public have access. There must be evidence that the public utilises that access. In each of those cases, and in this case too, there was no such evidence'."

50 At paragraph 28 he said that on the facts of his case that there was insufficient evidence to allow for a conviction. In paragraph 29 he said that the first difficulty that the prosecution faced was that it was quite clear from signage that the relevant car park was private. In paragraph 30 he said that that alone meant that the prosecution failed. In paragraph 31 he said that a second reason for the prosecution to fail:

> ". . . was the absence of evidence of any use by the public, as opposed to members of the public who happened to have business at the premises served by the car park including, for example, those patients visiting 'Enhance Aesthetics'. In the absence of such evidence, there was no case to answer . . ."

He referred to *Spence* [1999] RTR 353 as authority for that; and went on to say:

> "This case is wholly different from cases such as *May* [2005] EWHC 1280, which also concerned a car park at commercial premises, namely a Volvo franchise. In that case there were signs inviting members of the general public to enter and to park. That was held to be sufficient. In para 9 of his judgment Laws LJ said that in *Spence*: 'There was no evidence of any reason why any member of the general

> public should go there as opposed to those having pre-ordained specific business'."

He then gave a third problem for the prosecution as being that there was no evidence of direction access by the public. It seems to me that each of those three problems were relied on by Julian Knowles J as being separate reasons as to why that car park was not a public place.

51 Counsel also took me to case law regarding whether, in light of the fact that European Union Council Directive 2009/103/EC requiring insurance of motor vehicles has a wide definition of in what physical circumstances such insurance should provide cover, the Road Traffic Act definition of 'public place' should be read down and construed more widely than the above case law might suggest – this being Ms Nelson's contention but resisted by Mr Grime QC for the second defendant. It is common ground that there is what is known as the '*Marleasing* principle', being that where United Kingdom legislation is inconsistent with European Union law the domestic legislation can be “read down” so as to achieve the European law objective, provided that such a reading down does not go against "the grain" of the domestic legislation.

52 Relying upon that principle, there had been an attempt in *Lewis v Tindale* [2019] 1 WLR 1785 to “read down” the definition of road or other public place for these motor insurance purposes by deeming there to be inserted the word "including" before "road" so as to effectively widen the Statute significantly. That attempt was rejected at first instance by Soole J. At paragraph 42 of the judgment he referred to the *Marleasing* principle, and in paragraph 43 to the restrictions on it, that the constraints which existed on its broad and far reaching nature were that:

> "(a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed; and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate . . ."

At paragraph 58 Soole J said that the attempt to widen the Road Traffic Act provision must fail for three interrelated reasons: First, an interpretation which excises the geographical limitation to 'a road or other public place' clearly went against the grain and thrust of the legislation which provided that limitation. The result would be to amend rather than interpret the section. Secondly, it would raise policy ramifications which were not for the court; and thirdly, because to widen would potentially impose retrospective criminal liability for the use of uninsured vehicles on what would otherwise be private land, and to excise the geographical limitation would have the necessary and retrospective consequence that use of a vehicle on private land without insurance was an offence. That decision was appealed but only on other grounds. Soole J's decision was said by the Supreme Court in *R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd*, [2019] UKSC 16 at paragraph 40 to be consistent with the approach and reasoning of *Roadpeace v Secretary of State for Transport* (at paragraph 90).

53 Ms Nelson sought to suggest that this had been somewhat watered down by the decision of *Colley v Shuker & Ors* [2020] EWHC 1889 but, as pointed out by Mr Grime, at paragraph 12 that decision too says that the European Directive cannot be used to change the Road Traffic Act insurance provision. Ms Nelson therefore seeks to rely on these matters in a slightly different way to which I will come in due course.

54 In support of the second defendant's application, Mr Grime submits, in general, the following matters:

(1) There is no evidence that anyone – dog walkers, enquirers for the recycling site or otherwise – actually used the yard as the base for any activity unconnected with the private Bonfire Society Club. Those various types of person simply came in and left, and were very occasional in any event, and he says that there is no suggestion in the evidence as such, as opposed to in the amended particulars of claim, that they were ever given any permission or tolerance to park and walk off elsewhere.

(2) That in relation to anyone else they either were there for the express purposes of the operations of the Society or their equivalent and that, in any event, (a) those buying tickets would be rare, and there is a conflict on the evidence as to whether or not they really existed to any event at all, but in any event they were there for a Society purpose. (b) Those who were bringing jumble were generally instructed to leave the jumble at the gate to the yard but, even if they came into the yard that was only very occasional and as a result of invitation and for the specific purposes of the Society. He says that there was insufficient public access to make the yard a public place.

(3) He repeated that insofar as anybody came to the yard who was not just somebody who came and left, they came because they had business with the Society, or were there for the specific purposes of the Society, and thus that the matter fell within *Spence* and *Richardson* rather than *May*.

(4) In any event, one should be looking at matters as they stood at the time of the accident, and at that particular point in time there were no Society members

there other than Ms Dimoglou, who was there by specific arrangement. With regards to that particular submission it seems to me to look at matters within a very tight time compass is not what is done in the relevant cases, but it is more that what was happening at that point in time is the sort of occasion which one should consider to see as to whether or not the fact that it happened and might be an example of other instances is sufficient to render the yard, when open, a public place. But, in any event he submits that on established principles it is not a public place, and that when one looks at the witness evidence there is not witness evidence which could lead to a judge properly coming to that conclusion; and

(5) To seek to expand the definition by reference to European Union law is impermissible.

55 Ms Nelson for the claimant submits that:

(1) In the light of the Directive that I can interpret "public place" as an expression itself widely and purposively to meet the Directive's aim of the requirement for insurance and, by so doing, extend the liability of relevant insurance companies in a way which might be to a very wide range of places but would certainly potentially include the yard. I think that the way in which she is seeking to do this is by seeking effectively to outflank the *Lewis v Tindale* decision by saying she is not seeking to add or amend the Statute by adding the word "including" before "road or public place" so as to extend to non-road or other public place areas, but rather simply to say that "public place" as such should be construed more widely; thus she would say interpreting rather than amending the legislation.

(2) In any event, (i) this is all fact specific and therefore the sort of matter which would be for trial; and (ii) the facts themselves are crucial and they are to be established by witness evidence and that the court should be distinctly careful before seeking to confine itself to the precise words used in the precise witness statements; when at trial: other questions may be asked either with the permission of the court in chief, in any event in cross-examination and then re-examination; and where witnesses may, as often happens at trials, considerably expand on their own evidence. She would say that this is particularly so here, where the claimant has actually pleaded something of a wider case than appears in his own witness evidence. She would submit that the trial judge would be unlikely to restrict cross-examination on the basis of attempts to establish that wider case, when that wider case would be of no surprise to the other side. She says, therefore, that for me to find that the claimant has no real prospect of success at trial would be going very far indeed.

(3) There are a number of instances in the evidence of what amount to tolerated by the Society access by the public which could – and she would emphasise the word "could" – render the yard a public place. She says the defendant is wrong to restrict who are the public by reference to the selective class test and, in any event, that there are enough people who would, even on that basis, fall within 'the public' to enable the yard to potentially be a public place. As far as who are “the public” concerned, she says it would include the various types of visitor, and that an approach of just asking whether persons are a selective class by reference to whether or not they have business at the premises, rather than

whether or not it is the public as a whole who are allowed to come in, is an approach which is inconsistent with *Paterson* and *May*.

56 I found the question of whether the claimant has no real prospect of succeeding on the issue of the yard being a public place within the Road Traffic Act definition at the time when the collision took place to be a difficult one. The essential problem in my mind is the conflict between two particular aspects. First, my impression of the yard from the evidence is very much that it is a private parking and meeting area. It belongs to a private members' club. It is remote in location, fenced and gated. The gate is only open for limited periods of time and principally: (i) for those who have business with the club, and which persons form the vast majority of those who come in; and (ii) those who are there temporarily, mainly by accident, and who form a very limited minority. It is thus in one respect at least difficult to see as to how it is different from the club access drive in *Pugh v Knipe* where, of course, enquirers as to what happened at the club, or even people wanting to come in to join the club, might well use a relevant access themselves – access by such persons is something which would be expected in such a situation. But against this, secondly, I have difficulty in formulating a unified and coherent approach to who are the relevant "public" whose permitted access to the place can, under all the case law, starting from *Harrison v Hill* and going onwards, render the place a “public place” for Road Traffic Act purposes.

57 As Ms Nelson submits *Paterson v Ogilvy* and, more importantly, *May*, cast some doubt on the "permission to only a selective class of the public" approach, i.e. an approach of asking whether it is only those having business at the specific premises which are linked to the area who come there, and as to whether that approach is a hard line approach of law to something not being a “public place”. Some of the cases suggest that it is, and *May's* citation of *Vivier* itself suggests that, but further elements of the judgment in *May* and its conclusion are less

consistent with that. It is also difficult to see why (i) car parks for some premises are public places, even though they are only intended for the customers of those premises, such as certain pub car parks and also the car park in *May*, but (ii) other car parks only intended for the customers of those premises, such as the boundary car park in *Spence* and the business car park in *Richardson* are not public places.

58 Before I come back to that, I need to deal with – or at least bear in mind – two sets of points. First, the submissions which are made with regards to the European Union Directive. Notwithstanding Ms Nelson's arguments, I do not think that it affects the interpretation of public place in this particular "road or other public place" provision in the Road Traffic Act. That is a phrase which is used generally in the Road Traffic Act, including for the purposes of criminal offences such as drunk and dangerous driving. As such a general phrase of road traffic law it does not seem to me that it will alter its meaning by context, including whether the context is drunk driving rather than the law of motor insurance and the need to have a motor insurance policy. It seems to me that the case law envisages the phrase having a constant meaning consistent throughout road traffic law, that is to say in road traffic law generally an area either is or is not a public place.

59 Adopting that approach, it does not seem to me that it is permissible for the meaning to be changed by a Directive which relates to a single context, namely that of motor insurance. A concept of what is a "public place" has already come into existence before, and exists separately from, the Directive and its context and therefore should continue unaffected by it. It seems to me, for those reasons, that to use the Directive to render something a public place for insurance purposes when it would not be a public place for the rest of the Road Traffic Act legislation would be to go against the grain of the pre-existing legislation. It would also have the effect, which was rejected in *Lewis v Tindale*, of potentially

retrospectively creating a criminal offence with regards to circumstances which would otherwise not give rise to criminal liability. If this yard is not a public place, absent the Directive, and somebody had driven a vehicle within it whilst under the influence of alcohol, or with an impermissible alcohol level within their blood, then it seems to me that, on Ms Nelson's argument, either the Directive, which relates to insurance would have caused them to commit a criminal offence, or alternatively the words "public place" would have different meanings within different parts of the same Act, which it seems to me would go against the grain. Even more specifically, as far as insurance is concerned, if the yard would not otherwise be a public place, and somebody, for example a teenage child, was allowed by their parent, a member of the Society, to drive a vehicle uninsured, the effect of Ms Nelson's argument is that they would be committing a criminal offence where they otherwise (i.e. without the existence of the Directive) would not be doing so.

60 It seems to me that what *Lewis v Tindale* is really holding is that the Directive cannot be used to change the meaning of the Statute and to extend the definition of what is covered by the insurance provisions. Although *Lewis v Tindale* is actually directed towards one way of trying to extend it, namely by inserting the word 'including' before 'road' it seems to me that the spirit and underlying reasoning of the decision applies equally well to Ms Nelson's attempt to use the Directive to just simply alter what would otherwise be the meaning of the words "public place", and I do not think that that approach is permissible. I therefore reject the attempts to use the Directive to alter what would otherwise be the meaning of the legislation.

61 Secondly, there is the question of the evidence which is before this court, and which would be before the trial judge, as contained in the plans and photographs, and also, importantly, in the witness statements. This is a reverse summary judgment application and is not a mini-

trial. The question is whether the claimant has no real prospect of success at the trial where that evidence remains to be tested as to whether it has weight, and what that weight actually is. Under well settled principles of summary judgment applications I would need something very substantial to refuse to accept that any individual piece of evidence upon which the claimant relies would not have weight. Therefore, in the circumstances of this hearing (i.e. where I am hearing an application for summary judgment) it seems to me that I just have to proceed on the basis that I accept all the evidence from the claimant's side and any evidence from the defendant's side which would assist the claimant, and I proceed on that particular basis.

62 However, that leaves the question of whether the claimant can raise other matters not in the present witness statements, either on the basis that the claimant would be allowed by the trial judge to expand on the claimant's existing evidence, or on the basis that the claimant may obtain helpful answers in cross-examination. This is important because it seems to me that there are two types of matter which the claimant may seek to say that the evidence will be expanded. First, the matters which the claimant has pleaded in the amended particulars of claim, but which do not seem to me to be presently within the witness statements, being principally as to the public being both permitted to park and actually parking in connection with the use by them, not to engage with the Society and its members but, to go walking outside on the public footpath and in the woodland whether with or without dogs. Secondly, in relation to members of the public calling simply for social activities in terms of having a chat, not in any way related to the Society and its business; and, I suppose, thirdly, in relation to unpleaded matters, but where questions might be asked in the hope that a witness would say something further about use by the public.

63 The defendant says that the claimant's present evidence simply does not contain such matters, and that, first, it is mere Micawberism although, secondly, Mr Grime would say that those particular matters would not amount to a change of area to a public place if the present evidence would not lead to that conclusion.

64 It seems to me that the claimant has difficulties here in going beyond what is in the present witness statements as:

(1) Civil Procedure Rule 32.4 lays down that the witness statements are supposed to contain the evidence which a party is seeking to adduce at the trial.

(2) To expand on one's own witness statements requires the permission of the court, and if there is to be an expansion on one's own witness statements, then that permission ought to be sought at an early stage, that is to say at this stage rather than simply waiting to the trial itself, especially if it relates to a matter which could really affect the outcome, and potentially catch an opponent by surprise.

(3) This is not a situation where the claimant is needing to expand the claimant's evidence on something as a result of something which has only appeared within the defendant's evidence. That is not the situation here.

(4) It is for the claimant to adduce evidence to support the claimant's own pleaded case; this is not one of the situations, such as a fraud case, where a claimant contends that matters have been concealed from the claimant and who therefore cannot be expected to ascertain and advance them. This is a situation

where the claimant is seeking to advance a case based on the claimant's own evidence.

(5) While further answers in evidence-in-chief may elicit information, at first sight there is no reason to suppose that they will. If such reason exists then the relevant party (here the claimant) should be adducing an additional witness statement from the relevant witness. No reason has been suggested as to why that should not occur and if it is an important matter then there is every reason why the witness statement should not be produced now

(6) Cross-examination is, of course, different, because the claimant cannot be expected to produce further witness statements from the defendant's witnesses. Nonetheless, I still have to have a basis to suppose that such cross-examination would elicit some useful material for the claimant's purposes. Here, where the claimant himself, and the claimant's own witnesses, who know the premises well, do not themselves have relevant material within their own witness statements, it does not seem to me at first sight that there is much of a basis for saying: 'We, the claimant and my witnesses, have not said these things but we expect, in cross-examination, that the defendant's witnesses will'. It seems to me that in the circumstances of this case that seems somewhat fanciful. Further, it would be open to the Defendant simply not to call any of their witnesses, and in which case there would be no cross-examination

(7) I do bear in mind, as I said earlier, that one of the second defendant's witnesses is the first defendant, and there is some surprise, at first sight, that he is so ready to co-operate with the second defendant, notwithstanding that the second defendant has avoided the insurance policy. But, on the other hand, the second

defendant is not founding this application on the first defendant's evidence, and I am proceeding, in any event, on the basis that I am only taking account of the defendant's witnesses' evidence insofar as they support the claimant; their evidence, otherwise, being potentially the matter of dispute for trial.

65 It seems to me that the defendant is entitled to say that the defendant can simply just accept the claimant's witness statements as they are and not call any evidence of its own with the claimant able to use the defendant's witness statements as hearsay statements, if the claimant wishes to do so. I cannot see why the claimant is really able to say that the claimant would gain permission to adduce additional evidence himself, when he has not so far sought that permission and has not supplied any witness statement either for himself or anybody else which contains such additional material. It seems to me that the claimant is simply, for the purposes of this application, limited to, as at first sight the claimant would be at trial, the evidence of which the claimant has chosen to give notice that the claimant is going to advance.

66 I have particularly been concerned as to whether there is a real prospect that the claimant might establish at trial that members of the public actually used, and were permitted, even if only tacitly and passively, by the club to use the yard as a car park for walking in the woods and/or along the footpath, either by themselves alone or with dogs. However, I have concluded that, on the material before me, I do not have a basis for holding that there is a real prospect of the claimant establishing that. The present evidence simply does not go that far; no witness says any more than that some dog walkers stray in; none suggest that this is a public parking spot for walks in the woods.

67 In those circumstances I come back to the case law and the consistent theme that there needs to be actual real public access enjoyed by the public which, in some way, is permitted or at least tolerated by the owner. That gives rise, as set out in the case law, to the essential question as to when visitors are "the public" or – which is a linked question – as to when their access or use is "public" in nature, these really being two facets of ways of approaching the same question.

68 Mr Grime says that if the visitors attend for the purpose of the activities and operations carried on at the premises, here the activities of the Society, then they are not the public, and relies on such cases as *Pugh* and *Richardson*. Ms Nelson says that the case law, such as *Paterson* and *May*, shows that there is not such a bright line test. As I said, I find the case law difficult as, first, it is clear that use as a purely public car park is by the public if the users can simply go anywhere, notwithstanding that they have paid, and are therefore a subset of the public, that is to say paying motorists. Secondly, it is clear that a car park will be, or at least can be, a public car park where the users are there to attend a sufficiently public event, that is to say the car park is open to the public generally for attenders of that (public) event (see *Paterson*). Thirdly, it also seems to be a public car park where the visitors are there to attend a location which has a sufficiently public purpose, for example the operating of a public house but also for other "public purposes" which would extend beyond a public house to, at first sight, a shopping mall, or shopping park, and potentially other sets of commercial purposes. That seems to be the purport of various of the cases as cited in *May*,

69 The public house example is, itself, somewhat curious because a public house is a single location business, although in *May* some of the *dicta* would seem to suggest that it is sufficient for the relevant area to be a "public place" for the public to be invited to

commercial retail premises. I note that in *May* there is no suggestion in the judgment that the car park was used by the public to access not only the Volvo franchise but also other places in the general locality. I also note that in *May* the sign was simply "Customer Parking", without any sign which expressly prevented visitors from going from the car park to other places, although it could, of course, be said that there was some implication to that effect.

70 I do, in fact, find various elements of the reasoning in *May* to be somewhat difficult to follow because various sections of it, including when the court is dealing with the *Vivier* decision, suggest that attendance at a particular location for the purposes of the owner of that location is simply private, while other attendances, although it is intended by the owner to be for the purposes of that owner, are public. It may be that the distinction which has been drawn is between (1) where the owner's premises are a very specific business, where there has to be a particular reason to attend them, such as a foundry business as in *Spence*, and (2) where the owner's premises are used for general commercial retail purposes where the public are being invited as the general public, to come and buy, as is the case with a Volvo franchise, and would also be the position with regards to a public house. However, it does not seem to me that the distinction comes over particularly well, if that is what it is, from the *May* judgment.

71 On the other hand, *May* is not the last decision in the area which has been cited to me. It is followed by *Richardson*, which is a decision of the High Court, and which is also at High Court Judge level, and so is binding upon me. In that case, the contrary conclusion was come to from *May*, and although reasons were given about the specific signs in the *Richardson* case, and the lack of evidence of access by the public, it seems to me that it was quite clearly treated by the court as a free-standing and independent reason the fact that it

was obvious that you would only come to that car park to visit the particular businesses there, i.e. in order to attend those particular businesses such as the patients of “Enhanced Aesthetics.”

72 As I have said I have found trying to find a coherent rationalisation of the various case law difficult, but having considered the various judgments and, in particular, *Richardson* following *May*, and *May*'s apparent approval of both *Vivier* and *Spence*, it seems to me that the true distinction is whether the area is used, and allowed by the owner to be used, by visitors who are only coming to enjoy the linked owner premises for a private purpose of the owner, or whether there is some real and significant number of visitors whose access is tolerated, who are there other than only for the owner's truly private purposes. By " the owner's truly private purposes" I mean purposes of the owner which are private in nature rather than being the general public doing something which the general public generally does as such, for example buying drinks in a pub, or cars from a car franchise; and where those private purposes dominate the purpose of the visit so sufficiently so as to make the visit private rather than public. It seems to me that that is an effective rationalisation of, and is consistent with, the case law, and in particular the basic principle derived from *Harrison* that the essence of a public place is actual use by the public at least tolerated by the owner. The cases make clear that the purpose of the access and use of the area is key, which underlies the decision in: first, *Pugh*, where the access was simply for the purposes of the private members' club, which was a private purpose which dominated the car accessing the area; second, *Spence*, where the purpose was simply that of the foundry business which dominated why anyone would go there; and third, *Richardson* where, again, the purpose was simply that of the relevant private businesses, which dominated why people went there. This is consistent with much of the reasoning in *May*, which identified a difference between such an invitation and just a general invitation to the public to come and park with the desire

that they should engage in a general public activity of looking to see whether to buy a car from a franchise but which was in no way expressly limited. Further, the requirement that the owner's purpose should be private in nature rather than public in nature, seems to appear from numerous of the other cases, including such cases as *Paterson* and *Waters*.

73 I do bear in mind that it is possible for the public to use their access for a public purpose even if the owner intends it to be for a private purpose; that seems to have been the actual situation in *May* and, quite possibly, the situation in *Harrison*. Nonetheless, even applying this approach it does seem to me that I end up having to ask myself as to whether or not this case falls clearly on the *Spence/Richardson* side of the line, or whether there is a real prospect of the claimant persuading the trial judge that it could fall on the *May* side of the line. That involves a multifactorial evaluation of asking whether the use on which the claimant relies is truly for an actual public purpose.

74 It involves consideration of the location and whether those who come there involve public user or merely private user. It does involve consideration of signage, whether positive in terms of invitation or negative in terms of seeking to dissuade the general public; the situation in this case being that it is apparently common ground that there is nothing to suggest there was any signage inviting the public but there is a real prospect (which I accept) that there was no signage seeking to dissuade the public. It involves a consideration of what is required in order for someone to come and be there, and whether the owner has set out a specific requirement or whether, as a matter of fact, those who come there will be limited by a requirement as in *Spence*, and it includes assessment of who actually is there and why they are there.

75 As I said earlier, my instant impression on seeing the plan and the photographs, and the scenario of the location, and also reading the witness statements, is that these are premises

of a private members' club, and where the access to them is for those private purposes of the club's own club operations, and that at first sight this is not a public place. However, I have still the two concerns that, first, notwithstanding my attempt to reconcile the various case law and that this is a difficult exercise; and, secondly, that this is a summary judgment application, and the question is whether the defendant has succeeded in persuading me that there is no real prospect of the claimant establishing that it is a public place.

76 Looking at the actual evidence I continue to see, first, that this is a remote location as in *Spence*. Secondly, these are the premises of a private members' club used for the private, rather than general public, purposes of the club and therefore seeming to resemble the situation in *Pugh*. Thirdly, that the only evidence about persons who enter, not for reasons linked with the club are: (i) people who are seeking directions to the Recycling Centre, who are simply going to receive those directions and leave, and where I do not see how their presence can render this a public place. (ii) Dog walkers who have wandered in and then, because they cannot go anywhere else wander out again, and where again I cannot see how they can render this a public place. It might be different if there was evidence that people actually parked in order to then leave and go to the woodland with or without their dogs, but there is simply no evidence as to that. It seems to me that the evidence with regards to dog walkers falls within the trivial category, as referred to in the elements of *Vivier* which were cited in *May*. Fourthly, there are those who deliver hardcore and other material for the club's purposes, but it seems to me that those deliveries are simply private purposes. I cannot see as to how any site or place becomes public, simply because there are deliveries to the commercial or other operation – here the club operation – which exists there.

77 There are those others, though, who are said by Ms Nelson to be more public. First, those who come as enquirers to ask about the Society. As against that, this is not the main

location of the Society, this is very much a subsidiary location; but, even if it was the main location, I cannot see where the fact that enquirers come to ask about the Society renders the yard a public place. Making such an enquiry seems to me to be exactly a private purpose, and if the fact that people come to a private members' club to make enquiries about it could render it those premises, and the area outside them a public place, it seems to me that that would be highly surprising and would have resulted in a contrary result to that which was adjudged in *Pugh.*

78 Secondly, there those who are invited to deliver jumble. That, however, it seems to me is still for very private purposes relating to the club and its operation. It is not for the purposes of a jumble sale which is being conducted for the purposes of the local community, it is simply, again, a delivery to the club for its own purposes.

79 Thirdly, there is the suggestion that some buy tickets. The evidence here though is that it is only a very few people. It is not the main location for ticket sales, and there is no suggestion or evidence that those persons then park and go off to walk around. Again, it seems to me that they are people who have simply come for a very limited purpose which is a purpose of the Society itself and that, again, this is within the *Richardson* classification rather than the *May* one.

80 Fourthly, there is a question as to whether or not there are members of the public who come there simply because it is a place to come for a social chat. That, however, is something which features only in the particulars of claim and not in the witness statements evidence.

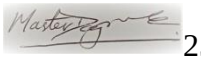
81 As I have said, because of my concerns both as to the law and the nature of the test which I have been carrying out, I have been considering very anxiously as to whether or not it could be said that this is a public place car park linked to a private club, but still access tolerated

by the club, being access by the public for their own, that is to say, public purposes, and not solely for what I would describe as the owner's private premises.

82 Nevertheless, notwithstanding my anxious consideration, I conclude that the claimant has no real prospect of success on this aspect. My overwhelming impression remains that this is a private place and people come in there either, effectively by mistake and to leave simply because the gates are open, which is not, in my judgment, sufficient to turn the matter into a public place, or because they come there for a specific Bonfire Society purpose which is not public in nature. Although I am very conscious that this is a summary judgment matter with a summary judgment test, and though I have only come to this conclusion on balance, I do conclude that there is no real prospect that the claimant would succeed on trial on the evidence before me and which is, at first sight, the evidence which would be before the trial judge.

83 I do also have to ask myself as to whether I see no compelling reason for there to be a trial in these circumstances, in circumstances where the third and fourth defendants have accepted that they are bound by the outcome and that the claimant is able to pursue them, principally the fourth defendant, along the lines pleaded – if those lines pleaded are right as a matter of law – I do not see any compelling reason for a trial.

84 For all those reasons I will grant the reverse summary judgment as sought and which, at first sight, would involve an order for the vacation of the trial. I will consider, in the light of any suggestion which may be made to me about appeal, as to whether I should be making such a direction at this point in time.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