IN THE COUNTY COURT AT LEEDS

BUSINESS AND PROPERTY WORK

BEFORE DEPUTY DISTRICT JUDGE ADKINSON

HEARD ON 22 OCTOBER 2020 (when judgment was reserved)

AND 14 JANUARY 2021 (when judgment was handed down)

BETWEEN

SSE GENERATION LIMITED (1)

KEADBY GENERATION LIMITED (2)

KEADBY DEVELOPMENTS LIMITED (3)

Claimants

And

JOHN CARNEY

Defendant

Appearances	
For the claimant	Mr L Wilcox, Counsel instructed by CMS Cameron McKenna Nabarro Olswang LLP
For the defendant	In person

DECISION

The defence is struck out in its entirety because it is an abuse of the Court's process.

REASONS

Introduction

1. This hearing's purpose is to determine the joint application of SSE Generation Limited, Keadby Generation Limited and Keadby Developments Limited ("SSE and others") joint application to strike out Mr Carney's defence because it is an abuse of process, or alternatively for summary judgment against him because his defence has no real prospect of success and there is no other compelling reason why his defence should be heard at a trial.

2. Central to the application is a judgment of the Crown Court at Grimsby, given by His Honour Judge Heath on 16 May 2000 ("The Crown Court judgment").

3. The judgment arose out of an application that Mr Carney had made to the Crown Court under the **Highways Act 1980 section 56** for an order that part of Bonnyhale Road was a public highway maintainable at public expense, was in disrepair and therefore ought to be put into repair. The Crown Court ruled the application failed because the part of Bonnyhale Road to which the application related was not a public highway. It also incidentally considered that the other parts of Bonnyhale Road which form the subject of this case were not public highways either.

4. Mr Carney admits to using the relevant parts of Bonnyhale Road. He says that his defence is not an abuse of process and has a real prospect of success. He says there is new evidence in the form of a book of reference ("the 1866 book of reference") attached to the **South Yorkshire Railway and River Dun Act 1866** ("the 1866 Act") and in the book of reference ("the 1956 book of reference") attached to the **Keadby Light Railway Order 1956** ("the 1956 Order"). The books of reference detail the various parcels of land affect by the 1866 Act or 1956 Order (as may be). He says these describe Bonnyhale Road as an occupation road and so as a public highway.

5. He also alleges that the Crown Court has not considered that there has been at least 20 years' open user by the public of the route as a highway from 1949 to 1990 and therefore it should form a highway by prescription ("the prescription argument").

6. In reply to this SSE and others cited the rule in **Henderson v Henderson** (**1843) 3 Hare 100 Ch**. They argued that the Crown Court did not consider it because he never raised it. Because Mr Carney had already had the opportunity to raise the prescription argument, he could not raise it now without abusing the Court's process.

The hearing and procedure

The claim, defence and procedural background

7. By a claim issued on 19 March 2019, SSE and others assert that they own between them the lands across which a route called "Bonnyhale Road" runs. For present purposes which claimant exactly owns what does not matter. They say that Mr Carney is committing acts of trespass and nuisance by using this route. They seek an injunction against him to stop him from doing so. They also seek damages.

8. At the same time as they issued their claim, SSE and others applied for an interim injunction to stop Mr Carney from using the relevant part of Bonnyhale Road. His Honour Judge Klein granted the interim injunction on 3 April 2019 accepting SSE and others' cross undertaking as to damages.

9. Afterwards, Mr Carney filed his defence.

10. His defence is lengthy and convoluted. It is clear in this regard: he says Bonnyhale Road is in fact an ancient public highway (whether he says it is

a footpath, bridleway or “cart way” (i.e. open to all traffic) is not clear but is not relevant to this hearing). Therefore, he says that he is entitled, as a member of the public, to use it.

11. At the hearing he suggested that his defence raised the following additional arguments:

    11.1. SSE and others did not have sufficient title to claim trespass or nuisance; and

    11.2. the prescription argument I have set out above. (I will refer to the legal rule that a highway can be formed after 20 years user as “the 20-year rule”.)

12. These suggestions came as a surprise to me and to SSE and others because they are not apparent from his defence.

13. He did not refer to the Crown Court judgment in his defence.

14. On 20 November 2019 District Judge Goldberg conducted a costs and case management hearing. He directed amongst other things standard disclosure by 18 December 2019.

15. On 18 December 2019 Mr Carney complied with that order. He verified his disclosure with the relevant statement of truth. He disclosed numerous documents but none of them was the Crown Court Judgment. He has provided no explanation about why he failed to disclose the Crown Court judgment, documents relating to that hearing or the Crown Court’s actual order. The Crown Court judgment at the very least is plainly a disclosable document.

16. On 16 January 2020 SSE and others applied for a stay because they had independently become aware of the judgment. That stay was granted on 22 January 2020 for 3 months.

17. On 29 April 2020 SSE and others made the application that I am today determining.

18. Listing of the application took some time because it required a face-to-face hearing and the effects of the Covid-19 pandemic adversely affected the Court’s ability to list the application. Neither party complained that the delay had had an adverse impact on their case or its presentation. For my part I am satisfied it has not adversely impacted on there being a fair hearing.

Hearing before me

19. I had a hearing bundle of 2 lever arch files prepared by SSE and others. Mr Carney filed his own copies of the documents he relied on (though they appear to be in the claimants’ bundle in any event) and 2 tubes of maps. I have taken into account the documents to which I have been referred.

20. Each party prepared a skeleton argument. Mr Carney’s is substantial. Those, together with authorities, ran to another 2 lever arch files. I am grateful for them and have also taken those into account.

21. In total there were about 8 lever arch files and 2 tubes of maps.

22. The hearing was listed for one day.

23. I had the opportunity to read into the case the day before. I decided then that this case would require me to reserve my decision, whatever that decision might be. Therefore, I was able to be more generous with the time than otherwise might be the case.

24. At the hearing Mr Wilcox, Counsel, represented SSE and others. Mr Carney represented himself.

25. The hearing began at 10:00. With the parties' agreement we took a break at 11:30 or thereabouts and at 13:10 for lunch, resuming at 14:10 or thereabouts. It had been my intention to take an afternoon break. However, neither party required it and as a result we finished a little before 16:00.

26. SSE and others did not require any reasonable adjustments to take part in the hearing.

27. Mr Carney did require reasonable adjustments to take part in the hearing. Mr Carney needed to stand up for most of the hearing because of an injury. There was no objection and I therefore let him do so. Mr Carney also indicated he might need urgently to take a short break with little notice. There was no objection to this either and I concluded it would on the face of it cause no real problems, so I made that adjustment too. In the end, Mr Carney did not in fact need to take any short break.

28. In order to ensure that the case could be heard I agreed a timetable with the parties. After discussions with Mr Wilcox and Mr Carney I allowed SSE and others 1 hour 30 minutes to make their arguments and Mr Carney 2 hours to make his. These times excluded breaks.

29. SSE and others took about 1 hour 30 minutes.

30. Mr Carney took slightly longer than 2 hours. I had to warn Mr Carney of the deadline when he had about 5 minutes left, and shortly after the 2 hours was up, I decided to stop his submissions. I was satisfied that he had had a fair and reasonable opportunity proportionate to the issues I had to consider to present his case and that if I did not stop him, the Court would run out of time. I also considered that by this point Mr Carney was beginning to repeat himself.

31. I allowed Mr Wilcox an opportunity to make brief replies to points Mr Carney had made but which were not covered by the claimant's original submissions. He took about 10 minutes to do that.

32. During the lunchbreak, Mr Carney's path and mine crossed. Before I had a chance to stop him, he spontaneously expressed to me an apology for appearing befuddled in his submissions that he made before lunch. There were no other exchanges. I disclosed this to SSE and others in open Court in the afternoon in Mr Carney's presence, of course. No party objected to me continuing to hear the case. I concluded that in the circumstances there was nothing to suggest I should recuse myself because a well-informed observer at the back of the courtroom would not consider there to be anything untoward, yet alone a perception of bias. Therefore, I continued to hear the case.

33. For what it is worth, at no time did I consider that Mr Carney owed any apology to me or to anyone at all for anything he had done or not done.

34. I am satisfied in the circumstances that each party has had a fair opportunity to present their arguments to me and has taken that opportunity.

35. SSE and others confirmed that if the defence were either struck out or their application for summary judgment succeeded, they would rely solely on the allegation of trespass, and would not seek to pursue the alternative claim for nuisance nor any claim for consequential damages from either trespass or nuisance. They would however seek a final injunction in the terms of the interim injunction already in place, and their costs.

36. Clearly, if they own the lands in question and the route is not a public highway, then Mr Carney's admitted user amounts to a trespass because there is no other reason advanced to support his right to be there.

37. In those circumstances I therefore confined myself to the question of whether Mr Carney can argue that Bonnyhale Road is a public highway. I have not addressed the nuances of whether the claim against him is strictly one of nuisance, trespass or both because that would not further the case in any useful way at this stage.

38. After the hearing I reserved my decision. This is that decision.

Issues

39. I believe the following issues arise:

    39.1. Does the defence include:

        39.1.1. A defence that SSE and others do not have sufficient title to bring a claim in trespass or nuisance?

        39.1.2. A defence relying on the prescription argument?

    39.2. Is the defence an abuse of the Court's process?

    39.3. If so, should it be struck out?

    39.4. If it is not an abuse of process (or it is but that is not a reason to strike out the defence) have the claimants shown it has no real prospect of success?

    39.5. If so, is there any other compelling reason Mr Carney should be allowed to defend the claim?

Facts relevant to the issues before me

Bonnyhale Road

40. The dispute concerns Bonnyhale Road which is on or near at least the Isle of Axholme in North Lincolnshire and runs from Ealand to near Keadby. It runs approximately south-east out of Ealand and then turns east to run as good as along the north bank of a watercourse labelled "North Soak Drain" ("the soak drain") on the Ordnance Survey Map, which I attach to this judgment at the last page. The soak drain is to the

immediate north of the "Sheffield and South Yorkshire Navigation, Stainforth and Keadby Canal" ("the canal").

41. Relying on the map's gridlines as a rough guide, about 1.5 kilometres south-east of Ealand the route passes Ealand Warpings.

42. Another 0.5 kilometres further on it passes North Pilfrey Farm. Just to the east of North Pilfrey Farm is the outflow of a drain into the soak drain known as the Keadby Boundary Drain ("the boundary drain").

43. The route continues along the northside of the soak drain to a junction with Chapel Lane, which is about 1 kilometre due west of Keadby. It crosses Chapel Lane then for a short distance into the power station site that is just west of Keadby.

44. The parties agree that such part of Bonnyhale Road that lies between Ealand and Ealand Warpings is a public highway. It does not form part of the application before me.

45. The parties also agree that Chapel Lane is a public highway and again that does not form part of the application before me.

46. Strictly, it is only the route from Ealand to the crossroads that is known as Bonnyhale Road. After the crossroads with Chapel Lane it is known as Ealand Road. It continues into the power station. However, for the sake of simplicity, I will refer to the whole disputed route as Bonnyhale Road unless context requires otherwise.

47. SSE and others are building new power stations on their lands. The details do not matter for my purposes. However, the construction involves the use of heavy machinery along Bonnyhale Road. Anyone using Bonnyhale Road in such circumstances puts themselves or others at risk of death or serious injury. It follows that if SSE and others are aware of anyone using it and who is not involved in the construction, they have to halt works in order to ensure safety. This interferes with their construction work.

48. Therefore, in order to ensure safety, SSE and others have closed Bonnyhale Road between North Pilfrey Farm and the power station, excluding Chapel Lane. They have in particular erected a gate at the boundary drain ("the west gate") and just west of Chapel Lane ("the east gate"). There is also a gate preventing access into the power station.

49. The attached Ordnance Survey Map shows the relevant area. Its labels are added by SSE and others. They are sufficiently accurate except to the location of the West Gate. That is in fact level with the boundary drain and so slightly further east than indicated. The mushroom farm also was not where indicated but I am told was probably at Ealand Warpings. However, its exact location is not relevant to my decision.

The Crown Court judgment

Introduction

50. At an uncertain date Mr Carney presented an application to the Crown Court at Grimsby for an order that a particular section of Bonnyhale Road was a highway maintainable at public expense and was in disrepair.

51. As noted earlier, the case was heard by His Honour Judge Heath. The transcript of his judgment has markings on it. It is not clear whose they are (some appear to be from the Learned Judge because they are clearly corrections) but they do not interfere with the ability to read and understand it and do not appear to affect the substance. Except where they are obvious corrections, I have ignored them.

52. The application related only to a short section of Bonnyhale Road. Unfortunately, the transcript does not have attached to it a map of the section which the Court was considering. However, it was common ground that this related to the section that ran more or less from Ealand Warpings to the boundary drain and I note that this tallies with documents that Mr Carney has submitted in support of his defence.

53. The Learned Judge made the following relevant observations in his judgment (my reference to page numbers and letters is to the location within the transcript. References within the quotes are to pages in the bundles before him. I have not seen those bundles nor the indices to them. I do not have any reason to believe that undermines the conclusions to which I have come).

Mr Carney's case before the Crown Court

54. At **8G-9C**, the Learned Judge set out the case that Mr Carney had put before him as follows:

> "In very simple terms Mr. Carney's case is this: That the length of road in question is part of an ancient highway from Ealand to Keadby. He submits that he has conclusive proof that it was a highway. He has sought to persuade me that what he describes as the bank in photograph page 63 in volume A4(1) of the bundles of documents was there from the 1790's and that this is part of the ancient highway.
>
> "He urges me to accept that the road to North Pilfrey Farm is an ancient highway. His basic premise being that there was in ancient times a road running from Ealand to Keadby and that this stretch of road is part of it. He says that there are four hundred banks which are public highways. Part or the bank he says is shown in the photograph to which I have already referred at page 63."

The law as set out by His Honour Judge Heath

55. At **14G-15H** the Learned Judge set out the law in summary. He said:

> "The first question is: Is the extension a public vehicular highway? The law is not in dispute. If the extension is a public vehicular highway, and became such before 1835, then it would be maintainable at the public expense by North Lincolnshire Council, as Highway Authority. If it is a highway that was dedicated after 1835 it will he maintainable at the public expense only if the adoption procedure contained in the Highways Act of 1835 or succeeding legislation has been followed. The Court have shown themselves prepared to apply a doctrine analogous to that of loss of modern grant in the case of easements so that lack of evidence a highway was dedicated in accordance with the statutory procedure has not always proved fatal to a claim of the highway is publicly maintainable. That has

been so only where there has been both a history of repair and the highway authority and/or one or more of its statutory predecessors is repaired under the belief that the way was repairable at the public expense.

"A highway might be created at common-law by dedication by a landowner of a public right of way across his land and acceptance by the public of that right of way. Both dedication and acceptance may be implied from evidence of public use of the way and acquiescence in that use by the land owner, and proof of highway status may be assisted by the rebuttable presumption of dedication arising from proof of a 20 year period of public use under [the **Highways Act 1980 section 31**]. A highway may also be created by or under statute and it is therefore necessary in this case to look at the enclosure awards which relates to the land over which the extension runs."

56. It is quite apparent that the Learned Judge was not restricting his definition to only a highway capable of being used by vehicles (as opposed to on foot or with a horse, say). That is because never once in his judgment does he suggest the ability to use Bonnyhale Road with a vehicle is criterion for him to consider.

57. It is also clear from this extract that the Learned Judge was aware of the 20-year rule.

58. I am satisfied that Mr Carney was aware during the Crown Court proceedings of the prescription argument and 20-year rule because he confirmed as much in the hearing before me.

59. It is clear from the sections I have quoted above that Mr Carney did not put the prescription argument before the Crown Court for the Court to consider. In reply to my enquiry about why did not raise in the Crown Court proceedings, he explained that he would have expected His Honour Judge Heath to know of the 20-year rule and to have considered it in any event. He said as a judge he should know the law.

60. The extracts show he clearly did know of the 20-year rule. He clearly also understood Mr Carney was not relying on it or the prescription argument.

61. Mr Carney had available to him all the documents available now except for the 1866 Act, the 1866 book of reference, the 1956 Order and the 1956 book of reference. A Mr Thorley also gave first-hand historical evidence orally at the hearing about the use of Bonnyhale Road. I give some more detail below about that.

62. As to Mr Carney's suggestion that His Honour Judge Heath ought to have considered it in any event, I note that it is not the role of a Court to decide what claims or defences a party could advance, ought to advance, guess what the party might want to advance or consider factual allegations not put before it.

63. It is an inevitable conclusion in the circumstances that the prescription argument relying on the 20-year rule was available to Mr Carney and he either knew it or ought to have known of it but, for whatever reason, he chose not to pursue it.

Consideration of the whole route

64. It is clear that, while His Honour Judge Heath was legally seized only with considering a small section of Bonnyhale Road, Mr Carney invited him to consider, and the Learned Judge did consider the whole of Bonnyhale Road that is relevant to this claim. He had to. It is unrealistic and absurd in the circumstances of this case that a public highway might exist to the immediate west and east of the section on which the Crown Court was asked to adjudicate but that the part that linked those two was not a highway. The evidence, arguments and submissions clearly related to the whole of Bonnyhale Road. I am therefore satisfied that the Crown Court judgment in fact deals with the whole of Bonnyhale Road. I am also satisfied that the Crown Court heard evidence about the whole of Bonnyhale Road. It is quite apparent also that the numerous documents Mr Carney puts before this Court were also put before the Crown Court.

65. Given the evidence was put before the Crown Court and arguments were presented by both Mr Carney and by the then local highways authority, and given the decision and deliberations of His Honour Judge Heath I consider it is fanciful to argue that this Court would come to a different conclusion about Bonnyhale Road's status as a highway, unless the 1866 Act, the 1866 book of reference, the 1956 Order and the 1956 book of reference change matters.

Ownership of land

66. Mr Carney raised before the Crown Court issues of ownership and ambiguity about the titles. At **13A-14A** the Learned Judge said:

> "I make the general observations at this stage that a lot of the banks in the area do carry roads but it does not necessarily follow that all banks, that is to say double-sided embankments, carry roads. Mr. Carney suggests that there was a pre-existing road along exactly the line of the canal, or that the canal intercepted or picked up the line of the highway and continued it. There is absolutely no evidence for these propositions at all.
>
> "[Mr Carney] also says that the highway was created or asserted under the [**Stainforth and Keadby Canal Act 1793**] which led to the cutting of [the canal]. A considerable amount of time was spent during the case looking at the Act and it is clear that a right was given to construct private roads by the Act and the Act imposed a duty to accommodate existing public features, including highways. It did not mean that if you cross a road you can pick it up and carry it along. There is nothing in the Canal Act which supports any contention that if created a road or way along the canal bank.
>
> "There was also much time spent in the case looking at documents in relation to land ownership of the [Electricity Authority], Rail Track, and the Environment Agency. I have looked at those documents carefully and I have considered what both Mr. Carney and Mr Machin [Defendant's Counsel] have had to say about those and I have come to the conclusion that there is in fact no problem or discrepancy about land ownership in that particular area."

67. The Crown Court therefore considered ownership and concluded that there was no ambiguity in ownership at least prior and up to the date of the hearing. Mr Carney has produced nothing that has arisen since then that shows any new ambiguity has arisen since the Crown Court judgment that undermines SSE and others' titles to the respective parts of Bonnyhale Road. Therefore, it is an inevitable conclusion that SSE and others have sufficient title to bring this claim.

Conclusions on ancient highway status

68. His Honour Judge Heath went on to consider the various arguments that Mr Carney deployed to show that Bonnyhale Road was an ancient highway.

69. At **16A** the Learned Judge said:

> "The Council's position is simply this: That in the 1940's the extension existed merely as a narrow unsurfaced farm occupation road giving access from the eastern end of Bonnyhale Road at Ealand Warpings to North Pilfrey Farm. …"

I raise this because it is apparent that the Council defined the occupation road as being a private road (as opposed to public highway). His Honour Judge Heath did not anyway demur from the suggestion that an occupation road was a private road and not a public highway. He uses the term occupation road throughout his judgment and it is clear from context therefore based on the extract above he does so as meaning a private as opposed to public road.

70. His Honour Judge Heath then went on to consider the evidence that Mr Carney presented. While I have read the judgment in full, for brevity I summarise the Learned Judge's findings here:

    70.1. The memorial survey of Crowle in 1738 does not show a road in the vicinity of Bonnyhale Road: **16G-17A**;

    70.2. A map known as Armstrong's Map of 1778 shows a road connecting Ealand and Keadby but it is not Bonnyhale Road because it runs well to the north of Bonnyhale Road: **17B-C**. Mr Carney says the Learned Judge improperly approached the evidence on this map by failing to recognise that old maps are often no more than indications of a route. That however is a matter for an appeal against the Crown Court judgment. In any case it is plain that His Honour Judge Heath had many more reasons to support his conclusions beyond his interpretation of Armstrong's Map. Therefore, even if Mr Carney is correct it does not undermine His Honour's ultimate conclusion.

    70.3. A map of "The Manor of Hepworth in the county of Lincoln" does not show any in the position of Bonnyhale Road nor crossing Keadby Moors. **17B-E**;

    70.4. A plan described as "Corrie's? [sic.] Plan from the Atlas of roads" does not show a road on the line of Bonnyhale Road: **17F**;

70.5. The Isle of Axholme pre-enclosure plan of 1800 does not show a road associated with the canal like Bonnyhale Road is. The Learned Judge concluded there may have been a road running between Ealand and Bonnyhale but not between Bonnyhale and Keadby. I observe that the location of Bonnyhale is not clear, but I infer it is the point where the road from Ealand turns from a south-east direction to a due east direction. It does not matter in any event because the judge's findings are clear: Bonnyhale Road as relevant to this claim did not exist according to the plan.

70.6. The Isle of Axholme enclosure award and award map do not show a road in the position of Bonnyhale Road: **18D-19G**;

70.7. The **Isle of Axholme Enclosure Act of 1795** [erroneously described as being of 1875 in the transcript at **17G-H**] **section 25** had the effect of confirming that any road along the route of Bonnyhale Road was not a public right of way: **19H-20A**;

70.8. The Crowle enclosure legislation of 1785 and **Crowle Enclosure Amendment Act 1816** described a route along Bonnyhale Road as a private carriageway road 24-feet wide. After considering **Dunlop v Secretary of State for the Environment aors (1995) 70 P&CR 307**, the Learned Judge concluded the use of the word "private" indicated that the Acts said Bonnyhale Road was not to be a public highway: **20C-22D**;

70.9. In summary, the Learned Judge said at **23D-G**:

"It is therefore abundantly clear that upon enclosure Bonnyhale Road came into existence, 24 feet wide, as a private road and not a public road. It was not a public highway. So the award of Bonnyhale Road in this location is a private carriage road and the lack of any award of a road to the north of the canal further east than South Crossmoors Road is quite inconsistent with the supposed pre-existence and continued existence of a public road along this or any similar line. If one looks at the descriptions of the particular allotments they are wholly consistent with that position. I do not propose to rehearse them."

70.10. The Learned Judge concluded that there is nothing in the period 1822-1911 and the Keadby enclosure awards to support the existence of the road: **24F-H**;

70.11. He noted that a sketched plan of North Pilfrey Farm from 1885 and that an Ordnance Survey Map arising from a survey of the same year also show that there is no route running east of North Pilfrey Farm. In other words, the part of Bonnyhale Road that is the subject of this claim did not exist: **25E-H**;

70.12. The Learned Judge concluded that the subsequent maps showed the route was unchanged in 1907, 1910-1914: **26A-B**. He also dismissed an argument that Mr Carney ran before me

that somehow the Ordnance Survey maps prepared by cartographers were unreliable (whereas maps from the 18th century were accurate!). Such an argument has an absence of reality. There is no reason to suppose the maps are unreliable. The cartographers were plainly concerned to capture an accurate portrayal of the land. There is no reason they would miss off a whole road if it existed like Mr Carney alleges.

70.13. Drawing it together His Honour Judge Heath expressed the following clear conclusion:

"In my judgment it is quite plain that the documentary evidence indicates that as of 1911 there was no public right of way over the line of the extension and no road physically existing capable of or consistent with public use as a highway. At most there was an unsurfaced agricultural occupation road extending from the end of Bonnyhale Road [at Ealand Warpings] as far as North Pilfrey Farm."

Given how the Council put its case at **16A**, it is clear that the Learned Judge meant **private** (as opposed to a public highway) occupation road.

70.14. The Learned Judge considered oral evidence from a Mr Thorley who said he knew of Bonnyhale Road from 1947. He accepted his evidence and considered it alongside the local authority's contemporary records. Mr Thorley at the time of the hearing was 73 and lived in nearby Crowle. He had known of the road since 1947. Despite living in the area for some time and working in the area around Bonnyhale Road, Mr Thorley provided no real evidence that Bonnyhale Road was a public highway from 1949 onwards.

70.15. The detail of his evidence is set out at **28F-34C**. The Learned Judge concluded that the evidence showed the following:

"It is clear in my judgment that immediately before the construction of the new power station access road in 1948, 1949, all that existed along the extension was an agricultural accommodation road which was accessible from the west by Bonnyhale Road but had no vehicular connection to the east. In my judgment there is it is not slightest reason to think that that had acquired the status of a public highway."

70.16. The Learned Judge concluded that there was no road that ran east of the Chapel Lane crossroads. The road there was built by the electricity board as part of the power station: **35B-E**.

70.17. He found as fact that there was no existing public highway before 1948 along the parts of Bonnyhale Road relevant to this claim and nothing had happened since to make it a public highway: **36A-G**

71. In summary His Honour Judge Heath concluded at **41D-42B**:

"His application, I am afraid, fails. It is wholly misconceived. The situation is, in my judgement, quite plain as set out in the very helpful Skeleton of Mr Machin. I have little doubt that Mr Carney will go to his grave believing that this road is an ancient highway. Sadly for him the evidence which he has adduced is not conclusive proof that it was so. In fact the longer the case went on the more documents that I saw the plainer it became that the evidence supported the contention of the Local Authority and not of Mr. Carney. It is unfortunate that he was impervious to the irresistible logic and analysis and compelling analysis that was put forward by the Local Authority in the Skeleton Argument. I understand from the correspondence which I have seen in the bundles that the Local Authority set out their position very early on to Mr. Carney in full in detail, and I believe letting him have a copy of Council's [sic.] advice to that he could see what they were saying. It had no effect upon him."

72. Again absent any effect that the 1866 Act, the 1886 book of reference, the 1956 Order or the 1956 book of reference may have, there is nothing else that suggests that there is remotest chance that this Court would come to a difference conclusion about whether Bonnyhale Road is a public highway.

Appeals against the Crown Court judgment

73. Mr Carney asked His Honour Judge Heath to state a case for the opinion of the High Court. He refused. Mr Carney then commenced judicial review proceedings. Silber J refused it on the papers. Hooper J refused it an oral renewal hearing. He appealed to the Court of Appeal and there was an oral permission hearing (**[2002] EWCA Civ 186**). Pill LJ refused permission to appeal. Primarily the refusal was because of Mr Carney's delay. Pill LJ also remarked **at [11]** as follows:

"Impressed as I am by Mr Carney's knowledge of the subject and the work he has done, and accepting as I do, the genuineness of his feelings on this subject, nothing has been drawn to my attention which leads me to believe that, upon a consideration of the evidence as a whole, Judge Heath was wrong. He also refused to state a case having regard to the merits of the matter. While I refuse the application on the grounds that it was brought too late and the judge was entitled not to grant an extension of time, I have heard nothing to indicate that any injustice has been done in this case."

The defence to this claim

74. Mr Carney has filed a lengthy defence. It raises the new issues of the 1866 Act, the 1866 book of reference, the 1956 Order and the 1956 book of reference.

75. He had attached various documents to it. They included conveyances from 1938 and in paragraphs [82]-[88] (first set) and [82]-[87] (second set – there are 2 sets of paragraphs, each with different content but which share the same numbers) he talks about the purchase of the land. The only reasonable reading of these paragraphs in the context of the whole defence is that he maintains that Bonnyhale Road is a public highway. He does not say that SSE and others do not have sufficient title. He referred

in submissions to the HM Land Registry Titles but he never took me to them. I am unaware of the contents of those titles or why they might support what he says.

76. Nowhere else in his defence does he raise a clear dispute as to SSE and other's title.

77. Most tellingly in my judgment is his defence at [25]. He writes:

"[25] At page 2 paragraph 9 Ms Reichman 'He has regularly trespassed on land owned by the claimants, causing disruption, damaging property and risked the safety of himself and others while doing so.' This statement Mr Sonal Riechman statement [sic.] is perverse.

"[26] The Highway Code states that pedestrians walk on the right side. I had walked on the left-hand side so the driver could see me and did not have to walk the dog in the mud."

He continues in a similar vein to about [76] explaining how it is a highway. Then his defence appears to fizzle out in that it does not expressly raise other issues.

78. I am surprised that his first response (or a clear response) is not "It's not the claimants' land" or similar. If he really disputed ownership it would be written clearly. It is not set out anywhere clearly. A reasonable reader would be unable to deduce it were an issue without significant, unjustified inference or supposition.

79. It may be that Mr Carney is seeking to argue that the "scrapings" (i.e. as much of the surface as is necessary to support and be the highway) do not belong to SSE and others because the law deems them to belong to the relevant highway's authority. This pre-supposes the route is a public highway. Therefore, if this is Mr Carney's argument, it does not take the case any further forward because it depends on the road being a highway in the first place.

80. The defence does not expressly or impliedly raise the prescription argument either. The focus and only reasonable reading is on Bonnyhale Road being an ancient highway from before 1835. To conclude that Mr Carney was also raising the prescription argument would also require a reasonable person to draw significant and unjustified inferences or make suppositions from what Mr Carney has written.

New evidence – the 1866 Act and 1866 book of reference

81. Mr Carney did not have the 1866 book of reference available to him for the Crown Court proceedings. He says it was only recently found in the relevant archives, having been lost. I note that they were in the West Yorkshire archive, not the Lincolnshire archive. There is nothing I have seen that suggests a reasonable person in this case should be searching the West Yorkshire archive. SSE and others do not forcibly challenge the suggestion they were not available at the time and have given me no reason to believe they would have been found with reasonable diligence. Therefore, I am satisfied that they were not and could not have been available for the Crown Court proceedings in 2000.

82. The 1866 book of reference identifies land affected by the construction of the railway which the 1866 Act authorised. It contains a table of numbered parcels of land and what was on them e.g. roads. The numbers correspond to land or parts of land (e.g. road) so labelled on the associated plan.

83. Under the title “the Parish of Crowle, in the parts of Lindsey, in the County of Lincoln” the book identifies item 73 which covers the parts of Bonnyhale Road that is subject to this claim. The item reads as follows:

Number on plan	Description of property	Owner or reputed owner	Lessees, or reputed lessees	Occupiers
…	…	…	…	
73	Occupation-road and bank	The South Yorkshire Railway and River Dun Company Reverend Nathaniel Brunyee	The Manchester, Sheffield and Lincolnshire Railway Company	The Manchester, Sheffield and Lincolnshire Railway Company Robert Drewry Nathaniel Thompson
…	…	…	…	…

84. Under the title “the Parish of Belton, in the parts of Lindsey, in the County of Lincoln” it identifies the items 4, 5 and 6a which also cover the parts of Bonnyhale Road that is subject to this claim. They read as follows:

Number on plan	Description of property	Owner or reputed owner	Lessees, or reputed lessees	Occupiers
…	…	…	…	
4	Stack-yard Waste ground and Occupation-road	Mary Coulman James Clark Ross	[shown as leased but the copy I have does not show to whom.]	Nathaniel Thompson
5	Pasture field, Drain and Occupation-rad	Mary Coulman James Clark Ross	””	Nathaniel Thompson
…	…	…	…	…
6a	Occupation-	The South	The	Nathaniel

	road and drain	Yorkshire Railway and River Dun Company Mary Coulman James Clark Ross	Manchester, Sheffield and Lincolnshire Railway Company	Thompson
…	…	…	…	…

85. Under the title “the Parish of Althorpe, in the parts of Lindsey, in the County of Lincoln” it identifies the items 3 and 4 which also cover the parts of Bonnyhale Road that is subject to this claim. They read as follows:

Number on plan	Description of property	Owner or reputed owner	Lessees, or reputed lessees	Occupiers
…	…	…	…	
3	Pasture field, Drain and Occupation-road	Thomas Harsley Carnochan	[The table shows it was let to The Manchester, Sheffield and Lincolnshire Railway Company; Edward Ross, Secretary]	Nathaniel Thompson
4	Pasture field, Drain and Occupation-rad	Thomas Harsley Carnochan	””	Nathaniel Thompson
…	…	…	…	…

86. The tables are all part of one document. The other privately owned, leased or occupied lands are labelled similarly to the parts I have quoted above no matter which parish they are in. There is a clear consistency in style and approach throughout the document. There are other “Occupation-roads” identified throughout. They are all labelled the same way and have the same particulars provided in respect of each.

87. There are a few entries though that identify highways. The extracts below are from the section entitled “the Parish of Crowle, in the parts of Lindsey, in the County of Lincoln”

Number on plan	Description of property	Owner or reputed	Lessees, or reputed	Occupiers

		owner	lessees	
…	…	…	…	
10	Public highway	The local board for the Parish of Crowle; Thomas Hodgson, clerk		
42	Public highway and bridges	The local board for the Parish of Crowle		
…	…	…	…	…
55	Public highway	The local board for the Parish of Crowle		
…	…	…	…	…
63	Public highway	The local board for the Parish of Crowle		
…	…	…	…	…
68	Public highway	The local board for the Parish of Crowle		
…	…	…	…	…

88. This would make sense since no private individual could lease the highway (though they may lease the sub-soil or air above that is not part of the highway) and no private individual can occupy the highway. The reference to “Thomas Hodgson, clerk” does not undermine that. I do not know who he is. He may be an owner of sub-soil or, less likely, the air above or may simply be the parish clerk. Either way, the key fact is in no case are there lessees or occupiers. Also, they are all labelled clearly as “Public highway” and not as anything else. There is a stark contrast in the style of labelling public highways and private Occupation-roads like Bonnyhale Road. In my opinion the only reasonable way to read this is that the draftsman is acknowledging that the “Occupation-road” (i.e. Bonnyhale Road) is not a public highway at least as of 1866.

New evidence – the 1956 Order and 1956 book of reference

89. This too appears to have been misplaced in the archives, but I am less clear as to the circumstances. However again there is no real basis to conclude that the 1956 Order or 1956 book of reference would have been found with reasonable diligence. I am therefore prepared to accept that this too was not and could not have been available for the Crown Court proceedings in 2000.

90. The 1956 Order article 4 describes the relevant railway to Mr Carney's case:

> "[a] railway 1 mile 0 furlongs and 2.32 chains or thereabouts in length commencing at catch points on the north side of and adjacent to the Barnsley and Barnetby railway of the Commission 1 mile 0 furlongs 1.82 chains or thereabouts measured in a westerly direction along the railway of the Commission from the rolling bridge over the Keadby and Stainforth Canal, thence curving in a north easterly direction and continuing in that direction for a distance of 18.2 chains or thereabouts over **a level crossing of a private access road belonging to the [electricity authority] extending eastwards from the unclassified county road known as Bonnyhale Road, Ealand, Crowle to the Keadby power station** [my emphasis], then curving in an easterly direction and continuing in that direction for a distance of [?] Chains or thereabouts through a complex of railway sidings…"

91. The circumstances surrounding the 1956 Order appear to be as follows. There was already a railway which ran as good as along the north of the soak drain. The railway to which the 1956 Order was referring was a new line that was to branch off the existing railway more or less south east of North Pilfrey Farm. This railway then ran in a north easterly direction. It crossed Bonnyhale Road by a level crossing.

92. Considering the geography of the areas, the words used in the 1956 Order and in particular the layout of Bonnyhale Road, the words

> "[a] private access road belonging to the [electricity authority] extending eastwards from the unclassified county road known as Bonnyhale Road, Ealand, Crowle to the Keadby power station"

> can only be a reference to the Bonnyhale Road that is the subject of this claim. It is fanciful to suggest it describes anything else. There is no other road it could match according to the contemporary documents. Also, that road is the only one that runs easterly.

93. The fact that the legislation describes it as a "private access road" I find makes it unarguable that Bonnyhale Road was in fact a public highway when the 1956 Order was made.

94. I was in the end not referred to any particular part of the 1956 book of reference. However, I have considered it. There is within it no clear reference to Bonnyhale Road at all. However, it does refer to a public highway as follows:

On plan	Description of	Owners or reputed	Lessees or reputed	Occupiers

	property	owners	lessees	
…	…	…	…	…
2	Unclassified county road known as Chapel Lane, Keadby	County Council of Administrative County of Lincoln (Parts of Lindsey)		County Council of Administrative County of Lincoln (Parts of Lindsey)
…	…	…	…	…

95. The parties agree Chapel Lane is a public highway. If Bonnyhale Road were a highway when the order was made, the draftsman would have described it in similar terms. That he has not done so is a further point that goes to show it is not arguable that at the time of 1956 Order Bonnyhale Road was a highway.

New evidence – conclusions

96. The new evidence does not point to any other conclusion other than the one in the Crown Court judgment: Bonnyhale Road was at late as 1956 not a public highway. Nor was it a public highway in 1866. Any argument otherwise is fanciful.

97. Mr Carney has not put forward any new evidence to support a prescription argument based on user after 1956. The prescription argument is also therefore doomed to fail if allowed to proceed.

Law

The jurisdiction of the Crown Court in highways matters

98. I set this out for background to understand the role of the Crown Court, High Court and Court of Appeal in the proceedings before the Crown Court in 2000.

99. At all relevant times, the Crown Court is the Court of competent jurisdiction to determine whether a road is highway, maintainable at public expense and is out of repair: **Highways Act 1980 section 56**. Those are civil proceedings.

100. Appeals from the Crown Court's decision lie to the High Court by way of case stated: **Senior Courts Act 1981 section 28(1)**. If the Crown Court refuses to state a case then that refusal is subject to a judicial review: **Sunworld Ltd v Hammersmith and Fulham Borough Council [2000] 2 All ER 837 EWHC**.

The definition of an occupation road

101. In **Stroud's Judicial Dictionary 10th edition**, the words "occupation road" are defined as follows:

> "An occupation road "ordinarily passes through fields, people having the right to use it and the fields remaining in the occupation of the persons who farm the land" (per Alverstone CJ, **R. v Somers [1906] 1 K.B. 326**, cited occupier)."

102. In **Butterworth's Personal Injury Litigation Service at Div XXI** it says:

"[53] It is, as **Pratt and MacKenzie** wrote (**Pratt and MacKenzie, Law of Highways (21st ed, 1967)** (out of print)), essential to the notion of a highway that it should be open to all members of the public. The definition excludes land over which an individual may pass:

" (a) by virtue only of a licence personal to himself; or

" (b) in the exercise of a right as the owner or occupier of land; or

" (c) as the owner or occupier of other land to which an easement over that land is attached.

"[54] The definition also excludes roads, which used to be called occupation roads, laid out for the accommodation of the occupiers of adjoining properties and legally open to them only."

103. A similar definition appears in **Halsbury's Laws of England, "Highways" vol 55(2019), [1]**.

Requirements for the contents of a defence

104. **CPR rule 16.5** provides as follows (so far as relevant):

"(1) In his defence, the defendant must state—

" (a) which of the allegations in the particulars of claim he denies;

" (b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and

" (c) which allegations he admits.

"(2) Where the defendant denies an allegation—

" (a) he must state his reasons for doing so; and

" (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.

"(3) A defendant who—

" (a) fails to deal with an allegation; but

" (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,

"shall be taken to require that allegation to be proved.

"…

"(5) Subject to [paragraph] (3)…, a defendant who fails to deal with an allegation shall be taken to admit that allegation.

"…"

105. I recognise there has been no application to strike out the defence because it is verbose, vague or incoherent. I also recognise that, while it is lengthy (and probably lengthier than necessary), it has been prepared by a litigant in person who is doing his best to assist the Court and SSE and others to understand his defence. In my view the proper approach is to attribute to it a meaning that the reasonable person would attribute to it

in light of (a) the claims it defends and (b) **CPR 16.5**. While I should not be overcritical, I remind myself that it is not the role of the Court to decide what defences there might or could be or make educated guesses as to what a party may be saying. The Court does not prosecute or defend cases. The Court is not an inquisition. The Court can only adjudicate on the claims and defences that a party puts before it.

106. In my judgment the requirement in **CPR 16.5** requires a party to clearly state if it denies an allegation. That much is apparent from rule **CPR 16.5(5)** which deals with a defendant's silence in relation to a claimant's allegation and from **CPR 16.5(3)** which provides an escape for the defendant who does not deny an allegation but who clearly sets out an alternative. It is also clear from **CPR 1.1** and **CPR 1.3**. **CPR 1.1** requires the Court amongst other things to deal with cases justly and at proportionate cost considering a need to ensure the parties are on an equal footing and the complexity of the issues. **CPR 1.3** requires parties to assist the Court. The Court can only know what the issues are based on their respective statements of case. Therefore **CPR 16.5** can only be interpreted as requiring a clear statement of the basis of the defence. The rule does not permit an approach in which parties and the Court have to infer (or guess) what the defence(s) is(are) because that undermines **CPR 1.1 and 1.3**.

Abuse of process

107. The **Civil Procedure Rules 1998 ("CPR") rule 3.4** provide as follows (so far as relevant):

"(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

"(2) The Court may strike out a statement of case if it appears to the Court—

"…

" (b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or"

"…"

108. The law on whether it is an abuse of process to seek to raise novel arguments that could have been raised in earlier proceedings is, I believe, set out in the speech of Lord Bingham in **Johnson v Gore Wood & Co (No.1) [2002] 2 AC 1 UKHL** (which itself is a development of the rule described by Wigram VC in **Henderson v Henderson (1843) 3 Hare 100 Ch** on this point).

109. **Gore Wood & Co** was summarised by Thomas LJ (adopting Clarke LJ's earlier explanation of the rule) in **Aldi Stores Ltd v WSP Group Plc [2008] 1 WLR 748 EWCA at [6]**:

"(i) where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process;

"(ii) a later action against B is much more likely to be held to be an abuse of process than a later action against C;

"(iii) the burden of establishing abuse of process is on B or C or as the case may be;

"(iv) it is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive;

"(v) the question in every case is whether, applying a broad, merits-based approach, A's conduct is in all the circumstances an abuse of process; and

"(vi) the Court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C;"

110. The phrase

"broad, merits-based approach"

refers only to the merits that are relevant to the question of whether the claimant should have brought their claim as part of the earlier proceedings: **Stuart v Goldberg Linde [2008] 1 WLR 823 EWCA**.

111. While **Gore Wood** is about abusive claims rather than defences, I can see no reason why it cannot apply to defences. In **Henderson**, Wigram VC made it clear that the rule applied to both claims and defences and that the **parties** [my emphasis] must advance their whole cases. Nothing in Lord Bingham's speech in **Gore Wood** departs from or undermines that. It would be contrary to the protection of the Court's processes if the requirement on whether a party had to advance their whole case depended on whether they were a defendant or claimant.

112. Separately, it can be a specific abuse of process to pursue a case that amounts to a collateral attack on an earlier decision of a Court of competent jurisdiction. In **Hunter v Chief Constable of West Midlands Police [1982] AC 529 UKHL** the House of Lords dismissed Mr Hunter's civil action founded on an allegation that his confession was obtained under duress because Mr Hunter had argued the same thing before the Crown Court and the jury had rejected that argument (they had been directed to acquit if they believed that the confession had been obtained under duress).

113. Lord Diplock said (**at 541**)

"My Lords, collateral attack upon a final decision of a Court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of AL Smith LJ in **Stephenson v Garnett [1898] 1 QB 677 at 680-681** and the speech of Lord Halsbury LC in **Reichel v Magrath (1889) 14 App Cas 665 at 668** which are cited by Goff L.J. in his judgment in the instant case. I need only

repeat an extract from the passage which he cites from the judgment of AL Smith LJ

> " 'the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent Court.'

"The passage from Lord Halsbury's speech [in **Reichel**] deserves repetition here in full:

> " 'I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'"

114. Lord Diplock recognised that fresh evidence might justify allowing a claim that is otherwise a collateral attack to continue. He said:

"There remains to be considered the circumstances in which the existence at the commencement of the civil action of 'fresh evidence' obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the Court. I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff LJ. He points out that on this aspect of the case **Hunter** and the other Birmingham Bombers fail *in limine* because the so-called 'fresh evidence' on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a Court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns LC in **Phosphate Sewage Co. Ltd. v Molleson (1879) 4 App Cas 801 at 814**, namely that the new evidence must be such as

> " 'entirely changes the aspect of the case.'

"…

"I agree with Goff L.J. that in the case of collateral attack in a Court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate."

115. Therefore, in order for the evidence to be relevant fresh evidence it must satisfy 2 criteria:

115.1. First, it must be either

115.1.1. not available at the original hearing, or

115.1.2. could not with reasonable diligence have been obtained for that hearing

115.2. Secondly, in either scenario it must entirely change the aspects of the case.

116. Lord Bingham in **Gore Wood** referred to **Hunter** with approval.

117. The claimants have referred me to other decisions on the issue of collateral attack. None of them undermine what Lord Diplock said in **Hunter**. Of particular help is the case of **Secretary of State for Trade and Industry v Bairstow [2004] Ch 1 EWCA**. Sir Andrew Morritt VC said:

"[38] In my view these cases establish the following propositions.

" (a) A collateral attack on an earlier decision of a Court of competent jurisdiction may be but is not necessarily an abuse of the process of the Court.

" (b) If the earlier decision is that of a Court exercising a criminal jurisdiction then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Lord Cairns LC in **Phosphate Sewage Co Ltd v Molleson 4 App Cas 801 at 814**, cf. the cases referred to in paragraphs 32, 33 and 35 above.)

" (c) If the earlier decision is that of a Court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.

" (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the Court to challenge the factual findings and conclusions of the judge or jury in the earlier action if

" (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or

" (ii) to permit such re-litigation would bring the administration of justice into disrepute."

118. The following further points though can be derived from them

118.1. The rule against collateral attack applies whether one is the defendant in one set of proceedings and claimant in the other: **Hunter, Reichel**;

118.2. It does not matter if the prior set of proceedings which are now attacked were criminal or civil: **Hunter, Reichel**;

118.3. The rule against collateral attack depends not on the exact legal remedy sought or claim pursued but whether the previous Court of competent jurisdiction has adjudicated on the essential

elements of the case a party now pursues: **Amin v Director General of the Security Service [2015] EWCA Civ 653** (unreported elsewhere); and

118.4. If A pursues a civil claim in a Court of competent jurisdiction against B and that Court decides against him on the issues raised, A cannot then raise those same issues as a defence in civil proceedings brought by C in another Court of competent jurisdiction: **Reichel, Hunter**, **Bairstow**.

118.5. The rule against collateral attacks is even stronger if there has been an appeal: **Amin, Hunter, Bairstow**.

Summary judgment

119. **CPR 24.2** provides:

"The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

" (a) it considers that—

" (i) that claimant has no real prospect of succeeding on the claim or issue; or

" (ii) that defendant has no real prospect of successfully defending the claim or issue; and

" (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

120. If a statement of case is struck out or summary judgment is given against a party, then the Court can make any appropriate consequential order.

121. I am satisfied that under **CPR 2.4, CPR 2 PD2B** and **CPR 24** I would have jurisdiction to make the consequential orders that the claimants seek in this case if successful.

122. There are numerous authorities on the correct approach to an application for summary judgment that all say ultimately the same thing. The claimants rely on **Easyair Ltd v Opal Telecom Ltd [2009] EWHC 399 (Ch)** (which the Court of Appeal approved in **AC Ward & Sons Ltd v Catlin (Five) Ltd [2010] Lloyd's Rep IR 301 EWCA**) and it is convenient to cite it because it summarises all the other key authorities. Lewison J in **Easyair** drew together all the relevant authorities on summary judgement and set out the principles for a Court to apply.

123. Lewison J set them out as follows:

"[15] …[T]he Court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

" (i) The Court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: **Swain v Hillman [2001] 2 All ER 91 EWCA**;

" (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 Ltd v Patel [2003] CP Rep 51 EWCA at [8]**;

“ (iii) In reaching its conclusion the Court must not conduct a ‘mini-trial’: **Swain**;

“ (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 Ltd 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] BLR 297 EWCA**;

“ (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] FSR 63 EWCA**;

“ (vii) On the other hand it is not uncommon for an application under **Part 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**.”

124. Lewison J was considering an application by a defendant for summary judgment against a claimant. However, the cases he refers to show the principles are of general application and so apply equally where a claimant seeks summary judgment against a defendant.

125. Ultimately, whatever the nuances of shifting legal and evidential burdens described in **Civil Procedure (2020) vol 1 [24.2.5]**, I consider that it is for the claimants to satisfy the Court that the Court should enter summary judgment against the defendant: **ED & F Man Liquid Products Ltd** and **Part 24 PD para 2.3**.

Conclusions

126. Applying the law to the facts relevant to this case I come to the following conclusions.

Does the defence include a defence that the claimants do not have sufficient title to bring a claim in trespass or nuisance?

127. It does not.

128. As I have noted above the defence overwhelmingly focuses on the alleged fact that Bonnyhale Road is a public highway. Mr Carney does not expressly state anywhere that title is an issue. It is most telling in his failure to mention it when describing the complaint that he is trespassing. Instead of saying “It is not their land” he focuses on how it is a highway.

129. **CPR 16** is clear that Mr Carney had to state clearly which allegations he admits or denies or requires SSE and others to prove.

130. He has not done that so far as SSE and others’ right to bring the claim is concerned. I do not accept that it is within the meaning of **CPR 16.5** to paste copies of documents into a lengthy defence without explanation as to their relevance but expect a party or the Court to guess what issue they might relate to, yet alone what line of defence they are advancing. It is Mr Carney’s duty to set out his case clearly. If he wanted to raise ownership of the land as an issue, he should have raised it clearly.

131. I appreciate he represents himself. However, he has experience of Court proceedings because he represented himself before the Crown Court. The need for clarity cannot have been lost on him. Rules apply to him as much as to a represented party (**Wright Hassell v Barton [2018] 1 WLR 1119 UKSC**) and while I see no issue with a defence not being presented in the style which lawyers are trained to use, it must still comply with **CPR 16.5**. That rule is clear, unambiguous, and easy to understand.

Does the defence include a defence that the land in question is a highway because of the prescription argument?

132. It does not.

133. The criticisms that apply to the alleged defence that SSE and others do not have the right to bring the claim apply equally to this. It is simply not set out anywhere. It is for Mr Carney to decide what arguments he wishes to advance. It is not for the Court or the claimant either to work out for itself his defences or decide for itself what defences he should be running or could run.

Is the defence an abuse of the Court's process?

In general

134. Subject to the new evidence, the answer is yes.

135. Mr Carney has already run before the Crown Court the argument that Bonnyhale Road is a highway. The Crown Court is a Court of competent jurisdiction in this matter. It decided against him after detailed and thorough consideration of the case he put forward and the evidence he produced. He was in effect not allowed to appeal and Pill LJ remarked that it seemed Mr Carney had had a fair hearing before His Honour Judge Heath. To run the argument a second time is exactly the sort of collateral attack that Lord Diplock in **Hunter** said should not be permitted.

136. To allow him to argue the matter again would, to use Sir Andrew Morritt VC's words, bring the administration of justice into disrepute. The reason is that in short it would amount to a *de facto* appeal (by way of rehearing) against the Crown Court judgment because this Court would be having to decide fundamentally the same issues. That is clearly not appropriate if only because this is an inferior Court and the Crown Court is a superior Court. In any event the law sets out a clear procedure with clear time limits in which appeals can be brought. Mr Carney acted too late to pursue those rights of appeal though Pill LJ expressed a view that the proposed appeal appeared to lack merit. By the time that these proceedings were issued nearly 19 years had elapsed. To relitigate a settled matter after such a period is highly inappropriate absent a strong reason that does not arise here.

137. Alternatively, it would, again to use Sir Andrew Morritt VC's words, be manifestly unfair to SSE and others to have to defend this matter. They are entitled to rely on findings already made and the public records that would have been confirmed by the Crown Court judgment that Bonnyhale Road is not a public highway. Furthermore, the Crown Court proceedings were against the local highways authority who have access to the best evidence as the highways authority about roads in their area and are therefore in the best position to reply to allegations that there is a public highway in their area. The relevant highways authority has already been a party to proceedings and secured an order that at least part of Bonnyhale Road is not a public highway and a factual finding that none of it is (so far as relevant to the claim). Finally proceeding would in effect make SSE and others *de facto* respondents to a *de facto* appeal that will be heard at least 20 years after the original judgment.

138. Although I have ruled that they are not parts of his defence I will deal with the prescription argument and the ownership argument.

    138.1. The prescription argument would be an abuse of process under the rule as described in **Gore Wood**. Firstly, His Honour Judge Heath clearly knew of the 20-year rule. It is apparent that Mr Carney did not pursue it as an argument in an application that he himself had made. Mr Carney had available to him all the evidence necessary to pursue that argument if he wished. In particular the evidence of Mr Thorley was available that

covered the relevant period. The Crown Court was factually considering the whole of the road. It was best placed to make that determination. The relevant highways authority was the respondent in those proceedings and would be best placed to be able to provide evidence on the issue if had been raised. That cannot be said of SSE and others who do not have the same ready access to the records that the local authority does. In all the circumstances, applying a broad, merits-based approach, such a defence would be an abuse as defined in **Gore Wood**.

138.2. The argument that SSE and others do not have title is one that would also amount to an abuse if it were properly a part of his defence. The matter of ownership and alleged ambiguity Mr Carney seeks to advance was expressly considered by the Crown Court. It is a collateral attack on the Crown Court judgment. It is seeking to bring a *de facto* appeal which is wrong for the reasons I set out above. In any case Mr Carney has not produced any documents (let alone new ones) that support what he is saying so it would have no real prospect of success in any event.

The new evidence

139. The real matters are whether the books of reference, 1866 Act and the 1956 Order change things. I have indicated that I am satisfied they were not available at the Crown Court hearing and could not with reasonable diligence have been obtained for that hearing. The focus is on whether they (together or individually) entirely change the aspects of the case.

140. In my opinion they do not.

The 1866 book of reference to the 1866 Act

141. The 1866 book of reference is very clear in how it describes public highways. It is in sharp contrast to how it described the occupation roads that are the relevant parts of Bonnyhale Road. If the occupation roads were public highways in 1866 then there is no reason to believe they would not be described like the other public highways.

142. This is emphasised by the fact the public roads have neither lessees nor occupiers. In contrast the occupation roads have lessees (where appropriate) and occupiers. They are described like all other private property in the book.

143. The draftsman must be taken to be aware of how the law treated the definition of occupation roads. There is no reason to assume otherwise. The term is consistently used to refer to private roads, as opposed to public highways, to facilitate access to adjoining land.

144. The 1866 book of refence can only support the conclusion in the Crown Court Judgment that Bonnyhale Road was not a public highway. Therefore, it does not change the aspect of the case at all.

145. It is supported by the fact that in law the term occupation road tends to describe private rights of way.

The 1956 Order

146. The 1956 Order does not change the aspect of the case at all. As I have noted above it described Bonnyhale Road as a private access road. It can only support the conclusion in the Crown Court Judgment that Bonnyhale Road was not a public highway. Therefore, it does not change the aspect of the case at all.

The 1956 book of reference

147. This is of limited assistance because it does not expressly refer to Bonnyhale Road.

148. However, it does define within it a public highway, namely Chapel Lane. The draftsman was plainly concerned to set out any public highways when drafting the book of reference. It is telling therefore that he made no reference to Bonnyhale Road if it were a public highway.

149. In so far as it is relevant it can only support the conclusion in the Crown Court Judgment that Bonnyhale Road was not a public highway. Therefore, it does not change the aspect of the case at all.

Conclusions

150. The defence is an abuse of process because it is a collateral attack on the Crown Court judgment, which is the decision of a Court of competent jurisdiction.

151. Neither the books of reference nor 1956 Order represent evidence that entirely changes the aspect of the case. If anything, they support the Crown Court judgment.

If it is an abuse of process, should it be struck out?

152. The answer is yes.

153. Lord Diplock in **Hunter** makes it very clear that there is a very strong presumption – if not an obligation – in favour of strike out in such circumstances in order to protect the Court's processes.

154. If I did not strike out the defence, I would be permitting a collateral attack on the Crown Court (and hence a superior Court's) judgment. There are routes of appeal from the Crown Court. Mr Carney pursued them but they were not successful. It would be wrong for me to allow the County Court to become a proxy for that appeal by rehearing and put SSE and others in the position of being the respondents. It would also not further the overriding objective because I would be allocating resources to proceedings that have been determined already.

If it is not an abuse of process (or it is but that is not a reason to strike out the claim) have the claimants shown it has no real prospect of success?

155. This is not strictly necessary for me to decide but I will express my view for completeness. In my judgment they have.

156. Nothing that Mr Carney has raised in his defence undermines the findings in the Crown Court judgment. His Honour Judge Heath plainly considered the evidence before him, much (if not all) of which was before me. To suggest that this Court could come to different factual conclusions is

fanciful. Mr Carney did not in his submissions demonstrate anything which could properly suggest that this Court might come to a different conclusion.

157. The 1866 Act, 1866 book of reference, 1956 Order and 1956 book of reference support, rather than undermine, the Crown Court's judgment.

If so, is there any other compelling reason Mr Carney should be allowed to defend the claim?

158. No. Ultimately the situation is that Mr Carney strongly disagrees with the Crown Court judgment. He has clearly convinced himself he is correct and refuses to countenance the possibility he is wrong. That is not enough.

Postscripts

Railtrack correspondence

159. Mr Carney referred me to some correspondence from Railtrack where they suggest that Bonnyhale Road is a public highway. Interesting as it may be, it is not relevant. The question is for the Court to decide and a private party's opinion about the ultimate issue a Court must decide is inadmissible. The Crown Court has decided the issue. The opinion expressed in those letters does not take the case any further forward because it carries no weight.

Mr Carney's further submissions after circulating the draft judgment

160. As is usual in the County Court, I circulated my draft judgment to the parties before I handed it down. I allowed the parties to consider my decision and to draw my attention to any editorial corrections that they might propose.

161. The claimants sent in proposed editorial corrections. I have considered them and, where I think it appropriate, either incorporated them into my judgment or reworded a sentence to make the intended meaning clear.

162. Mr Carney however has not done that. Instead, he sent in some more evidence and yet more submissions. It was unclear if he sent them to the claimants too. I have ensured the claimants have received them now.

163. On 8 December 2020 I emailed the parties. I reminded the parties that when communicating with the Court or me, they must copy in the other side and explained what I would consider to be a satisfactory way of doing that.

164. I said the following in that email about Mr Carney's proposed corrections:

"Having considered Mr Carney's emails, I have come to the conclusion I should not take any action on them. They are not proposed typographical corrections or corrections of obvious errors. Mr Carney's emails are attempts to adduce new evidence, make new submissions or repeat submissions made already. That is not the purpose of being sent a draft judgment. Its purpose is to allow a party to point out typographical errors or obvious mistakes, like calling the claimant the defendant or getting someone's name mixed up. I will not therefore accept these new submissions or evidence. The parties have had the chance to put their

evidence before the Court and to make their submissions. I have now made my decision subject to editorial correction. This approach is in accordance with the Court's rules and procedures and in particular the overriding objective and principle of finality in litigation. The High Court (Fraser J) said in **Grosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 227 (TCC)** that

> " 'The distribution of a draft judgment under CPR Part 40 should not be seen (as it seems to be, by many legal advisers currently) simply as an open invitation to embark upon an additional round of the litigation, remedying lacunae in their own evidence and raising further arguments. If a matter could have been raised at the first hearing, then it should be.'

"Because I am taking no further action on Mr Carney's emails at this stage, the claimants do not need to make any submissions in relation to them.

"I will add a postscript to my judgment to confirm my decision not to consider Mr Carney's further submissions. That will appear on the handed down version."

165. I have therefore not considered Mr Carney's further evidence or submissions. Since I sent that email, Mr Carney has not made any further submissions nor sent to me any proposed corrections.

The Ordnance Survey Map