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Case No: C00GU611

IN THE GUILDFORD COUNTY COURT

The Law Courts,
Mary Road,
Guildford
Surrey GU1 4PS

Date: 10/09/2018

Before:

HER HONOUR JUDGE EVANS-GORDON

Between :

ABBOTS RIDE LAND LIMITED

Claimant

- and -

(1) SURREY COUNTY COUNCIL

(2) WATES DEVELOPMENTS LIMITED

Defendants

Mr Robin Green (instructed by Ladders Solicitors LLP) for the Claimant

Ms Poonam Pattni (instructed by Surrey County Council) for the First Defendant

Mr Timothy Mould QC & Ms Anjoli Foster (instructed by Cripps LLP) for the Second Defendant

Hearing dates: 7th & 8th June 2018

JUDGMENT

Her Honour Judge Evans-Gordon :

1. This dispute is about whether a strip of grass verge that runs east along the south side of Waverley Lane, Farnham, Surrey from the corner of the road known as Abbot's Ride to the end of the frontage of 62 Waverley Lane ("the Verge") is part of the Public Highway. The Claimant is the freehold owner of the Verge, the First Defendant is the highway authority and the Second Defendant is a building company with an option on land to the north and east of the Verge. It would like to build 157 homes on the option land but to do so, it must create a new pedestrian footway along that part of the Verge immediately adjoining the road surface of Waverley Lane, pursuant to a s.106 agreement it has made with the First Defendant. If the Verge is part of the highway, there is no barrier to the fulfilment of the obligation to create a new footway. If the Verge is not part of the highway then the consent of the Claimant is required and that is unlikely to be forthcoming. In that eventuality, the development could not go ahead absent some form of compulsory purchase.

Representation

2. The Claimant was represented by Mr Robin Green, the First Defendant by Ms Poonam Patni, and the Second Defendant by Mr Timothy Mould QC and Ms Anjoli Foster, all of Counsel. I am grateful to them all for their help in this matter.

Background

3. Waverley Lane is an ancient highway that runs between Farnham and Waverley Abbey. It is maintainable at public expense. By 1922, Farnham Urban District Council (“FUDC”) had formulated an intention to widen Waverley Lane [1/5/140-141] in due course. This remained the situation in 1932 [1/5/142-144]. Exercising its powers under s.30 of the Public Health Act 1925, on 5 June 1934 FUDC made a ‘new streets’ order in relation to that part of Waverley Lane between the junction with Tilford Road at Farnham Station to the eastern boundary of FUDC near Stella Cottage, some distance past, what is now known as, Abbot’s Ride. The Order is contained in the minutes of a meeting of the FUDC of that date [2/414-414, ref. B3001]. The consequence of this was to impose an improvement line on both sides of the affected part of Waverley Lane. Broadly speaking, an improvement line is a line beyond which no buildings may be built so that a street may be subsequently widened. The position of the improvement line is derived from the FUDC’s bye-laws made in 1924 particularly, bye-law 7 [2/389 to 390] which line was adopted in 1931 and amended in 1932 to provide that there must be a width of 50 feet between the improvement lines on a new street. The southern improvement line on Waverley Lane lay along, what is now, the boundary fences and hedges of the residential properties comprising Abbot’s Ride.
4. By the mid-1950s both sides of Waverley Lane to the east of Farnham up to what is now Abbot’s Ride, had largely been developed. In or around 1957 Mercari Limited (“Mercari”) applied to develop Abbot’s Ride and on 5th July

entered into an agreement with FUDC pursuant to s.146 of the Public Health Act 1875 (“the 1957 Agreement”) [1/146-148-149]. The development involved the laying out and construction of a new road between Waverley Lane to the north and Tilford Road to the south. That road, Abbot’s Ride, would, in due course, subject to completion and proper construction, be adopted by FUDC. Section 146 confers power on local authorities to enter into such agreements.

5. The 1957 Agreement had five plans annexed to it – the salient plan is identified as Plan 1 [1/157] (“Plan 1”) which shows the extent of Mercari’s freehold title and the layout of the proposed development, including the new road, which is sited roughly in the middle of the site (“the Development Site”). Part of the Development Site is hatched, and the hatched land is coloured either red or green (“the Hatched Land”). The Hatched Land runs along the full length of Mercari’s boundaries with Waverley Lane to the north and Tilford Road to the south. That part of the Hatched Land coloured green forms four roughly triangular pieces of land, two at either end of the proposed new road: they are clearly visibility splays (“the Splays”) and are deeper than the rest of the hatched land coloured red which is situated between the improvement line and the highway. This also consists of four parcels of land one running east and one west of each of the Splays. Plan 1 shows the Verge as being part of the red hatched land to the north east of the Development Site. A legend appears on the map which reads “To be surrendered to highway authority when the development of the adjoining plots takes place (sec. 30 Public Health Act 1925)”. A line runs from the legend into that part of the red hatched land to the north west of the development site.

6. Mercari sold one of the plots of land abutting on to Waverley Lane, including part of the Verge, to a Mr and Mrs Turner on 5 May 1958, prior to the completion of Abbot's Ride and its adoption. The land transferred was identified as Plot 28 which is now 56 Abbot's Ride ("No. 56").
7. Both parties complied with the terms of the 1957 Agreement and Abbot's Ride was adopted. This occurred sometime in 1961, probably on or shortly before 10th August 1961 when FUDC's Engineer and Surveyor wrote to the Clerk of the Council stating that "we have now taken over the maintenance of the grass verges at Abbot's Ride" [2/6/482]. It is also evidenced by an extract from (undated) minutes of the relevant committee found at [3/7/1041].
8. In or around 1966 FUDC constructed footpaths on both Waverley Lane and Tilford Road running west from Abbot's Ride towards Farnham ("the Footpaths"). The date is derived from the evidence of Ian Taylor at paragraphs 25-26 [1/5/117] of his witness statement dated 8th January 2018 ("Mr Taylor's WS") and the minutes of the Highway Committee of 13th December 1966 [3/7/939-940]. There is a dispute about whether, and the extent to which, FUDC and subsequently Waverley Borough Council ("WBC") has maintained the Hatched Land since 1961. On 11 September 2006 the Claimant was registered as the freehold owner of all the Hatched Land save for that fronting No. 56. It acquired the remaining part on 8 April 2015. In 2005, 2006 and 2007 there was some correspondence between Aveley Conveyancing, for the Claimant, and the First Defendant about the status of the Hatched Land and the extent of the highway [2/6/579a-595]. Up until 13 February 2007, it appears that the Claimant accepted the First

defendant's assertion that the Hatched Land was part of the highway. For the first time, on that date, the **Claimant** asserted that there had been **no** dedication of the Hatched Land as a highway but thereafter appears to have accepted that the First Defendant mowed, at least the Splays. The reason for the correspondence seems to have been a proposal to place a telephone mast on one of the Splays. No further action seems to have been taken by either side until mid-2014 when the proposed development by the Second Defendant arose.

The Law

9. It is common ground that the burden of proving that land is a highway falls on the party asserting the existence of the highway (*Folkestone Corporation v Brockman* [1914] AC 338 at 355, 367-368): in this case that is the Defendants. It is also common ground that a highway may be created at common law either by dedication by the competent landowner together with acceptance by or on behalf of the public or by virtue of a statutory provision (see *Fortune v Wiltshire Council & anor* [2013] 1 WLR 808 at [12]) ("*Fortune*"). Although not expressly common ground, user or acceptance of part of the dedicated land constitutes acceptance of the whole and this means that user of part constitutes acceptance of the whole (*The Secretary of State for the Environment Transport and the Regions v Baylis (Gloucester) Ltd & Anor* [2000] All ER (D) 563 (Transcript) ("*Baylis*") at p.8, in reliance on *Tottenham UDC v Rowley* [1912] 2 Ch 633), cases by which I am bound.
10. One, relevant statutory provision is s.31(1) of the Highways Act 1980 which provides as follows:

“(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

That subsection is qualified by subsection (2) which reads:

“(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.”

11. Section 31(1), broadly, is the highway equivalent of the Prescription Act 1832. It does not alter the common law but adds an alternative means of creation of a highway when long user is the only basis from which dedication can be inferred. It puts on a statutory footing the approach long adopted by the courts and transfers to the landowner the burden of adducing sufficient evidence that there was no intention to dedicate.

12. The First Defendant also relies on s.146 of the Public Health Act 1875 (now repealed) which provided that:

“146. Any urban authority may agree with any person for the making of roads within their district for the public use through the lands and at the expense of such person, and may agree that such roads shall become and the same shall accordingly become on completion highways maintainable

and repairable by the inhabitants at large within their district; they may also with the consent of two thirds of their number, agree with such person to pay, and may accordingly pay, any portion of the expenses of making such roads.”

13. There is no suggestion that there are any other relevant statutory provisions in relation to the creation of a highway although extensive reference has been made to ss. 30, 31 and 35 of the Public Health Act 1925 in relation to intention to dedicate or accept a dedication and the relevant powers. Section 33 provides as follows:

“33.- (1) Where in the opinion of the local authority-

- (a) Any street repairable by the inhabitants at large is narrow or inconvenient, or without any sufficiently regular boundary line; or
- (b) It is necessary or desirable that such street shall be widened;

The local authority may prescribe in relation to either side of the street, or at a distance of fifteen yards from any street corner, the line to which the street shall be widened (in this section called “the improvement line”).

.....

- (8) The local authority may purchase any land not occupied by buildings, lying between the improvement line and the boundary of the

street, or any interest in such land, and the provisions of the Land Clauses Acts, including the provisions with respect to the purchase and taking of lands otherwise than by agreement, except sections ninety-two and one hundred and twenty-three of the Lands Clauses Consolidation Act, 1845, shall extend to such land or interest in land.”

14. Creation of a highway is not the same as adoption. In the latter case the highway is maintainable at public expense but the fact that it is not adopted does not mean that land is not a highway. The law on creation is founded on an intention in the landowner that his land should become a highway and an acceptance of that dedication by or on behalf of the public. Dedication need not be express, it may be inferred from the available evidence. “Dedication is primarily a question of intention of the dedicator, although there are some cases where the dedicator lacks the legal capacity to dedicate. The intention may be proved by the express words or conduct of the dedicator, or by inference from his acquiescence in public use of the way.” (*Baylis* at p.3).
15. While an intention to dedicate is frequently inferred from use of the way by the public without objection by the land owner, such an intention may be inferred from other evidence, as was made clear by Lewison LJ in *Fortune* at paragraph 22 when he said:

“In the nature of things where an enquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact-finding tribunal must draw inferences from **circumstantial evidence**. The nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is

almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 9 to 2, 929:

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.””

16. Further, section 32 of the Highways Act 1980 directs a fact-finding tribunal as follows:

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

17. Acceptance may be express, as in *Baylis*, or inferred from facts such as actual user by the public or acts by the highway authority on its behalf. The fact that the highway authority expends public funds on maintaining land is a “strong indication of the public right. It is a burden accepted by the parish which

would not be accepted unless there was a public way.” (*Eyre v New Forest Highway Board* (1892) 56 J.P. 517).

The Defendants’ case

18. The Defendants assert that the Verge is part of the highway by virtue of dedication and acceptance. Indeed, they go further and say that the 1957 Agreement is an agreement to dedicate the whole of the Hatched Land.

19. The legend on Plan 1, say the Defendants, is a clear, express agreement to dedicate the whole of the Hatched Land. Alternatively, it clearly evidences an intention to dedicate. The dedication or intention to dedicate, they say, can also be inferred from Mercari’s knowledge of the existence and location of the improvement line as set out on Plan 1. There is no evidence that this intention ever changed; on the contrary, the evidence is that, save in relation to No. 56, Mercari erected fences or hedges along the improvement line and sold only the land behind the improvement line, retaining everything within the improvement line. After the completion of Abbot’s Ride, Mercari took no further action in relation to the Verge and raised no objections to FUDC’s, and subsequently, Surrey County Council’s, maintenance of the Verge and other similarly identified land. Nor has any objection been raised to the use of the Verge by both pedestrians and vehicles. Hedges form a boundary line between the private properties to the south of the verge and these are clearly fencing against the highway. While Mercari sold No. 56, including part of the Verge, to Mr and Mrs Turner on 5 May 1958, this does not evidence a change of intention to dedicate the Verge in the light of subsequent events; and, given

their conduct, it may be inferred that Mr and Mrs Turner also had an intention to dedicate their part of the Verge as a highway.

20. Acceptance is evidenced by firstly, the maintenance of the Verge since 1961; initially, by FUDC and subsequently by WBC on behalf of the First Defendant. Secondly, utility companies have placed telephone cables and a gas network pipe in the verge in reliance on it being part of the highway without, it appears, objection from the land owners and without any wayleave agreements. The evidence, including that of the Claimant, indicates that the public use the Verge. Where a dedication is found on the basis of evidence other than long user alone, any user is sufficient to indicate acceptance; it does not have to be of the frequency or quality necessary to establish an inference of dedication solely on the basis of user.
21. To the extent that s.31 is relevant, the correspondence of 2006/2007 does not constitute a challenge as it was not directed at the public users of a right of way, but to other uses of the Verge, namely utility companies.

The Claimant's case

22. For the Claimant it is said that the 1957 Agreement has no bearing upon the issue because it relates only to the building of Abbot's Ride itself and makes no reference to Waverley Lane. The wording on Plan 1 does not constitute an immediate dedication by Mercari: at best, it indicates an intention to dedicate at some time in the future. By transferring part of the Verge to Mr and Mrs Turner in 1958, Mercari put it out of its power to dedicate that part of the Verge and this evidenced a change in its position from 1957 thereby negating any intention to dedicate thereafter. Further the use of the word 'surrender' on

Plan 1 indicates that some further step involving a transfer of land was required: it does not equate to a grant of a public **right** of way. The Claimant challenges the alleged maintenance of the Verge since 1961 and says that the use of it by utility companies without reference to the landowner is neither here nor there as such use may be explicable by ignorance, misunderstanding, assumption, indifference, tolerance or even agreement. Their use of or placement of equipment within the Verge does not evidence a public right of way. In oral submissions Mr Green asserted that the Defendants had not identified the statutory power that the highway authority was exercising when agreeing to accept, or actually accepting, dedication of the Verge. As highway authorities are creatures of statute they can only act pursuant to a statutory power (*Bennett* at p.6).

23. As far as s.31 of the Highway Act 1980 is concerned, the relevant 20-year period ends in 2007 because the Claimant wrote to the First Defendant challenging the right. There is no adequate evidence of user between 1987 and 2007.

Decision

Express Agreement to Dedicate

24. In my judgment the 1957 Agreement, on its true construction, constitutes an agreement to dedicate all the Hatched Land. There is no sensible basis for distinguishing the red hatched land to which the legend is attached from the rest, and even less sense in distinguishing it from the green hatched land forming the Splays. Indeed, this **appears** to have been Mr Green's view, as set out in his Advice of 1 August 2016 [2/6/676-689 at 677, para 6]. Plan 1 itself,

is evidence of a clear agreement between Mercari and FUDC to dedicate all the Hatched Land, which includes the Verge, as a highway. While I accept that there is no mention of the Hatched Land in the body of the 1957 Agreement, the text of that Agreement is directed at the obligations on Mercari in relation to the making up of the roadway, footpaths and sewers of and under Abbot's Ride itself and the conditions that must be fulfilled before the FUDC was obliged to adopt it or otherwise fulfil its own obligations. There was nothing that either party had to do in relation to the hatched land by way of construction or approval therefore no reference was made to it in the body of the 1957 Agreement. I draw support for this conclusion from the fact that the Splays, hatched and coloured green, at either end of Abbot's Ride are not referred to in the 1957 Agreement either. Yet Plan 1 provides that they are to be 'cleared and sown' and that is precisely what happened.

25. Both parties complied with the terms of the 1957 Agreement and Abbot's Ride was adopted. I accept that, on its true construction, there was no immediate dedication of the Verge on the date that the 1957 Agreement was entered into: dedication was plainly conditional on the construction of Abbot's Ride and its adoption by the FUDC. This occurred sometime in 1961, as set out above.
26. If adoption of Abbot's Ride is insufficient to constitute acceptance of dedication, acceptance is also evidenced by the highway authority thereafter maintaining the Splays by mowing them from 1961. I am satisfied that the FUDC memorandum referring to it taking over the maintenance of the grass verges at Abbot's Ride in 1961 includes maintenance of the Splays [2/6/482] as the footpaths constructed by Mercari extended past the grassy parts of the

Splays all the way up to the highway and thus the reference to Abbot's Ride included the full length of the constructed roads and footpaths (see Plan 1). Further, there is an admission in the Claimant's evidence to this effect [1/4/17, para 13] and an acknowledgment in the correspondence of 2006/2007 [2/6/588, 589 & 595]. Further acceptance is evidenced by the construction of the Footpaths on parts of the Hatched Land. The Footpaths have been maintained ever since by the highway authority. This plainly constitutes acceptance of that land. Applying *Rowley* and *Baylis*, dedication and acceptance of part constitutes dedication and acceptance of the whole so that the entirety of the Hatched Land, including the Verge was accepted by 1966 at the latest.

27. I am also satisfied on the evidence that the highway authority has been maintaining the Verge by cutting the grass on it for many years. The evidence is that of Mr Taylor at paragraphs 27-28 of his witness statement [1/5/118], a letter of 16th January 2007 from the First Defendant to Mr Price, one of the residents of Abbot's Ride (he is also a director of the Claimant and one of the Claimant's witnesses) [2/6/583] which included a plan showing the extent of the publicly maintainable highway at that time and an email from a Mark Collings of Waverley Borough Council ("WBC") to the Chairman of the South Farnham Residents' Association (Sofra) of 28 October 2015 [1/5/162] stating that WBC maintains the Verge, by reference to an appended plan [1/5/165]. While I recognise that the 2015 plan provided by Mr Collings suggests that the grass cutting stopped at the boundary between No. 54 Abbot's Ride and 62 Waverley Lane and therefore excludes the very last part of the Verge, that is not consistent with other plans showing the extent of the

- publicly maintained highway produced by the First Defendant or the photographic evidence (see below). While the plan appended to the letter of the First Defendant of 16th January 2007 does not appear to be included in the bundle, in my judgment, it is reasonable to infer that it was similar to the plan or map appended to Mr Collings' email, and that at [3/7/1080], even though those plans are of a later date. There is certainly no evidence to suggest that the First Defendant or its agents have increased or enlarged the extent of the publicly maintainable highway in the time since 2007. It is clear from the tenor of the 2006/2007 correspondence that by 2007, the Verge, or the vast majority of it, had been mowed for some considerable time.
28. There are also various photographs of the Verge showing that the grass, or large parts of it, has been cut at various times. I recognise that the length of grass varies from season to season but that does not explain the difference in length and appearance between that part of the Verge that has been mown and that part that hasn't, see e.g. [1/5/173]. Ms Pownall for the Claimant exhibited photographs to her witness statement which she stated showed the mown Verge in October 2017 – this included a photograph of the Verge outside 62 Waverley Lane [1/4/83-85]. The photographs at [1/5/166-167] suggest that the Verge outside 62 Waverley Lane has either been mown at the edge or flattened by pedestrian or vehicular use, or both: see also the photographs at [1/5/195, 197 and 198] which appear to show more extensive mowing of that part of the Verge. In any event, acceptance of part of the dedicated land is acceptance of the whole.

29. In my judgment, it is likely that the maintenance of the Verge began in 1961 when Abbot's Ride was adopted as Mercari, the Turners and the highway authority have all proceeded on the basis that all the Hatched Land, including the Verge, became part of the public highway as a result of the 1957 Agreement. I note that Mr Price was also of that view when writing on behalf of the Claimant to the First Defendant on 30 September 2005 [2/6/579b] and 17 August 2006 [2/6/580].
30. Further, the evidence shows that the Verge has been used by the public both on foot and in vehicles. The photographs of the Verge, taken at various points in time, show some sort of use of the verge as there are clear tracks – see, e.g. 1/5/166, 1/5/172 and 1/5/176. Many of the witnesses, including all the Claimant's witnesses, saw pedestrians on the Verge, as stated in their witness statements [1/4/88, para 15; 1/4/40, para 15; 1/4/72, para 17] and confirmed in oral evidence. I recognise that not many pedestrians were seen but given the location, that is hardly surprising. Ms Pownall also told me that vehicles, particularly lorries, use the Verge and the Splays as the road is too narrow for them to pass one another without doing so. I agree with Mr Mould; the level of use is neither here nor there when there is sufficient evidence of dedication and acceptance independent of usage. Where dedication or intention to dedicate is established on the evidence, a low level of use is sufficient for acceptance. A sufficiently high level of use is only relevant if reliance is placed on s.31 of the Highways Act.
31. In my judgment, the reference to the 'surrender' of the hatched land is merely a loose, non-legal use of language by whoever prepared Plan 1 – probably the

architects or surveyors, Eggar & Co, and not a carefully chosen phrase with a specific legal meaning. It should not be construed as requiring a further legal step to be taken. The word ‘surrender’ is not usually used in a property context to refer to a transfer of a freehold interest in land. Indeed, there was no transfer to the highway authority of the land on which the Footpaths were constructed, the freehold title remained vested in Mercari and now in the Claimant. Further support for this can be derived from the understanding of FUDC when completing the Footpath running west from Abbot’s Ride along the south of Waverley Lane in 1966. The Highway Committee minutes of 13th December 1966 state that “The new footpath has now been provided along the whole length of road where the overall width of land enabled this to be done within the existing highway limits. To complete the job, it is now necessary to make arrangements for the acquisition of land along the frontage of Waverley End.” The Footpath runs along part of the hatched land on plan 1. In 1966 it is plain that the highway authority treated that part of the hatched land running west along Waverley lane from Abbot’s Ride as highway. No steps were taken to acquire the land from, or objections raised by, Mercari. It is not argued, nor is it reasonably arguable, that the Footpaths are not part of the highway.

32. As far as the transfer of Plot 28 (No. 56 Abbot’s Ride) to Mr and Mrs Turner on 5th May 1958 is concerned, I agree with Mr Mould: it can be inferred from their conduct that the Turners adopted that part of the 1957 Agreement that related to the section of the Verge that fronts the property. While I recognise that the imposition of an improvement line together with the erection of a boundary fence or hedge is not, by itself, sufficient from which to infer a

dedication or an intention to dedicate (*Hale v Norfolk County Council* [2001] Ch 717 (CA)), taken with other evidence, such actions may found a reasonable inference of dedication (*ibid* at para 20). In this case I am satisfied on the whole of the evidence that Mr and Mrs Turner accepted and agreed that the Verge beyond their fence should become part of the highway. The additional evidence on which I rely is their correspondence with FUDC in November 1958. In a letter dated 7th November 1958 Mr Turner (?) wrote asking for permission to make a small entrance gate onto Waverley Lane. An entrance gate could only have been situated in the fence or hedge erected or to be erected. The response, dated 12th November 1958, indicated that new accesses onto classified highways would not usually be permitted. Such an application would not have been necessary if the Turners did not accept that the Verge outside their fence/hedge was to be part of the highway. If it were not then an access would not require permission as it would be opening, not on to the highway, but onto another part of their own, undedicated land.

33. I was not taken to any particular statutory provision in relation to the highway authority's power to enter into an agreement for the dedication of land as a highway, or to otherwise acquire such land, other than s.146 of the Public Health Act 1875. Section 146 is the statutory predecessor to s.40 of the Highways Act 1959 (see *Baylis* at p.7). In that case it was held s.40 could not confer a power on an authority to accept the dedication of land as a highway other than the new road or way to be constructed, that is the subject of the agreement. Mr Green is correct, therefore, when he says that s.146 did not confer the necessary power on FUDC.

34. However, it seems to me that once a new street has been declared to be a new street, pursuant to s.31(1)(b) of the PHA 1925, because it is desirable to widen it; and an improvement line has been prescribed pursuant to s.33(1) of the same Act, s.33(8) does confer a power to purchase or acquire land by agreement to give effect to that purpose, provided the land is unbuilt upon and lies between the improvement line and the existing boundary of the street. I have not been taken to any express statutory power, applicable in 1957, to widen a highway but I infer that there must have been such a power otherwise ss.33(1)(b) and (8) of the PHA 1925 would be pointless provisions. To be able to identify a need to widen the highway and purchase land for the purpose but to be unable actually to widen it would be bizarre.

35. While I recognise that the 1957 Agreement is not a contract to purchase land in the usual sense, it is, as I have set out above, an agreement to acquire land or an interest in land, being the surface of the Hatched Land as a highway. It does not seem to me that an agreement to acquire land necessarily imports the payment of money. Alternatively, applying the maxim or principle that the greater includes the lesser, a power to acquire land by purchase includes a power to acquire it by gift or anything in between e.g. as part of a larger agreement. It would be absurd, not to mention detrimental to the public purse, if a local authority could “purchase” land but could not acquire it, by agreement, without payment. Indeed, a purchase could involve a price of 1p or a peppercorn. Alternatively, I adopt the reasoning of Kim Lewison QC sitting as a Deputy Judge of the High Court in *Baylis* at p.7 when he said that the power to enter into an agreement for the dedication of adjoining land as a highway is ancillary to the power to widen the highway.

36. FUDC's entry into the 1957 Agreement was not limited to the purposes of s.146 as it provided, in the third recital, that it was made "in exercise of the powers conferred on the Council by section 146 of the Public Health Act, 1875, and by virtue of all other powers (if any) them enabling" (my emphasis). There is copious evidence of FUDC's intention, in due course, to widen Waverley Lane – see paragraphs 14 and 15 of the witness statement of Mr Taylor [1/5/115].

Decision – Inferred Dedication and Acceptance

37. If I am wrong to say that the 1957 Agreement constituted an agreement to dedicate by Mercari and to accept the dedication by FUDC, I am satisfied that the matters set out above constitute evidence from which it may reasonably be inferred, on balance of probabilities, that Mercari and the Turners intended to dedicate the Hatched Land/Verge as a highway. In this case, to borrow Pollock CB's analogy, there are many strands of evidence which, although individually may be insufficient to support the inference, taken together, provide a rope strong enough to support such a finding. They are the references to surrender of the Hatched Land on Plan 1; the restriction of the sale of all but one of the freehold titles to land behind the improvement line; the erection of fences/hedges between the Hatched Land and the property boundaries; the clearance and sowing carried out to establish the Splays at the entrances to Abbot's Ride; the standing by when FUDC built footpaths on part of the Hatched Land and maintained the Splays and the Verge; failure to object when BT and British Gas laid utility pipes under the Verge; the failure to object to the erection of road signs on the Verge and the failure to object to

any public use of the Verge. While part of the Verge was sold to the Turners, the hedge fronting their property was planted along the improvement line. Again, I acknowledge that this alone cannot constitute dedication; however, taken together with the correspondence of November 1958 and their failure to take any objection to the maintenance and use of the Verge as set out above, it is sufficient material from which to infer the Turners' intention to dedicate their part of the Verge as a highway.

38. Acceptance may be and is inferred from the acts of the public in using the Verge and those of the highway authority in constructing the footpaths, maintaining the whole of the hatched land, including the Verge, and erecting road signs on it. The understanding of the utility companies and their laying of utility pipes under the Verge is a further strand in the rope. The evidence is that there was no agreement with Mercari in relation to the laying of utilities' equipment in the Verge. The works carried out were plainly an assertion of a public right to use the verge as part of the highway. In addition, the highway authority clearly believed that the hatched land was part of the highway when it constructed the footpaths in 1966, as evidenced by the minutes of its meeting in December of that year.

39. Whatever the situation in 1957, by 1961 the highway authority had power to accept a dedication of land for the purposes of widening the highway and/or improving it (see ss.71(1) and 62 of the Highways Act 1959 and *Bennett* at p.7). Acceptance of the hatched land/Verge undoubtedly amounted to a widening of the highway and the laying out of footpaths and verges, even

passively (see *Baylis*), amounted to improvements that fell within the statutory powers.

Summary

40. In summary, I am satisfied that, on its true construction, the 1957 Agreement constituted an express, valid agreement for the dedication of all the Hatched Land as a public highway upon the completion and adoption of Abbot's Ride. If I am wrong about this, I am satisfied, on the evidence, that Mercari and the Turners intended to dedicate the whole of the Hatched Land, including the Verge, as a highway and those intentions never changed. The dedication was accepted by FUDC in 1961, when it started maintaining the Hatched Land, alternatively, by 1966 when it constructed the footpaths to the west of each end of Abbot's Ride. In the further alternative, the dedication was accepted when the Verge was maintained at public expense, many years prior to 2006. Any subsequent objection by the landowner was too little, too late: once a highway, always a highway.
41. In the circumstances I refuse to make the declaration sought by the Claimant and dismiss the claim.
42. If the parties can agree an order it should be lodged with their corrections to the draft judgment in which case their attendance at the handing down of the judgment is not required. If they cannot agree I will adjourn the matter to a date convenient to the parties.

