IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ORDER OF VIKRAM SACHDEVA KC SITTING AS A DEPUTY HIGH COURT JUDGE MADE ON 20 OCTOBER 2023

APPEAL REF: CA-2023-002207
CLAIM NO. QB-2021-003247

B E T W E E N

MR DEMETRIOS KARPASITIS

Appellant/Claimant

and

HERTFORDSHIRE COUNTY COUNCIL

Respondent/Defendant

APPELLANT'S APPEAL SKELETON ARGUMENT
DATED 14 MARCH 2024
PERFECTED ON 16 APRIL 2025

References in bold square brackets are to the Core Bundle **[CB/page number]**, Supplementary Bundle A **[A/page number]**, and Supplementary Bundle B **[B/page number]**.

Introduction

1. This is the Appellant's skeleton argument for the appeal hearing. Permission to appeal was granted by Lord Justice Males on 28 February 2024 **[CB/16]** in relation to both grounds of appeal, namely:

    (1) Ground 1: The learned deputy judge erred in finding that the Defendant Highway Authority had established the statutory defence afforded by section 58 of the Highways Act 1980. This ground raises an appeal on a point of law and against findings of fact.

(2) Ground 2: The learned deputy judge erred in finding that there was no common law duty to sign the end of the cycle path. This ground raises an appeal on a point of law.

2. The Appellant invites the court to allow the appeal on the basis that the decision of the lower court was wrong (CPR 52.21(3)(a)). In summary:

(1) Regarding Ground 1: The Respondent adduced no credible evidence in support of its section 58 Defence and therefore failed to prove it.

(2) Regarding Ground 2: An END of cycle path sign was, unusually but definitely, required in the subject location to avoid misleading users of the highway into believing they were continuing on a cycle path. It was neither lawful nor safe to cycle on the footway which was too narrow to pass other users without going onto a verge which the Respondent did not see a need to maintain to an acceptable standard. There was a breach of the duty of care owed to highway users.

Background

3. On 22 April 2020 the country was one month into the first 'lockdown' imposed to reduce the rate of infection with COVID-19. One of the limited lawful excuses for leaving home was to take exercise. Furthermore 'social distancing' was heavily encouraged even outdoors.

4. The Appellant left his home that afternoon to take exercise on his bicycle. His witness statement is clear that he perceived cycling in traffic to be too dangerous for him and that he accordingly sought out cycle lanes free of any motor traffic. His bicycle was a rugged mountain bike suitable for rough/grassy terrain.

5. One of the routes the Appellant was familiar with took him onto the shared use bi-directional path running alongside and to the east of the A10 dual carriageway. This was separated from the main carriageway by a wide grass verge. Travelling north, as the Appellant initially did, this facility was clearly signed as suitable for cycling, to a point just past the pedestrian bridge known as the Paul Cully bridge which crosses over the A10 near Cheshunt. Cyclists turning off the path onto the Paul Cully bridge could do so via an unsigned track just to the south of the bridge. Cyclists who continued north

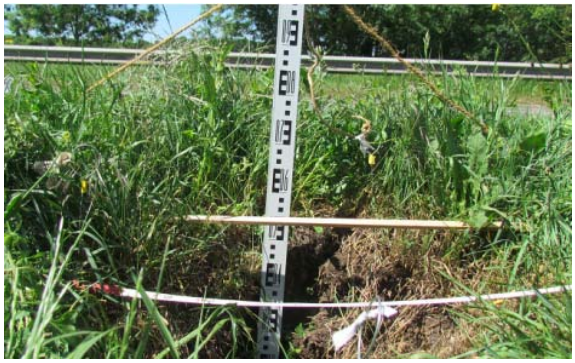
beyond the turn off for that track would carry straight on where the width of the path decreased from around 2 metres to around 1 metre. The only other alternatives at the point where the width decreased were to turn right past a 'Cyclists Dismount' sign and carry a bicycle up the pedestrian steps to the Paul Cully bridge or to U-turn to the south. There was no signage for cyclists continuing north on what the learned deputy judge (hereafter "the Judge") found to be a footway (Judgment paragraph 111) **[CB/106-107]**.

6. The following overhead photograph of the Paul Cully bridge is taken from Figure 2 in the Respondent's highways expert, Mr Hopwood's, report. North is up. A cyclist wishing to travel over the bridge could turn east between the two trees at the bottom of the photograph to meet the access ramp just above the word 'Geoinformation'. Pedestrian steps can be made out on both sides of the bridge. These met the ground underneath the bridge and a short path extended just north of the bridge. On the east side the path from the steps turned 90 degrees to meet the track at the point where the northbound track narrows. This point is in the shadow of the bridge.

7. The point of the narrowing and the path north of the Paul Cully bridge to the steps are seen in photographs taken by Mr Hopwood and by the Appellant's cycling expert, Dr Davis.

8. The Appellant continued north where the path diverges somewhat from the A10 to a quiet road called Anchor Close where he reversed direction to retrace his route home.

9. Heading south back towards the Paul Cully bridge, the Appellant encountered a jogger with headphones also travelling south. Immediately after a large sign for the benefit of southbound motorists which was placed over the grass verge, the Appellant turned sharp right onto the verge to overtake the pedestrian. Unfortunately, he cycled into a large hole (measuring 0.8m x 0.7m x 0.55m, Judgment paragraph 107 **[CB/106]**) just south of the sign causing him to be thrown from his bicycle and to sustain serious injuries including a complex fracture of the second cervical vertebra. Recovery has been very difficult, and he has now in consequence of his injuries lost his job as a social worker.



10. There was an order for a split trial and the issue of liability was determined against the Appellant at a trial which commenced on 14 March 2023. Judgment was handed down on 20 October 2023, just over 7 months after the trial.

Issues at trial

11. At trial the Appellant alleged that the hole causing his accident was a dangerous defect constituting a disrepair within the meaning of section 41 of the Highways Act 1980. The Judge accepted this was so.

12. The Respondent argued that it had a statutory defence pursuant to section 58 of the Highways Act 1980 placing reliance on its subcontractor's purported inspection, said to have been carried out by a Mr Jeff Cooke on 13 February 2020. The Judge accepted that the Respondent had proved this defence. The Appellant's case is that he was wrong to do so, and this forms the first ground of this appeal. This ground raises an appeal on a point of law and against findings of fact.

13. The Appellant at trial further alleged that there should have been signage indicating that the cycle track had ended so that he could neither lawfully nor safely continue. The absence of such signage constituted the breach of a common law duty of care. The Judge rejected this submission, and this forms the Appellant's second ground of appeal. This ground raises an appeal on a point of law.

14. The Judge would have made a finding of contributory negligence of 33%. Whilst this finding is not accepted in the event of a re-trial, it is not being challenged in this appeal.

Ground 1 the s58 Defence

15. Having found that section 41 was engaged, the Appellant was entitled to succeed unless the Respondent was able to discharge the burden of proving a section 58 Defence.

16. The only witness evidence that a walked inspection had taken place came from the Highways Inspector, Mr Jeff Cooke, who refused without giving a valid reason to attend Court to give evidence. A witness statement from him had been filed indicating that he had conducted a walked inspection of the footway and verge on 13 February 2020 and that, had there been a hole comparable to that there on 22 April 2020, he would have categorised it as the highest category 1 defect and taken immediate action to render it safe (paragraphs 3 **[A/114]** and 10 **[A/116]**). The only other evidence that an inspection had taken place was a screenshot of a contemporaneous computer entry filled in by Mr Cooke **[A/122]**, which did not confirm whether the inspection had been conducted on a

walk and did not contain adequate information to assess the adequacy of any inspection. This document was identical (in terms of the description of the defects and the work location) to the document which had been filled in by Mr Cooke following a previous inspection on 16 August 2019 **[A/121]**.

17. The Respondent served a Civil Evidence Act Notice **[A/129]** in respect of Mr Cooke's witness statement shortly prior to trial but then during the course of the lay evidence (during a short adjournment on the afternoon of Day 2 of the trial) announced that they would not rely upon his statement.

18. In the meantime, the Respondent's witnesses Mr Allen-Smith **[B/91-95]** and Mr Vine **[B/71-72]** gave oral evidence **for the first time** that they would have expected Mr Cooke to categorise the defect as category 2 – non urgent, directly contrary to Mr Cooke's written statement that he would have categorised it as the highest category 1 defect and taken immediate action to render it safe.

19. This very significant change in the defence case at trial placed the Appellant in the invidious position of having to deal with witnesses who (knowing that Mr Cooke was not going to give evidence) were stating that he would have categorised the defect as category 2. The Appellant expressed concern to the Judge that *"… a completely misleading impression has been given to your Lordship that the highways inspector would have categorised this defect at category 2"* (Transcript Day 2 p150 **[B/130]**). The Appellant was not permitted to put to those witnesses the parts of Mr Cooke's witness statement regarding the categorisation of the defect without putting the full statement into evidence. It is submitted that the parts of Mr Cooke's statement relating to the categorisation of the defect could and should have been admitted for that purpose without requiring the admission of the entire statement. In a recent High Court decision in *Chapman v. Mid and South Sussex NHS Foundation Trust* [2023] EWHC 1290 (KB) at paragraphs 43 to 45, Mrs Justice Hill permitted the admission of parts of the statement of a witness that the defendant sought to rely on in closing, which neither party had adduced in evidence, and took into account that the contents of the statement had not been tested in cross-examination.

20. The court having declined to admit parts of Mr Cooke's statement, the Appellant was again placed in an invidious position of having to decide whether to admit Mr Cooke's

statement in full. Mr Cooke's statement was put into evidence on the express basis (which was not challenged at the time) that the full content of the statement was not accepted. It is apparent from the transcript on day 2 that Leading Counsel for the Respondent's then position was that all of Mr Cooke's statement or none of it should be admitted at the Appellant's election, not that the Appellant would be bound to accept the entire contents of Mr Cooke's statement if he elected to admit it. The court is referred to the Transcript Day 2 pp155 to 162 **[B/135-142]**, in particular:

Pages 160 to 161 **[B/140-141]**:

MR WEITZMAN: And I am avoiding -- I am making a decision that I'm not going to rely on any of it. What my learned friend is seeking to do is to rely on parts of it and not the rest. He's put to his election under the CPR. He can put it in and cross-examine Mr Allen-Smith. He can leave it out and not cross-examine him. What he can't do is have his cake and eat it. It is cakeism.

MR PORTER: My Lord, I'm conscious we have slightly limited time. So in the light of what my learned friend says, I think I'm going to -- I make this very clear before I put it in, that I will address your Lordship as to weight in the respects in which it's, as it were, self serving, which may differ substantially from the weight to be given to those parts which I'm about to put to this witness, which are not so obviously self-serving. I do have to say it's most unsatisfactory that Mr Cooke did not simply attend the trial. No sensible reason has been given. We are significantly hampered in the prosecution of our case because of his last-minute absence.

THE DEPUTY: Well, if you can't cross-examine, then that's obviously a factor going to weight.
MR PORTER: Yes.
THE DEPUTY: If the statement is in.
MR PORTER: I think given my learned friend said I'm put to

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my election, to put it all in or none in, I think rather than spend further time drafting questions overnight, perhaps the obvious thing for me to do, although I better do it on instructions, is to put it in, ask the questions and then we are where we are and we'll make submissions as to the weight to be attached to the curate's egg part. It's become very obvious that the defendant doesn't want to put it in for reasons that go beyond Mr Cooke's reluctance to attend. They don't want it in because of what he says about what he thinks about the defect.
THE DEPUTY: Shall I give you some time to take instructions on --

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MR PORTER: My Lord, thank you very much for the time. I do have instructions to put the statement of Mr Jeff Cooke into evidence with all the caveats that I expressed before, but obviously I'm not accepting the content of the statement.

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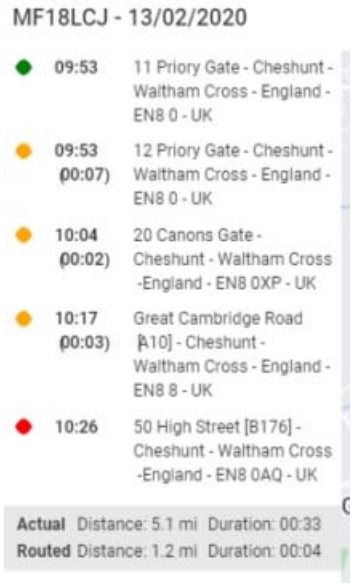
21. The Respondent had disclosed a document with timings derived from a tracker on Mr Cooke's car which indicated where his vehicle was at various times of the day on 13 February 2020. These timings made it clear that Mr Cooke cannot have undertaken a walked inspection of the footway and verge. There was simply insufficient time to cover the distances involved. It had been anticipated that Mr Cooke would be cross-examined on this document. These timings constituted a potentially compelling reason why Mr Cooke may not have wished to attend trial. The timings were as follows, accompanied by a map **[A/32]**:


MF18LCJ - 13/02/2020

●	09:53	11 Priory Gate - Cheshunt - Waltham Cross - England - EN8 0 - UK
●	09:53 (00:07)	12 Priory Gate - Cheshunt - Waltham Cross - England - EN8 0 - UK
●	10:04 (00:02)	20 Canons Gate - Cheshunt - Waltham Cross -England - EN8 0XP - UK
●	10:17 (00:03)	Great Cambridge Road [A10] - Cheshunt - Waltham Cross - England - EN8 8 - UK
●	10:26	50 High Street [B176] - Cheshunt - Waltham Cross -England - EN8 0AQ - UK

Actual Distance: 5.1 mi Duration: 00:33
Routed Distance: 1.2 mi Duration: 00:04

22. The Respondent's response to this was to not admit the accuracy of timings on a document it disclosed. It gave no reason or explanation as to how or why the vehicle timings may be inaccurate. Mr Cooke left Cheshunt at 0953. He logged his inspection report (which was identical to his inspection report 6 months earlier) at 1016. He was back in Cheshunt at 1026. The timings, and how they did not leave time for a walked inspection, were covered in the Appellant's written closing submissions at paragraphs 35 to 45 **[B/332-334]**. The Judge was taken through them in detail in oral closing submissions **[B/382-390]**. The Respondent did not contend that it would have been physically possible to do a walked inspection in the time available but instead said, without explanation, that the timings were not accepted. The Judge did not indicate that he could not understand the timings without expert evidence.

23. Unfortunately, whilst transcripts of the evidence were available, the oral closing submissions were not transcribed, and the Judge appears by 21 July 2023 to have

forgotten the parties' position on the timings. Solicitors were contacted by email on that date **[A/204]**, four months after the trial had taken place:

"I write in reference to the above case the Judge has asked the following:

Can I please ask that the parties in the above case be contacted today and asked to provide submissions on the following questions by 4pm 28 July 2023:

1. *What factual findings are sought in relation to the size of the hole on 22 April 2020?*
2. *Any further observations on the document at TB972, noting that the Claimant has already commented at paras 37 - 42 of his Closing Submissions.*

The document at TB972 was the timings (extracted in paragraph 21 above) accompanied by a map.

24. Further submissions were duly filed (in the Appellant's case going into the timing point in even greater and exhaustive detail **[B/394-410]**) but the Judge was dismissive of the timings, Judgment paragraph 71 **[CB/96]**.

25. There was a delay of 7 months between the trial and judgment. The Judge did not give a reason for the delay. In *Bank St Petersburg PJSC and another v. Arkhangelsky and others* [2020] 4 WLR 55, the Court of Appeal reiterated the importance of parties receiving their judgments within a reasonably short period of time. Whilst *Arkhangelsky* was a commercial case the point applies to civil cases more generally as is clear in paragraph 84 of the judgment of Sir Geoffrey Vos C:

"I should conclude on this point by reiterating that the "three-month" general rule should be adhered to even in long and complex cases. Justice delayed is justice denied. The parties to civil, and particularly commercial, litigation are entitled to receive their judgments within a reasonably short period of time. That period should not be longer than three months. As has been repeatedly said, any other approach will lead to a loss of public and business confidence in our justice system".

26. The delay is a factor to be taken into account when the appellate court is considering the Judge's findings and treatment of the evidence. The delay weakened the Judge's advantage when making findings of fact, and this is a consideration to be taken into account when the material is being reviewed on appeal; *Goose v. Wilson Sandford and Co* [1998] TLR 85, paragraph 112 of Peter Gibson LJ's judgment, cited with approval

in *Arkhangelsky* at paragraph 79. The delay also appears to have had the same effect as in *Arkhangelsky* (at paragraph 82 of the judgment) in that it meant the Judge *"…was less able to deal with findings he made in the round, perhaps because the findings on one part of the case were made at such a remove in time from other findings"*. Further, the Judge appears to have forgotten the basis upon which Mr Cooke's evidence was admitted (paragraph 20 above). It is submitted that the threshold for interfering with findings of fact on appeal is satisfied in this case.

27. The only proper finding (or alternatively the finding which an appellate court can and should substitute having the same evidence as the Judge) was that a walked inspection of the relevant path and verge probably did not take place on 13 February 2020. This is for the following reasons:

    (1) The Judge made a key error of law in paragraph 136 of the judgment **[CB/111]**:

    "Criticism was also made of Mr. Cooke by the Claimant on the basis that GPS recordings of his car on the day (contained in a disclosed document but not referred to in his witness statement) proved that he could not have performed the walking inspection.…It would also constitute impermissible non-acceptance of part of a party's own witness evidence, contrary to the principles described in Property Alliance Group Ltd v. Royal Bank of Scotland plc [2018] 1 WLR 3529 at [170] to [173]…"

    In the *Property Alliance* case the issue was whether a party was permitted to put part of a statement in as hearsay evidence, not whether a party was permitted to put parts of such a statement to other witnesses during the course of cross-examination or whether the Judge could reject part of a statement when making findings. The Judge wrongly concluded that he could not reject part of Mr Cooke's evidence, namely that he had performed a walked inspection on 13 February 2020. It was permissible for the Appellant to submit, and therefore for the court: (1) to find that Mr Cooke's evidence was mistaken in particular respects; such an approach was described as *"…a common occurrence in civil litigation and unobjectionable in principle, provided that care is taken to avoid surprise and hence injustice"* by the Court of Appeal in *Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA (The Filiatra Legacy)* [1991] 2 Lloyd's Rep. 337 at 361. It is trite that it was open to the Judge to accept

or reject part of the evidence of the same witness; *Burnett v. Lynch* [2012] EWCA Civ 347 at paragraph 23; or (2) to find, if appropriate to do so on the evidence, that Mr Cooke's evidence was untrue in particular respects. In *The Filiatra Legacy*, their Lordships considered that this was within the court's discretion given that the object of the procedure is to achieve justice subject to every precaution necessary to avoid unfairness to the parties and to the witness himself (page 361). Their Lordships recognised that whether such a power ought in a given situation to be exercised is a different matter altogether and the occasions when this would be proper would be rare indeed (page 362). Their Lordships did not find in the case law or the legislation anything which required them to hold that the Judge had no power to treat the evidence of the witness in question as otherwise than true (page 362). In the present case there was no injustice to the Respondent who had chosen not to rely upon Mr Cooke's statement or to compel him to attend trial or to Mr Cooke who had refused without a valid reason to attend the trial to give oral evidence. Whilst it was open to the Judge to find that Mr Cooke's evidence was untrue in relation to the walked inspection, it was not necessary for the court to go that far, and a finding that Mr Cooke was mistaken was sufficient to dispose of the issue. It is submitted that the error in paragraph 136 of the judgment alone is sufficient to overturn the Judge's decision on the section 58 Defence.

(2) Further or in the alternative, the court retains an inherent discretion to impose a condition that the Appellant should not be treated as being bound by the evidence of Mr Cooke or having accepted the entirety of his statement by reason of putting it into evidence; *Towry EJ Ltd v. Bennett and ors* [2012] EWHC 224 (QB) at paragraphs 23 to 25. This discretion was exercised by the Judge in this case who said: *"Well, if you can't cross-examine, then that's obviously a factor going to weight…If the statement is in"* (Transcript Day 2 page 160 **[B/140]**). Following this Leading Counsel for the Appellant took instructions about whether to adduce the entirety of Mr Cooke's written statement on the basis of the Judge's ruling/indication on this issue, and the decision to adduce the statement was made on that basis **[B/142]**. The Judge's conclusion that he could not reject part of Mr Cooke's evidence was inconsistent with his

ruling/indication on the basis as to which the statement of Mr Cooke was to be admitted.

(3) When determining the facts, the Judge ought to have appreciated that his acceptance of Mr Cooke's evidence in relation to the categorisation of the defect should not preclude, or inhibit, him from finding that Mr Cooke's statement was mistaken or not truthful in relation to the walked inspection; see *A Local Authority v. K, D and L* [2005] EWHC 144 (Fam) at paragraph 28.

(4) The Respondent disclosed a document which indicated that there was insufficient time for Mr Cooke to have conducted a walked inspection. The Respondent did not contend that a walked inspection *could* have taken place if the timings on their disclosed document were accurate, but instead maintained that the Appellant could not contradict his witness statement and averred, without reasons, that the times on their disclosed document were not accurate. The email making disclosure stated that *'the tracking location is not 100% accurate as it does rely on 'pings' to/from satellites, similar to our phones'* and that *'this will be covered in the statement from Jeff Cooke'* **[A/209]**; Mr Cooke's statement did not address this issue.

(5) Mr Cooke declined to attend Court to give evidence. He was the Respondent's key witness in support of their section 58 Defence. The reason given for not attending was *"unconvincing"* (Judgment paragraph 72 **[CB/96]**). The Respondent declined to compel him to attend Court to give evidence and declined the opportunity to rely upon his statement. The Appellant was deprived of the opportunity to test Mr Cooke's evidence that he had conducted a walked inspection in light of the evidence from the tracker and as to the adequacy of any inspection. The Judge said that he placed *"…less weight on his statement than I might have done if he had given oral evidence in a persuasive way, although I do not infer that his evidence that he carried out an inspection of the relevant grass verge on 13 February 2020 was therefore untrue, for that would be inferring too much: there are various potential reasons why Mr. Cooke may not have wished to give evidence other than that…"* (Judgment paragraph 72 **[CB/96-97]**). In the circumstances of this case, the Judge ought to have drawn an adverse inference from Mr Cooke's absence namely that he had not

undertaken a walked inspection on 13 February 2020 or at the very least he ought not to have placed such weight on Mr Cooke's statement as he did when concluding that the hole was probably not present on 13 February 2020 at Judgment paragraph 133 **[CB/110]**. It is well established that the general rule is that oral evidence given under cross-examination is the *"gold standard"* because it reflects the long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness; *Carmarthenshire County Council v. Y and anor (A and anor intervening)* [2017] 4 WLR 136 at paragraphs 7 to 8. There is an inconsistency between the Judge's approach to Mr Cooke's evidence in paragraphs 109 and 133 of the Judgment which demonstrates that the Judge should not have concluded that the hole was probably not present on 13 February 2020 which conclusion (whatever the Judge said) must have been based upon Mr Cooke's statement and/or his computer entry:

"109. Given that a central question is whether Mr. Cooke missed a significant hole on 13 February 2020, it would not be logical to use as a reason why such a hole did not exist on that date the fact that Mr. Cooke would not have missed such a hole" **[CB/106]**.

"133. It is clearly of assistance to the Defendant that it employed an experienced inspector, Mr. Jeff Cooke. Mr. Cooke says in his witness statement that he would have spotted a hole of that size had it been there. I have found that the hole was probably not present on 13 February 2020" **[CB/110]**.

(6) The Judge applied the wrong burden and standard of proof when considering the issue as to whether a walked inspection had taken place on 13 February 2020 given the data from the tracker (Judgment paragraph 71 **[CB/96]**): *"…It would be very surprising if Mr. Cooke had seen fit to be deceptive in such an important way, and there would need to be cogent evidence to prove it, which is lacking"*. The Judge should not have required *"cogent"* evidence that Mr Cooke had been wrong. He should have decided the question on the balance of probabilities. This was a 'routine' personal injury claim. The allegation itself was not inherently unlikely nor was it sufficiently serious nor do sufficiently serious consequences

flow for the Respondent to merit such an approach; *Burnett* at paragraphs 24 and 25.

(7) There is a duty on the Court and the parties to keep expert evidence to the minimum reasonably required. Expert evidence on the data from the vehicle tracker was not necessary. If it were, the Judge should have indicated that view at trial so that an appropriate application could be made. The absence of expert evidence was not a valid reason for not evaluating this evidence. Equally, the burden being on the Respondent, there was no expert evidence supporting their view that the vehicle tracker data was subject to serious inaccuracies.

(8) The Judge concluded (Judgment paragraph 60 **[CB/94]**) that the evidence of Mr Allen-Smith that Mr Cooke would have flagged the defect as a Category 2 medium *"…would have been misleading had he known what Mr. Cooke's statement said, but that was not demonstrated to the court at that point…"* The Judge had forgotten that Mr Allen-Smith never maintained he was unaware of Mr Cooke's witness statement, see Transcript Day 2, p164 **[B/144]**.

16 Q. You've given evidence that Mr Cooke was experienced
17 inspector would well knew the difference between
18 category 1 and category 2 defects?
19 A. Yes.
20 Q. You made those comments in your statement in knowledge
21 of what Mr Cooke was saying?
22 A. Yes.

Accordingly, the Judge ought to have found that Mr Allen-Smith's evidence was misleading in that material respect.

(9) There is also confusion in paragraphs 60 and 61 of the Judgment as to when the Respondent's witnesses Mr Allen-Smith and Mr Vine first gave evidence that they would have expected Mr Cooke to categorise the defect as category 2 – non urgent. In the first part of paragraph 60 of the Judgment, the Judge acknowledges that Mr Allen-Smith omitted to state in his statement that he differed from Mr Cooke in his view of what category of defect existed under the DMA. But the

latter part of paragraph 60 gives the impression that this evidence had previously been given, the Judge said:

*"…**He maintained the view** that Mr. Cooke would have flagged the defect as a Category 2 medium which would have been misleading had he known what Mr. Cooke's statement said, but that was not demonstrated to the court at that point. When Mr. Cooke's statement was disclosed **Mr. Allen-Smith was entitled to continue to argue** that the DMA did not permit verge defects to fall within Category 1. That is a reasonable argument which is maintained by the Defendant"* (bold and italic emphasis added) **[CB/94]**.

Furthermore, in paragraph 61 of the Judgment in relation to Mr Vine's evidence the Judge said the following:

*"….**His adherence to the view** that Mr. Cooke would be expected to assess the defect as a Category 2 medium defect follows the Defendant's general line, but in the absence of proof that he had seen Mr Cooke's statement stating he would have assessed it as a Category 1 defect I do not think this counts against his credibility"* (bold and italic emphasis added) **[CB/94-95]**.

(10) The Judge was quite wrong to rely on "*the contemporaneous evidence of his inspection*" (Judgment paragraph 73 **[CB/97]**) as this was an entry from Mr Cooke replicating the entry 6 months earlier. Further, the entry did not contain adequate information to assess the adequacy of the inspection.

(11) This was a central issue. The burden was on the Respondent to establish the section 58 Defence. There was a complete absence of reliable evidence that could reasonably be expected from the Respondent to prove this.

28. Without the inspection the section 58 Defence fails and the Appellant's claim for breach of statutory duty must therefore succeed.

29. It is not in those circumstances necessary for the Appellant to demonstrate the dimensions of the hole other than on 22 April 2020.

30. In the alternative, if necessary, the Appellant challenges the finding that the hole was probably not present on 13 February 2020 (Judgment paragraph 133 **[CB/110]**) given that (whatever the Judge said) it must have been based upon the Judge's acceptance of

Mr Cooke's evidence that a walked inspection had taken place and that he would have spotted a hole of that size had it been there. For the reasons set out above it is submitted that the Judge's analysis of Mr Cooke's evidence was flawed. It is no answer to say that the Judge accepted the evidence of the Respondent's expert, Mr Hopwood, (Judgment paragraph 108 **[CB/106]**) since that evidence was based on a factual premise that there had been a walked inspection on 13 February 2020 (Judgment paragraph 83(xxv)(a) **[CB/102-103]**) and on speculation on how a hole may have opened up in the intervening period. Neither highways expert had expertise in the burrowing of rodents. A tree stump had been present from a felled tree for many years (Judgment paragraph 108 **[CB/106]**). A hypothesis that a hole could develop suddenly or vary in size over periods of time does not mean that it probably did between February and April 2020. Without the assumption that a walked inspection had taken place on 13 February 2020 there was no reason to accept speculation that it probably developed since that date.

Ground 2 – Negligence claim

31. The Judge made findings and/or there was clear evidence that:

    (a) The path north of the Paul Cully bridge was used by cyclists (Judgment paragraphs 57 **[CB/94]** and 111 **[CB/106-107]** and 123 **[CB/108]**).

    (b) The Respondent knew it was so used (Judgment paragraph 58 **[CB/94]**).

    (c) The Respondent had produced a cycling map inconsistent with its designation of the path as a footway (Judgment paragraph 87 **[CB/103]**).

    (d) The Appellant believed he was cycling on a shared use path. This is implicit in the finding that if an END of Cycle Route sign had been erected just north of the Paul Cully bridge, the Appellant would not have attempted to cycle on the footway north of any sign, and the accident would not have occurred (Judgment paragraph 129 **[CB/109]**).

32. The Judge also cited without apparent dissent the expert evidence of Dr Davis that the Appellant was behaving as a proficient and law-abiding cyclist in not using the A10 carriageway; by cycling on what he had every reason to suppose was a shared use

pedestrian and cycle path, there being no signs advising that the shared path had ended; and by overtaking the jogger in the manner he did (Judgment paragraph 91 **[CB/104]**).

33. In those circumstances, the manner in which the Judge purported to distinguish Lord Brown's example in *Gorringe v. Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 of a missing 'No Entry' sign was misconceived. The presumptive rules about not cycling on footpaths are precisely why a cyclist needs signage to inform him that the status of the path has changed. Every motorist is presumed to know they should not drive the wrong way on a one-way street, but a change in the status of the road from a two-way street to a one-way street would and should be signed.

34. The use of 'END' of Cycle Lane signs is clearly not mandatory in all cases and it is right to discourage their use where they are not needed. Nonetheless the Judge's acceptance that END signs are *"rarely required"* (paragraph 144 **[CB/112]**) does not mean that they are *never* required. Here such a sign was required. The cycle route ended abruptly with no sensible alternative to continuing north. The end of the cycle route was not obvious; paragraph 3.4.3 of the Department for Transport's Local Transport Note 02/08 **[A/7]**. Indeed, the Respondent's own staff produced and promulgated a map **[A/29-31]** encouraging its use as a cycle route and it is hardly surprising that the footway was very regularly used by cyclists mistaken (as the Appellant plainly was) as to its status. Very few individuals who are not highways experts would be aware of minimum standards for cycle tracks and it is not unknown for some facilities not to meet the recommended minimum standards. The finding that a reduction in width conveyed a change of status obviating the need for a sign was perverse and contrary to the evidence. See Joint Report of Cycling Experts **[A/184]** (confirmed by Dr Davis in evidence; Mr Franklin was not called to give evidence):

> 4.2 Dr Davis and Mr Franklin **agree** that the recommended minimum width for a two-way cycle path is 2.0 metres. (Cycle infrastructure design, Department for Transport, 2008 / 2020).
>
> 4.3 Dr Davis and Mr Franklin **agree** that it is not unusual for shared use paths to be narrower than this and that the width of a path is not a reliable indicator of its status.

35. The Respondent was responsible for this Highway. It abandoned proposed amendments to its Defence to blame a local borough council for the implementation of the cycling scheme (Judgment paragraph 10 **[CB/86]**). The implementation of this scheme without an END sign is best regarded as a positive act. Even if it is not, this is a case that clearly falls within the exception contemplated by Lord Brown in *Gorringe.*

36. In *Gorringe*, the House of Lords held that there was no private law duty on a Highway Authority to put up, or paint, a warning sign to advise motorists to slow down when approaching an (obviously) difficult piece of road. Lord Browne said the following at 1087 B-D:

> *"102. What I have said thus far is in the context of road accidents involving negligence on the part of at least one of the road users involved. But that is because I find it difficult to contemplate a case in which a road accident could occur without such negligence unless either a) it results from the physical state of the road (in which case, as already explained, liability will in any event rest upon the Highway Authority), or b) the Highway Authority will, irrespective of any particular statutory power or duty, be liable in a conventional common law negligence action for having enticed the motorist to his fate by some positive act. Assuming that the road user is not to be regarded as negligent, he must inevitably have been misled into ignoring whatever danger precipitated his accident. Although motorists are not entitled to be forewarned of the ordinary hazards of highway use, plainly they must not be trapped into danger. If, for example, an authority were to signal a one-way street but omit to put No Entry signs at the other end, it might well be found liable, not because of any statutory power or duty to erect such signs but rather because it induced a perfectly careful motorist into the path of danger.*

37. The Judge correctly summarised *Gorringe* in paragraph 33 of the Judgment as follows **[CB/90]**:

"The Highway Authority will be liable in negligence where it has enticed the motorist to his fate by some positive act, or where the motorist has been trapped into danger…"

When the Judge then went on to consider the common law claim from paragraph 140 of the Judgment onwards (from **[CB/111]**), the Judge failed to consider whether the

Appellant had been *"trapped into danger"* and focussed solely on whether the Respondent had committed a positive act which adversely affected the risk to users of the highway. It is clear from the case of *Yetkin v. Mahmood and anor* [2011] QB 827 at 838H to 839B that terms such as *"enticed the motorist to his fate"* or being *"trapped into danger"* should not be read too literally. If the Judge had considered whether the Appellant had been *"trapped into danger"* he ought to have found that the Appellant had been trapped by the Respondent's failure to erect an END sign at the end of the cycle route.

38. The Appellant's case is that:

(a) There was no fault on his part in using the footway and the Judge found no fault (the findings of contributory fault all related to riding into the hole not riding on the footway).

(b) It is completely inadequate to rely upon a change in width as indicating the end of a cycle path, without any signage either on the path or on a post.

(c) The Appellant was accordingly misled into believing he could lawfully and safely continue on the footway.

(d) The Respondent knew, or should have known, that many cyclists (and their own employees who produced a map of recommended cycle routes) were misled as to the status of the footway.

(e) As the Judge found, cyclists using the footway could foreseeably and understandably use the verge (Judgment paragraph 125 [**CB/109]**), yet the Respondent did not regard defects in the verge as being dangerous and therefore requiring timely repair (Judgment paragraphs 60 and 61 **[CB/94-95]**).

(f) There was therefore a breach of duty by the Respondent's positive act of implementing this scheme without an END sign or by entrapping the Appellant.

(g) The Judge correctly approached causation in that the absence of an END sign caused the accident (Judgment paragraph 129 **[CB/109]**).

39. The only appropriate finding, on the evidence, was that the Respondent was in breach of duty in failing to inform users of the cycle path that it ended just north of the Paul Cully bridge and this breach of duty caused the accident. There should therefore be Judgment for the Appellant.

Conclusion

40. The Appellant invites the court to allow the appeal and enter judgment for the Appellant at 67% of damages to be assessed.

14 March 2024

Perfected on 16 April 2025

MARTIN PORTER KC

ANASTASIA KARSERAS

2 Temple Gardens

APPEAL REF: CA-2023-002207

CLAIM NO: QB-2021-003247

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT KING'S BENCH DIVISION

ORDER OF VIKRAM SACHDEVA KC SITTING AS A DEPUTY HIGH COURT JUDGE MADE ON 20 OCTOBER 2023

BETWEEN:

MR DEMETRIOS KARPASITIS

Claimant/Appellant

-and-

HERTFORDSHIRE COUNTY COUNCIL

Defendant/Respondent

APPELLANT'S APPEAL SKELETON ARGUMENT DATED 14 MARCH 2024 PERFECTED ON 16 APRIL 2025

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Ref: UK01-2009485

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