Robert White v City of Westminster

Appeals Nos. 201008881A, 2010110497, 2010107798 2010079240

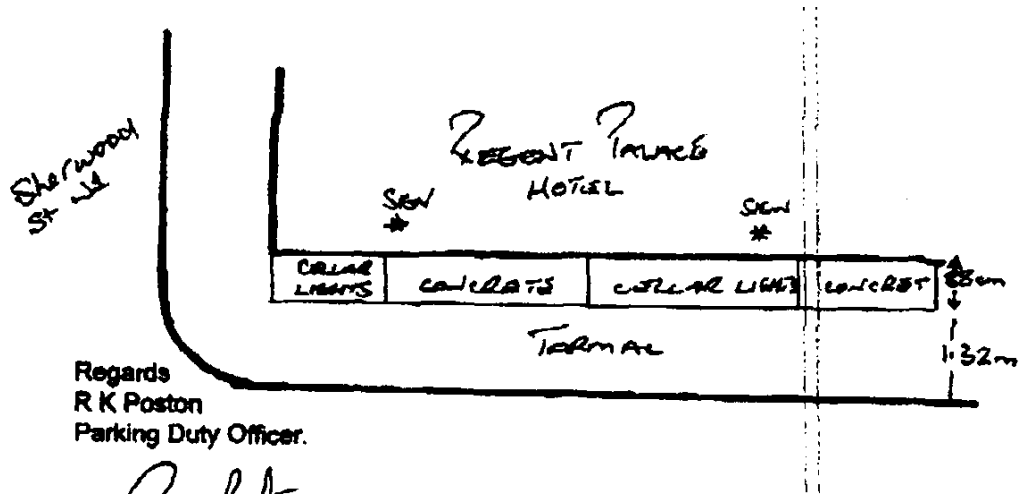
PAVEMENT LIGHTS

These appeals raise, not for the first time, the question of whether a vehicle (normally as in this case a motorcycle or motor scooter) commits a contravention by parking on pavement lights or other areas on the side of the street which are private property.

I have had the benefit of hearing from the Appellant in person on two occasions and considered all the written evidence submitted .The essential facts are not in dispute:

1) On the **27th and 31st October, and the 6th December, 2000** the Appellant's motor scooter was parked in **Glasshouse Street** with its wheels resting on pavement lights running close to and parallel with the adjacent building. The Appellant has supplied me with photographs which make the geography of the location clear (see the example below)

2) On the **14th November 2000** the Appellant's motor scooter was parked in **Brewer Street** at the rear of the Regent Palace Hotel. The area in question consists of concrete and pavement lights extending 88cm from the building line. The Council has provided the following sketch plan.



In this case there were 2 signs on the wall in the form of a prohibition sign with the legend "PRIVATE PROPERTY ANY BICYCLE LEFT HERE WILL BE REMOVED"

The Appellant's contention is that all these areas are private property as evidenced by

1) the plan he produces from the title deeds of the Regent Hotel which appears show the area included as part of the property
2) the notices in Brewer St
3) the fact that, as appears in some of the photographs, waste bins are routinely left there which would not be permitted by the Council if the area were highway.
4) that on occasion a nearby restaurant cordons off a length of the area for the purposes of its business.
5)

and that, as private property they cannot be part of the footway

On balance I am prepared to accept that the land which comprises these areas is private property. Although the plan is not wholly conclusive on the point as it is clearly not drawn to such a scale and with such intention as to deal with the point at issue, nevertheless it seems to me the weight of the evidence supports this finding

However it has to be emphasised that the true question is not the ownership of the surface or subsoil of the land concerned, but the very different one as to whether it is a part of the road. Although at first sight it might well appear that if an area is private property then it cannot be part of the road; this is in fact far from being the case.

THE ALLEGED CONTRAVENTION

The contravention the Appellant is said to have committed in each case is that his vehicle was parked with one or more of its wheels on any part of an *urban road other than a carriageway,"* contrary to s15(1) Greater London Council (General Powers) Act 1974 ("the 1974 Act").

As the areas where the vehicle was parked are clearly not part of the carriageway the next question is whether this area is part of an *"urban road"*. *"Urban road"* is defined as:

"a road which—

a) is a restricted road for the purposes of section 81 of the Road Traffic Regulation Act 1984: or
b) is subject to an order under section 84 of that Act imposing a speed limit not exceeding 40 miles per hour: or
c) is subject to a speed limit not exceeding 40 miles per hour which is imposed by or under any local enactment:"

In simple terms a road subject to a speed limit

There is no doubt that Glasshouse Street and Brewer Street generally fall within this definition but the key question or seems to me to resolve itself as this. Are the areas in question a part of these "roads".

"Road" is defined in s 142 of the Road Traffic Regulation Act 1984 as "any length of highway, or of any other road to which the public has access…".It follows that the question that has to be asked in each of these cases is :

a) is the area in question a "length of highway" or
b) is it a "length of road to which the public has access"

IS IT A HIGHWAY?

"Highway" is not statutorily defined beyond the rather unhelpful definition in the Highways Act 1980 which reads as follows *"the whole or part of a highway other than a ferry or waterway"*. To find out what it actually is, one has to go back to the common law and some ancient authorities which have been conveniently summarised by one text book writer as follows

A highway is a route which all persons rich or poor can use to pass and repass along as often and whenever they wish without let or hindrance and without charge (Orlik, An Introduction to Highway Law 2nd edition 2001 at p 2)

In *Rangely - v – Midland Rly Co (1868) 3 Ch App 306* it was said to be a *"dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing"*

Glasshouse Street and Brewer Street are busy thoroughfares in the heart of the West End and it seems to me obvious that generally speaking they are highways within this definition; The point of course is whether the highway extends right up to adjoining buildings and in considering this I am assisted by Adjudicators' views in a number of very similar cases, which I regard as highly persuasive Adjudicators have taken the view that the extent of the highway is indeed indicated by its natural boundary namely the building line (see for example *Coppolino v City of Westminster* (1999) (pavement

lights outside Debenhams); and/or they have been able to infer in the context of a city centre street 20 years use by the public which would give rise to a presumption under s31 Highways Act 1980 that the land was a highway. I adopt that approach in these cases.

The fact that this may involve a highway extending over private property is by no means a conclusive argument to the contrary. After all many highways such as footpaths run across land which is undoubtedly privately owned. Much depends on the nature and "look and feel" of the area in question. I share the broad view of previous adjudicators that in a case such as this where there are no physical barriers and the public apparently free to walk over the whole width of the street for many years the evidence suggests it is part of the highway and on balance I find that it is.

IS IT A ROAD TO WHICH THE PUBLIC HAS ACCESS?

Even if the area is not part of the highway it may still be a "length of road to which the public has access. [Road does not simply mean the carriageway; a footway is "road" see *Bryant – v – Marx (KBD) 1932 LGR 383*.] The decided cases on the meaning of public access are numerous and it is not necessary for the purposes of this decision to attempt to review them all. Many are concerned with the distinction between access by the public as a whole and access by a section of the public only – (a point which does not arise in these cases since on the facts here if the public has access it is the entire public or nothing) The principle that emerges from the cases is summarised in Wilkinson on Road Traffic (20th edition at 1.184 as follows

"a prosecutor will usually have to prove only two things: first, that the general public and not merely a special class of the general public has access to the road; and secondly that the public has access at least by tolerance of the owner or proprietor of the road in question…"

It is worth noting that by virtue of this definition all sorts of roadways may be included where the public has no positive *entitlement* to go. The leading case, subsequently much quoted, is *Harrison v Hill 1932 J.C.13* where Lord Sands said"

"In my view, access means, not right of access, but "ingress in fact without any physical hindrance and without any "wilful intrusion."

And later, *"In my view, any road may be regarded as a road to which the public have access upon which "members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of a prohibition express or implied."*

This dictum has been quoted with approval in a number of cases. In *Cox v White* Lord Widgery CJ said that in ninety-nine cases out of a hundred this guidance would be all that Justices needed

In the same case Lord Clyde said

"It is plain, from the terms of the definition, that the class of road intended is wider

than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or' from prescriptive user,

The question is whether in fact the public go there and whether there is any attempt made to stop them. The following propositions from the case law seem particularly relevant:

1.The phrase "road to which the public has access" can include a private road or even private land.

In the Northern Ireland case of *Montgomery – v – Loney(1959)NR 171* (where existing authorities were reviewed in detail) the Northern Ireland Court of Appeal held that the forecourt of a drive in petrol station was a "road to which the public has access"

Lord MacDermott LCJ said

As respects private property, "access" means access by permission, either express or to be implied from acquiescence or other conduct on the part of the owner or occupier. It does not mean access in fact and irrespective of the will of the owner or occupier

In *Norton - v – Hayward (1968) SJ 767* a Local Authority painted yellow lines across an entrance passageway to the rear of business premises and part of the land on which the lines appeared was demised to the owner of those premises. The Divisional Court held that although part of the relevant area was private land in the sense of forming part of the demise that did not prevent it from being part of the road.

In *Bugge – v – Taylor (1940) LGR 467 (KBD*) the Divisional Court held that there was "plenty of material" on which justices could come to the conclusion that the private forecourt of a hotel 69 feet long, open to the High Street at each end, and which was habitually used by members of the public as a short cut was a "road to which the public has access"

This case should be contrasted with *Thomas – v – Dando [1951] 1All ER 1010* where a vehicle was left unlit on an unpaved forecourt of as shop which adjoined the pavement with no physical barrier between the two. Customers of the shop crossed the forecourt to enter the shop but members of the public did not habitually use it. A Stipendiary Magistrate came to the conclusion that the area was not a "road to which the public has access" and the Divisional Court supported him. *Bugge – v – Taylor* was cited, but Goddard LJ said

"in my opinion, that was a wholly different case, in Bugge v. Taylor a motor vehicle was left unlighted in the forecourt of a hotel. Although the forecourt was the property of the hotel, it was in no way separated from the road, and the public were in the habit, not only of warning over it, but also of driving ever it. In fact, the people at the hotel allowed it to be used as though it were part of the road. ……..it was not laid down that a court is bound to find that a place

is a "road," for the purposes of the Act, merely because it is net separated by a wall or rail from the highway. In the case now before us it seems to me impossible to hold that this small forecourt, which was used only by the customers of the shop, is a "road," for the purposes of the Act of 1927."

2) The public does not have to have a *right* of access (as it would if the land were a highway). De facto access with acquiescence express or implied of the owner is sufficient. The fact that there is a notice indicating the land is private, will not automatically prevent the area from being a "road to which the public has access"

See *Harrison v Hill* above

In *Renwick – v – Scott [1996]SLT 1164* the defendant was charged with a minor traffic offence on a port authority road. . The road was within the curtilage of the ground owned and occupied by the port authority but there was nothing to prevent people from driving on to the land and along the road, which carried much traffic between the town and the dock terminals. No passes were required for persons to use the road and there was no physical obstruction of the road, but the port c authority had made a byelaw prohibiting access

…… "and any other way to which the public has access". The approach to be taken to the interpretation of those latter words can be seen from Rodger v Normand where, under reference to a number of previous cases, ***it*** *was stated that the test depends not upon the entitlement of the public to be there but* ***is whether the place was one where the public might be expected to be passing or over which they were in use to have access.***

The true question is whether this is a way, or was a road, to which the public had access. This matter does not depend upon the terms of any byelaw or upon the terms of any notice. It depends upon what in fact happens from day to day on the road.

This case can be contrasted with *Buchanan v Motor Insurers' Bureau* [1955] 1 WLR 488

In that case the plaintiff was injured by a lorry which was being driven on a dock road within the premises of the Port of London Authority. The driver of the lorry was not insured so the claim by the plaintiff for payment of his award of damages was made on the bureau under s35 of the Road Traffic Act 1930. The question was whether the road concerned was or was not a road within the meaning of 121 (1) of the Road Traffic Act 1930. The court held that it was not such a road, because it was not a road to which the general public had access either as a matter of legal right or by tolerance of the Port of London Authority.

However in distinguishing this case on its facts the court said in *Renwick v Scott*

" It is important, however, to observe that in that case passes were required to

enter the dock area and that unauthorised persons were refused admission. It was possible therefore to say in that case that ***not only was there no legal right to enter, but that the general public were not tolerated within the premises****. It appears to us that the facts of the present case are different in that, while it may well be true that the public have no legal right to enter the premises, it does not appear from the stated case that members of the public were not tolerated there. There is no suggestion that they were not allowed to enter the premises without showing a pass or demonstrating that they had permission to enter them.2*

Applying these authorities to the facts in the present cases it seems to me that the parts of Glasshouse Street and Brewer Street where the Appellant parked are a length of road to which the public has access. These are busy West End thoroughfares with no physical barrier between the highway and the areas in private ownership. Although there is in one case a notice indicating that the rights of an owner to remove trespassing bicycles might be exercised there is no notice prohibiting access to the public much less any evidence that such a prohibition is ever enforced. It seems to me plain that public access is tolerated in these areas and that applying Lord Sands' words these are places where .. *"members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of a prohibition express or implied."* The fact that members of the public might not be able physically to walk over all parts of the area in Glasshouse Street at all times because of the presence of waste bins does not in my view amount in any way to an attempt on the part of the owner to deny access; it is simply a convenient place to put the bins. Likewise the occasional temporary obstruction by the restaurant –even if it is construed as prohibition on public access does not in my view undermine the usual nature of the area

It seems to me support for this conclusion can be found in the decision of the High Court in *Price v DPP [1989] RTR 413* – a case also involving the status of a pavement. The headnote reads:

"A pedestrian was waiting for a taxi on a pavement part of which was maintained at public expense as part of the highway and part of the pavement, which adjoined shops, was part of the shop frontage and was owned privately, The surface of the pavement differed at or about ***a*** *line dividing public from private ownership; nothing indicated that the privately owned part of the pavement was shut oft to pedestrians or otherwise delineated so as to indicate that it was not part of the pavement as a whole for the purpose of people walking up and down the road, The defendant, a motorist, who owned a shop with adjoining pavement, drove across the pavement in order to park his car outside his shop. He caused the pedestrian to jump out of the way, although he used his horn to warn her of his approach. An information was preferred against the defendant that he drove a motor vehicle on a road without reasonable consideration for other persons using the road contrary to section 3 of the Road Traffic Act 1972. The justices found that the area where the incident occurred was a 'road' within section 198(1) of the Act of 1972 and they convicted the defendant.*

On appeal against conviction on the ground that the prosecution had failed to establish where the pedestrian was waiting and so had failed to establish that

she was a user of the road and, therefore, had failed to prove an essential ingredient of the offence:
Held, dismissing the appeal, that the question was whether the pedestrian was using a road to which the public had access within section 196(1) of the Road Traffic Act 1972; and that the justices were fully entitled to conclude that the pavement as a whole whether part publicly owned or privately owned, was and could in the ordinary sense be described as a road (pp 41 SL-41 GA)."

Saville J said

> *"The question, of course, is not whether Miss Harvey was using the highway but whether she was using a road to which the public had access. Miss Harvey is a member of the public. On the defendant's own argument she had access to both parts of the pavement and, whether publicly or privately owned, there was in my view ample evidence – as is clear from the photograph and plan put before the justices – for the proposition that* ***the pavement as a whole provided a means of passage for pedestrians going up and down Merthyr Road.*** *.Although the surface of the pavement differs at or about the line dividing public ownership and private ownership, there was* ***nothing in the photograph or plan, nor anything in the evidence, that suggested that the privately owned part of the pavement was in anyway shut off to pedestrians or in any way delineated so as to indicate that it was not part of the pavement as a whole for the purpose of people walking up and down Merthyr Road.*** *To my mind, therefore, the justices were fully entitled on the material before them to come to the conclusion… that the pavement as a whole, whether the part publicly owned or privately owned, was and could in the ordinary sense be described as a road"*

It seems to me that Glasshouse Street and Brewer Street are in a very similar position to Merthyr Road with nothing to indicate that private areas were not part of the pavement as a whole.

CONCLUSION

The areas in Glasshouse Street and Brewer Street where the Appellant parked, although privately owned, are either a part of the highway or a length of road to which the public has access (or both) and therefore are part of an urban road. As the motor scooter was not parked on the carriageway a contravention took place in each case and the Penalty Charge Notices were correctly issued.

I would, however, ask the City of Westminster to consider exercising its discretion to accept the discounted amount in settlement in each of these cases. There is no doubt the Appellant had a bona fide belief that he was lawfully parked; and the reasons why this was not the case are, perhaps, far from obvious to the ordinary motorist. It seems to me fair that now that the Appellant has been made aware of the law in detail he should be given the opportunity to pay at the reduced rate that I have no doubt he would have taken had his legal position been clear. However I should make it clear this is a matter for the council and unless the Appellant is notified to that effect within 21 days the full amount is legally due.

Edward Houghton
Adjudicator