

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

BETWEEN:

(1) THE SISTERS OF THE SACRED HEART OF MARY LIMITED

(2) HOLY CROSS SISTERS TRUSTEES INCORPORATED

(3) ROKEBY EDUCATIONAL TRUST LIMITED

(4) UNILEVER PLC

Claimants

-and-

THE COUNCIL OF THE ROYAL BOROUGH OF KINGSTON UPON THAMES

Defendant

JUDGMENT

(Handed down 14 March 2008)

(John L. Powell Q.C. sitting as a Deputy High Court Judge)

1. This judgment is arranged under the following parts:

Part 1: The Dispute
Part 2: Witnesses

- Part 3: The Coombe estate
- Part 4: The Claimants and the MCRA
- Part 5: Vehicle movements
- Part 6: History of barriers at the third entrance
- Part 7: The proposed barrier
- Part 8: Recent background to the Council's proposal
- Part 9: The draft operation procedures document
- Part 10: The 1933 Act
- Part 11: Nature of the Claimants' rights to use the relevant roads
- Part 12: Substantial interference with the Claimants' rights under the 1933 Act
- Part 13: Unlawful financing argument
- Part 14: Conclusion as to the declaration sought by the Council.

Part 1: The Dispute

2. The dispute relates to the proposal of the Defendant, the Council of the Royal Borough of Kingston upon Thames ("**the Council**") to control entry to a private road, Warren Road, Kingston-on-Thames, by an unmanned code-operated barrier ("**the proposed barrier**"). The road provides access from a public road to what is known as the "**Coombe Estate**". The proposal is supported by the local residents' association, the Malden and Coombe Residents' Association ("**MCRA**"). It is opposed by the Claimants. They operate three schools and a training centre from premises situated adjacent to another private road (for most of its length), George Road, which is accessed from the east from Warren Road. The three schools are Marymount International School ("**Marymount**"), Holy Cross Preparatory School ("**Holy Cross**") and Rokeby School ("**Rokeby**"). They are owned and operated by the First Claimant, the Second Claimant and the Third Claimant respectively. The training centre, the Four Acres International Training Centre ("**Four Acres**"), is owned and operated by the Fourth Claimant ("**Unilever**") or a subsidiary company. During the course of the hearing, the collective term "**institutions**" was used to describe institutional owners and occupiers of premises on the Coombe Estate comprising three schools, two training centres, care homes and two golf clubs, as distinct from houses in domestic use.
3. The Claimants contend that implementation of the Council's proposal would amount to a substantial interference with the rights of way over Warren Road and George Road of a range of persons needing access to their premises. They do not object to a barrier as such. In particular, they do not object to a manned barrier. They object to a code-operated barrier on the grounds that it is impractical and would result in what one witness described as a "logistical nightmare", given the diverse and multiple types of persons needing to have vehicular access to their premises.
4. Over the years, there has been a change from residential use to institutional use of many premises adjacent to private roads within the Coombe Estate and a consequent exponential rise in the number of persons visiting those premises in vehicles. The proposed barrier is not directed against those visitors or, as they were described, "authorised users". It is directed against "unauthorised users" or "rat-runners", namely vehicle drivers using Warren Road

and George Road as through-routes or short-cuts to and from adjacent busy public roads, especially during periods of traffic congestion. The insistence by witnesses for the Claimants that the proposed code-operated barrier is impractical is based primarily on their strongly held view that such a barrier would stop or impede large categories of authorised visitors who were unaware of the code or could not readily ascertain it, with consequent inconvenience, disruption and prejudice to both the Claimants and those visitors. Witnesses for the Council in contrast maintained that the Claimants were exaggerating the difficulties.

5. Ms Laing for the Council maintained that it is entitled to introduce the proposed barrier by reason of its management and control powers under a private Act of Parliament, the Maidens and Coombe Urban District Council Act 1933 ("the 1933 Act"). The Council is the successor to that urban district council ("the predecessor council"). On behalf of the Claimants, Mr Studer contended that they each have rights of way for all purposes over Warren Road and George Road by reason of original grant to their predecessors in title, registration, prescription and/or the doctrine of lost modern grant or by the terms of section 11(1) of the 1933 Act and that the proposed barrier would substantially interfere with those rights. Ms Laing countered that section 11(1) is an exhaustive statement of the claimants' rights of using those and other scheduled roads: properly construed in their statutory context, those rights are qualified by the defendant's functions of managing the scheduled roads. She further contended that whether or not that section constituted an exhaustive statement of the claimants' rights, the proposed barrier would not constitute an unlawful interference with those rights.
6. In addition, Mr Studer contended that it would be unlawful for the Council to debit the Coombe Estate reserve fund established pursuant to section 11 of the 1933 Act or to recharge to the Claimants any part of the costs or expenses of installing the proposed barrier or other mechanical barrier, which exceeded the reasonable costs of replacing the pre-existing barrier with a barrier intended to be operated exclusively by the manual intervention of a gatekeeper in physical attendance at the site ("unlawful financing argument"). Miss Laing maintained that it was lawful to do so.
7. I am grateful to both counsel for their detailed and careful submissions both on fact and law. Each fired off heavy broadsides of authorities. I intend no disrespect to their submissions in not traversing those authorities. That task is rendered otiose given my conclusion that the terms of the 1933 Act are alone sufficiently clear to resolve the dispute.

Part 2: Witnesses

8. Witnesses were called by both sides and were cross-examined on their written statements. For the Claimants they were Sister Kathleen Fagan (Headmistress of Marymount), Mr Charles Carter (Chairman of Rokeby Educational Trust Ltd.), Ms Maureen McLaughlin (Bursar of Rokeby), Ms Anne Hughes (Bursar of Holy Cross) and Mr Daniel Hornsby (Manager of Four Acres). For the Council they were Councillor Patrick Codd (Councillor for the electoral ward which includes the Coombe Estate), Mr John Tarrant (Chairman of the MCRA) and two employees of the Council, Mr Ingram Gavan and Mr David White, both of whom have had considerable dealings with access issues related to the Coombe Estate roads over the years.

Mr Gavan is a chartered civil engineer and member of Institute of Highways and Transportation. His dealings with the issues extend back to 1974. He left the Council's employment in 1993 after some 20 years, but has been intermittently employed on a part-time basis by the Council for the last 4 years on road-related matters. He attested to the history of access control to the relevant roads and produced minutes of relevant committee discussions by the Council and the predecessor council. Mr White, the Council's Highways Asset and Administration Manager, has been concerned with the management and maintenance of the relevant roads since 1999.

9. The courtesy with which each witness gave her or his evidence did not in any way detract from its force. Nevertheless, occasionally views were expressed which suggested that conviction afflicted perception and accordingly merited an antidote of scepticism.

Part 3: The Coombe Estate

10. What is known as and referred to as the "Coombe Estate" (although not referred to as such in the 1933 Act) describes an area now bounded on four sides by busy public roads, the Kingston Bypass (A3), Coombe Lane West (A238), Galsworthy Road and Kingston Hill (A308). The four roads delineate a roughly quadrilateral shape for the estate, with Galsworthy Road forming the western side. However, that road is so short relative to the other three roads that the Estate is better perceived as more in the shape of an equilateral triangle with Coombe Lane West forming the base (to the south) and Kingston Hill and the Kingston Bypass forming the other two sides. Kingston Hill extends from the apex of the triangle in a southwesterly direction. The Kingston Bypass extends from the apex in a south, south easterly direction. Coombe Lane West connects to the east with the Kingston Bypass. Coombe Lane West does extend west to connect with Kingston Hill, but before then Galsworthy Road branches north from Coombe Lane West to connect with Kingston Hill. The public roads are major arteries carrying traffic to Central London from the South West. Kingston Hill connects directly to Kingston-upon-Thames and adjoins Richmond Park.
11. Within the estate there is a network of private roads including Warren Road and George Road. There are three entrances that allow passage for vehicles through the Estate. Two of these are from Kingston Hill and the third is from Coombe Lane West. The first entrance is from Kingston Hill at its junction with Warren Road ("**the first entrance**"), the second entrance is further down Kingston Hill (in a south westerly direction) at its junction with George Road ("**the second entrance**") and the third entrance is from Coombe Lane West at its junction with Warren Road ("**the third entrance**"). From the second entrance George Road is initially a public road, but from a point marked by a white fence it becomes a private road to its junction with Warren Road. Warren Road connects the first entrance with the third entrance and provides a short-cut for vehicles between Kingston Hill and Coombe Lane West. Warren Road also connects the second entrance with the third entrance via George Road, thus providing another short-cut for vehicles between Kingston Hill and Coombe Lane West. Proceeding from the third entrance along Warren Road (in a north westerly direction), its first main junction is with George Road which branches to the left (approximately in a westerly direction). According to the evidence, it is from the third entrance that most vehicles travel to gain access to the Claimants' premises further along

George Road. This same route provides a short-cut from Coombe Lane West to Kingston Hill and, shortly after exiting by the third entrance, across Kingston Hill, to Richmond Park. Evidence was given to the effect that this route has become more used after the closure some 10 years ago of an access to Richmond Park (Robin Hood Gate).

12. As several witnesses described, the Coombe Estate conveys a relatively rural impression. This is mainly a result of there being within its confines two golf courses, Coombe Wood and Coombe Hill ("**the Golf Courses**") and its network of roads being flanked by mature trees. Its history over the last century or so is described in the Agreed Statement of Facts and in two documents produced by Mr Tarrant: a document entitled "*Coombe and its Open Spaces*" dated April 1957 by Colonel G.E. Rhodes CBE and an extract from a 1988 booklet entitled "*Coombe Malden Surrey*".
13. The Golf Courses and other lands around them were formerly known as the Coombe-FitzGeorge Estate. The estate was owned by a great grandson of George III, the 2nd Duke of Cambridge. He died in 1904. On his death the lands were inherited by his sons, Sir Adolphus and Sir Augustus FitzGeorge. More relevant in explaining the prevalence of trees and the existence of private roads seems the following extract from the 1988 booklet:

"At one time in this locality there was the famous Coombe Wood Nursery, which sent plant collectors to the ends of the earth to bring back many of the trees, shrubs and plants of today. The Nursery has moved away and many fine houses have now been built on the grounds which it occupied.

A striking and unusual feature of Coombe Hill are the Toll-bar gates guarding the main private roads'. They were built towards the end of the last century and maintained to preserve the privacy of these roads. They were always closed during Derby race day to discourage the gypsy nomads with their caravans and other undesirable traffic making its way towards Epsom. Then, as to-day, the only vehicles entitled to pass through the gates are those of residents and their visitors. At one time, tradesmen paid an annual levy for the right of their delivery vans to use the roads."

14. Shown on the same page in the 1988 booklet is a drawing of what is described as "*Ladderstile Tailgate, Warren Road*". Its vintage is not apparent. It may be 1988 or earlier. Mr Gavan produced a photograph of the third entrance from about 1910 including a sign reading in various scripts, "*Private Road. The Speed of Motor Vehicles must not exceed Ten Miles an Hour. No Traction Engines allowed. By Order.*"
15. The Coombe Estate has long ceased to be in single ownership. After coming into their inheritance, the FitzGeorge brothers sold off building plots for high prices to various purchasers, some of whom were the predecessors in title of the Claimants. The Golf Courses remained open spaces. This position was threatened in 1931, much to the chagrin of local residents. Colonel Sir Augustus FitzGeorge, then aged over 80 (and disposed to living more in Mayfair than in Coombe) and his trustees caused to be published a notice of their

intention to sell the Golf Course to a building company, Higgs & Hill Ltd. It was proposed that 100 houses should be built on one golf course and even more houses on the other golf course. The reaction was local furore and the mobilisation to action of concerned and interested residents. They demonstrated that they were more than capable of combatting unwelcome development. A committee was appointed and £1,000 raised *"to engage the best legal and professional advice"*. More significantly they enlisted the support of the predecessor council. That body procured a scheme for (1) the purchase by it of the Golf Courses and private roads within the Coombe Estate (2) the recoupment of the purchase price from local property owners who were perceived to benefit from the scheme by means of an *"improvement rate"* and (3) the imposition on property owners within the Coombe Estate of a rate (the **"Coombe rate"**) for the upkeep of internal private roads. The scheme entailed the predecessor council acquiring relevant powers under a private Act of Parliament, the 1933 Act. When the relevant bill was considered by a House of Lords Committee, it was described as *"a landmark in town planning legislation"*. The 1933 Act received the Royal Assent on 28 July 1933 and the predecessor council acquired the Golf Courses for £78,000 as well as private roads within the Coombe Estate. In the 1933 Act those roads are referred to as the *"scheduled roads"*.

16. The Golf Courses continue to be golf courses to this day. Under the 1933 Act the predecessor council was empowered to hold, use and appropriate each golf course as a municipal golf course or courses (s. 6(1)). It was also empowered to lease each for such period as it thought fit (s. 6(5)). The Council has continuously since the later 1930's let both courses on long leases to private golf clubs.
17. While the Golf Courses remain open spaces, over the years there has been considerable intensification of use of other land within the Coombe Estate. In particular, many houses have been built, including by infill construction on spaces between pre-existing large houses, and also there has been a change of use of many large houses from domestic to institutional use. At the time the 1933 Act was passed, there were about 48 separate properties fronting such private roads as then existed (which included Warren Road and George Road). Today the Coombe Estate comprises some 270 domestic houses, three independent schools, two conference or training centres, three care homes and two golf clubs.

Part 4: The Claimants and the MCRA

18. The three schools are situated to the south of, and bordering upon, George Road (the private length of that road). Viewed from east to west (and thus as would be seen by a person coming from the direction of the third junction and thus up Warren Road and turning left into George Road), the first school is Marymount, the second is Rokeby and the third is Holy Cross. Opposite Marymount and thus on the north side, and bordering upon, George Road, is Four Acres which backs onto Coombe Wood Golf Course.
19. Marymount is owned and operated by the First Claimant. The school campus occupies a site of some 7 acres. The school was established in 1955 on the site by the Sisters of Sacred Heart of Mary. It has associated schools and universities in Paris, Rome, New York, Los Angeles and Arlington, Virginia. It is an "international" independent boarding and day school

for girls aged between 10 and 19. It currently has 233 pupils, of whom 100 are boarding pupils and 133 are day pupils. Most boarders are resident at the school for 7 days a week during term time. The school caters mostly for children of diplomats and other members of the international community temporarily resident in the UK. Pupils are drawn from approximately 45 different nationalities. Most have English as their second language. The school has a staff of around 90, ten of whom are peripatetic language and music teachers. Included within the staff number are a permanent community of nuns, including 8 who reside on the premises. The school's chapel is open not only to staff, pupils and parents but also to others. Sister Kathleen said that a fluid group of some 25 to 20 people from the surrounding area come to Sunday services at the chapel.

20. Rokeby is operated by the Third Claimant. The school has operated on its site since 1966. It is an independent pre-preparatory and preparatory day school for boys aged from 4 to 13. It currently has approximately 360 pupils. It has a staff of around 55 of whom the majority are full-time or close to that. In addition there are around 12 peripatetic, principally music, teachers and some 8 to 10 catering staff who work at the school although employed by a contractor.
21. Holy Cross is operated by the Second Claimant. The school has operated on its site since 1966. It is an independent preparatory day school for girls aged from 4 to 11. It currently has approximately 250 pupils. It has operated from its present site since 1971. It has a staff of 55 of whom 10 are peripatetic.
22. Four Acres is a training centre for senior managers within the Unilever group. It has operated from its site since 1954. There are 17 staff currently employed at Four Acres. Attendees of courses come from all over the world (the Unilever group has factories or offices in 54 countries). Attendees normally arrive on a Sunday and depart on a Friday, although some one or two day courses are also run at the centre. Courses are run at Four Acres for an average of 48 weeks a year and the centre only closes between Christmas and the New Year. Mr Hornsby estimated that there are around 1200 attendees annually.
23. The MCRA is a company limited by guarantee. All owners of properties on the Coombe estate are entitled to become members of the MCRA. At annual general meetings of the MCRA, votes are counted on the basis of one vote per property. Hence Marymount, Rokeby, Holy Cross and Four Acres each counts as one property. For many years the MCRA has been concerned about the use of the scheduled roads by unauthorised traffic and by the levels of such traffic.

Part 5: Vehicle movements

24. Apart from residents, many people have good reasons to visit premises within the Coombe Estate. They may be grouped in several categories. Many are specific to premises in institutional use or at least far more common in the case of such premises than in the case of premises in domestic use. No issue arises with respect to pedestrians. The dispute relates to people who come in vehicles.

25. People who come in vehicles comprise the overwhelming number of those who travel to and from the Claimants' premises. Being situated in George Road, the only access to their premises is from the west from the second entrance directly into George Road or from the east via Warren Road from the first and third entrances. A previous means of access available to Marymount to the rear of the school from Warren Road via Ballard Close effectively ceased in 1994 with the agreed restriction of a previous right of way following arrangements including a section 106 agreement with the Council.
26. Vehicle numbers and movements are related to the use of the various premises situated on the Coombe Estate. Numbers and movements peak at certain times but a range of visitors have good reasons to access premises within the estate at other times also.
27. The three schools each generate a similar pattern of vehicle movements. Most obviously peak movements are related to the beginning and end of the school day: "school-run" times. At other times, events held at the schools may also produce heavy vehicle movements.
28. Four Acres generates its own distinct pattern of vehicle movements. Course attendees at Four Acres arrive at all hours of the day and night, often arriving in the country on international flights to Heathrow or Gatwick airports. All attendees arrive by car, approximately 60% arrive by chauffeured car and the remainder by black cab taxis. Mr Hornsby estimates that 70% of attendees arrive via the third entrance, as also do the majority of staff, other visitors and suppliers. He considered that the dissemination of a code number for the barrier to all attendees of courses at Four Acres and callers would be *"extremely difficult if not impossible"*.
29. In addition to staff and, in the case of the schools pupils and parents and course attendees in the case of Four Acres, a range of other visitors have good cause to visit the Claimants' premises at various times, including evenings and weekends, and with and without prior notice. They include general contractors, deliverymen and couriers. In the case of the schools they include visitors from other schools (staff, children and their parents) visiting for events such as sports fixtures, conferences and concerts. Over the weekend and with a view to demonstrating and providing a public benefit, the schools make their facilities (in particular their sports facilities) available to the public at large. They expect to do so much more in future, reflecting current political and societal expectations of private schools which benefit from their status as charities. Visitors to the schools include many who are unexpected and who do not give prior notice of their visit. They include parents prospecting for schools for their children and wishing to form an initial impression of the environs, without necessarily making or wishing to make any initial appointment. They also include, as instanced by Sister Kathleen, nostalgic former pupils. In the case of Four Acres they include friends and colleagues of course participants.

Part 6: History of barriers at the third entrance

30. Over the years the Council, like its predecessor, has sought to control access to private roads within the Coombe Estate by "unauthorised" vehicles, by means of barriers and/or a gatekeeper or gatekeepers. In recent years a gatekeeper (or gatekeepers) has been engaged

by the MCRA through commercial security companies. The cost of employing a gatekeeper was for a number of years debited to the contributing proprietors via the Coombe rate. However, as a result of doubts having arisen as to the Council's powers to do this, the costs of the gatekeeper have most recently been met by voluntary contributions from the residents of the Coombe Estate. Only about 70% of the residents have been paying these contributions. The first, second and third Claimants have distributed stickers to their staff and to parents of pupils in order to enable the gatekeeper to identify them, and the fourth Claimant has also obtained such stickers from the MCRA.

31. Mr Gavan has a distinct recollection of one gatekeeper, as recorded in his witness statement: *"When I was first employed by the Council on Highway works [from mid-1974] I came to know the then gatekeeper, Mr Privett. He was familiar with almost all of the residents of the Estate, and with the regular legitimate users of the scheduled roads, and it became quite simple for him to weed out those who were strangers or those who would regularly attempt to use the Estate roads without authority. He routinely turned away those whom he knew not to be authorised to use the Estate Roads. He also questioned those people seeking to enter the Estate whom he did not recognise but had reason to think might have proper justification to enter, i.e. a delivery or a meeting with a resident"*.
32. This account demonstrates the distinct advantage of access control by a human being familiar with authorised users of the scheduled roads: his ability to exercise discretion immediately and on the spot, with relatively minimum inconvenience to those authorised users whom he questioned.
33. Mr Privett was employed by the MCRA. Unfortunately, the halcyon days of his reign did not continue after he left its employment sometime in the early 1980s or before. There were difficulties in recruiting a replacement. One difficulty was an increasingly hostile environment, with the gatekeeper being the object of abuse by frustrated drivers. Staffing was provided for a while by engaging commercial security firms with the consequence that personnel changed quite frequently. Subsequently the barrier was unmanned, largely due to financing problems.

Part 7: The proposed barrier

34. The electronic barrier proposed by the Council, if and when fully installed, would enable one or both barrier arms to be raised and lowered by the transmission of an electronic message consisting of a four-digit code (alterable from time to time) to an on-site computer server linked to an adjacent electric motor. The motor would then raise the required barrier arm. The system would be designed to enable on-site or remote transmission of an electronic message. There would be three means of on-site transmission. The first would be by manually entering the code into one of two keypads, one situated before the entry barrier arm and the other situated before the exit barrier arm. The second would be by a portable transmitter device (a "zapper"), which was programmed to transmit an electronic message when the vehicle was within a few feet of the barrier. The third would be by a car-based "Hyper X tag" which could be mounted on the windscreen or the back of the rear-view mirror of a vehicle. As the vehicle approached the barrier, at a distance of about 4 metres,

the barrier would open. Remote operation would involve transmission of an electronic message from a remote computer (whether a desktop or laptop computer) to the on-site computer server. Such message would enable a barrier arm to be raised immediately or at such other times as it was programmed in the message to be raised. It is the Council's intention that the barrier would be programmed to remain in the open position at certain times, in particular "school run" times. Consequently, there would be no impediment to access by unauthorised users at such times. Only at other times would the barrier operate and require the transmission of a code in order to raise a barrier arm from its lowered position.

35. As previously noted, the Claimants do not object to a barrier as such. They object to the proposed electronic method of operation on grounds of impracticality. As apparent from the above description of the proposed barrier, its operation would involve a person who was confronted with a lowered barrier arm, needing to have one of the following to raise it: (1) actual knowledge of the access code so as to tap it into an on-site keypad; (2) a zapper; (3) a Hyper X tag; (4) a remote computer programmed to transmit the code; (5) ready means of ascertaining the code, which in turn presupposes knowledge of those means. The Claimants contended that many categories of visitors to their premises would lack each of these alternatives, thus inconveniencing and prejudicing both those visitors and the Claimants. Witnesses for the Claimants mentioned by way of example many contractors, deliverymen, couriers and conference attendees and, in the case of the schools, parents of children from other schools (in visiting sports teams or attending other events) as well as a range of others delegated to transport children to the schools (e.g. grandparents, child-minders). Further problems instanced were those associated with persons forgetting the code (especially when changed from time to time) or a zapper. Another example given of a problem was computer breakdown, including breakdown of the on-site computer server to activate the barrier. The Council and the MCRA countered that the enumerated potential difficulties were exaggerated and, as to breakdown of the computer server, the whole barrier system would be programmed so that the barrier arms would be permanently open in that event.

Part 8: Recent background to the Council's proposal

36. Traffic surveys were carried out by the Council in 1993 and in 1999. In the 1999 survey, traffic was counted over two two-day periods, one in school term-time, the other not. Those conducting the survey reported that on a weekday during term-time, 2600 vehicles used the scheduled roads during the day. Of these, about 29% consisted of through-traffic, 31% of school traffic, and 41% of estate traffic. The survey also reported that while the overall volume of traffic fell in school holidays, the proportion of through-traffic increased to 45%. Neither the methodology used to conduct the survey nor the results were agreed by the Claimants.
37. In 1999 the Council consulted institutions and residents on the estate about a proposal to install an automatic barrier in Warren Road near the third entrance, which would be operated by a smart card and/or an entry-phone system. Respondents were counted on a one-per-property basis. Thus a school and a house in domestic use were counted as one respondent each. About 80% of those who responded to this consultation were in favour of

the proposal. There were objections to the proposal. Those objecting included the Claimants. In the event, the Council decided not to proceed with the proposal.

38. In November 2005 the Council again consulted the institutions and residents on the principle of introducing an automatic barrier near the third entrance. This second proposal was for an automatic barrier which would be operated by a numeric code entered into an on-site keypad. It would also be possible to open the barrier by the use of zappers and/or automatic vehicle-mounted radio tags, without the need manually to enter the code into a keypad. It was also intended that the institutions would be capable of programming the barrier to open remotely. About 80% of those who responded to this consultation were in favour of the proposal. The Claimants objected to it. Again respondents to the consultation were counted on a one-per-property basis.
39. The Maldens and Coombe Neighbourhood Committee ("the Committee") is the Council Committee which has responsibility for the Coombe Estate. On 18 January 2006, at one of its meetings, the Committee considered a report by officers. The Committee resolved that work should proceed with the detailed design and implementation of the proposed barrier, taking account of, as far as possible, comments from consultees as to its lay-out and location; that no new access control method should be introduced until after reasonable efforts had been made to reach an agreement with institutional objectors and with residential owners who might be affected by the new location; and that the Committee should be regularly up-dated as to the progress of the proposal.
40. On 13 June 2006, Councillor Codd and Mr White on behalf of the Council met representatives of the four Claimants to discuss the proposed barrier. The Claimants' view was that the proposed barrier would be an infringement of their rights of way. They were not prepared to discuss details of its operation.
41. The Committee met again on 27 July 2006. It resolved that progress on the design and implementation of the proposed barrier, having had regard to the objections, be noted; that formal agreement be reached between the Council and the MCRA as to the functionality and management of the access controls; and that this agreement be submitted to the Committee for approval, prior to implementation of any changes.
42. On 2 August 2006, the Claimants' solicitors wrote to the Council. They put the Council on notice that if the Council resolved to proceed with the proposed barrier (i.e. code-operated), they would apply for an injunction. They asked for an undertaking that they be given at least 14 days' notice of the Council's intention to change the method of operation of the barrier. The Council did not give such an undertaking on the basis that no revised controls would be implemented until the proposals had been reported to the Committee at a further public meeting and then approved by it.
43. On 4 October 2006, the Claimants' solicitors wrote to the Council again. They recited their understanding that installation of a new barrier intended to be capable of automatic operation was to begin in the week beginning 23 October 2006 and that it would continue to

be operated manually until the terms of the resolution of 27 July 2006 had been fulfilled. They went on to say that they were fundamentally opposed to the introduction of a code-operated barrier. They asked the Council to undertake not to install such a barrier. On 12 October 2006, the Council replied but did not give the undertakings sought.

44. On 13 October 2006, the Claimants then applied for an interim injunction to seek to restrain the Council from installing any new barrier which was operable or intended to be operated only by means of a code keypad or remote transmitter and from leaving any such barrier in the closed position without a gatekeeper being in attendance, and also to restrain the Council from debiting the costs of any such barrier (over and above the reasonable costs of replacing the existing barrier intended to be operated exclusively by a gatekeeper) to the Coombe rate or to the Coombe reserve fund. On 20 October 2006 the Council gave undertakings until after final judgment in the action or further order in the meantime not to do these things.
45. Prior to this time, the barrier in Warren Road near the third entrance had comprised 2 metal cabinets, one at either side of the carriageway, each having an electrically-operated arm which projected from the cabinet into the centre of the road, where the 2 arms met, although there was nothing in the centre of the road upon which such arms might rest.
46. The proposed new barrier was to take the form of two cabinets constructed on a traffic island in the middle of Warren Road, each with a metal arm projecting out from the cabinet and coming to rest upon an end rest installed at the opposite side of the carriageway. The construction of the new barrier therefore necessitated the installation of a central traffic island which had not previously existed.
47. On the basis of the undertakings given by the Council, work proceeded on the ground in late 2006 with the construction by the Council of a new traffic island in the middle of Warren Road and the installation thereon of 2 cabinets. Each has an arm capable of being operated electronically, but in the meantime operable by a gatekeeper in attendance at the site. There have been recent difficulties in engaging a gatekeeper, but I am told that there was one in place on the last date of the hearing

Part 9: The draft operation procedures document

48. Subsequent to meeting of the Committee on 27 July 2006, Mr Tarrant, Chairman of the MRCA wrote a document entitled "*The Coombe Estate: Operating Procedures for an Automatic Barrier in Warren Road at Coombe Lane West.*" In the course of giving oral evidence, he described it as a draft document representing his thoughts on paper as to the proposed procedures for operation of the proposed barrier. The document extends to 34 pages and sets out detailed operation procedures. Different procedures are set out for 8 different categories of "*bona-fide users of the Coombe Estate*" including residents, Holy Cross, Rokeby, Marymount and Four Acres.
49. On any objective assessment, the document demonstrates the sheer complexity of devising procedures for the use of an electronic barrier by multiple users with different use profiles.

The required computer software is described as enabling remote setting of time controls: *"Using this software, remote control from PCs at multiple sites via a broadband link can be utilised with users having different levels of access giving different authorities. The highest level of access and authority will rest with the MCRA's secretary."* Detailed provision is made as to access control devices and codes, with the MCRA's secretary tasked with the responsibility for issuing access devices and codes. Provision is made for distribution and recovery of transmitter devices. This involves their purchase by the Council *"through the Coombe Rate"* and distribution by the MRCA or, in the case of extra transmitters required, their purchase through the MRCA. It is envisaged that the relevant code would be changed from time to time and that the code for Holy Cross and Rokeby parents would operate for six days during term time. A draft standard form of letter to residents includes the following passage, *"To others for whom you are responsible, eg builders, gardeners, window cleaners, newspapers, deliveries etc., you may provide the code. [I]t will be to the benefit of all if the code is shared by as few as possible and, therefore, it may be prudent, where possible, to ask some of these vehicles to use the Kingston Hill entrances."* The operation procedures for each of the institutions notes: *"Casual unannounced visitor: signage will indicate other entrances"*. This effectively acknowledges that, with the relevant barrier arm down, such a visitor would practically be compelled to use another entrance if lacking knowledge of the relevant code, despite having the implied consent of an institution to enter by the third entrance.

Part 10: The 1933 Act

50. The 1933 Act originally comprised a long title, nine recitals, 107 sections arranged under nine Parts and five schedules. Several sections have subsequently been repealed. During the hearing I was referred to numerous provisions of the Act, but it suffices if I refer only to the following.

51. Its long title is: *"An Act to authorise the acquisition and management by the urban district council of The Maidens and Coombe of certain lands now used as golf courses to make special provision with regard to the repair of certain private roads and the recovery of an improvement rate from the occupiers of buildings in the neighbourhood to confer further powers on the Council in relation to the improvement health and local government of their district and for other purposes"*.

52. *The preamble includes nine recitals, including the following:*
"And whereas it would be of great local and public advantage if certain lands (in this Act referred to as 'the Coombe lands') comprising one hundred and eighty seven acres or thereabouts and situate as to the greater part thereof in the parish of Coombe in the district and the private roads in the said parish described in the First Schedule hereto (in this Act described as 'the scheduled roads') were acquired by the Council." ("Recital 2")

"And whereas the Council have entered into a provisional agreement for the purchase of the Coombe lands and the scheduled roads for the sum of [£72,000] and it is expedient [1] that the Council should be empowered to purchase the same and [2] that the use management and control of the Coombe lands should be regulated in accordance with the provisions in

44. *this Act contained and [3] that the provisions with respect to the scheduled roads in this Act contained should be made.*" (**"Recital 3"**)

"And whereas the acquisition by the Council of the Coombe lands and their regulation and control under the provisions of this Act will greatly benefit the lands adjoining the same which are described in the Third Schedule to this Act and it is therefore expedient to authorise the imposition during the period by this Act prescribed of an improvement rate on the occupier of building situated on such lands." (**"Recital 4"**).

References to "the Council" in the 1933 Act denoted the predecessor council until it was replaced by the Council, the defendant in this case.

53. Section 4 of the 1933 Act (in Part I entitled "*Preliminary*") is an interpretation provision and includes definitions of the following terms which, in summary are defined as follows:
- a. **"the Coombe lands"**: the two Golf Courses of around 187 acres.
 - b. **"the scheduled roads"**: the private roads described in the First Schedule, including Warren Road and the private length of George Road
 - c. **"the scheduled premises"**: two premises described in the Second Schedule, including Cambridge Cottage (today Cambridge House) and land at the rear of Four Acres".
54. Part II, comprising sections 5 to 10, is entitled "*Acquisition and Management of the Coombe Lands*". The following provisions (including their marginal notes) are relevant:

Section 5 ("*Power of Council to purchase Coombe lands*"): "*The Council may purchase by agreement (subject to any existing leases and tenancies) the Coombe lands the scheduled roads and any other lands not exceeding twenty acres in extent adjoining any part of the Coombe lands or convenient to be held therewith and may enter into and carry into effect any contracts or agreements necessary or proper for the purpose ...and the Council shall hold and may use manage and control the Coombe lands the scheduled roads and other lands so acquired by them for the purposes and subject to and in accordance with the powers and provisions contained in this Act.*"

Section 7 ("*Management of Coombe lands*"): "*The Council shall have control and management of the Coombe lands including any other lands from time to time in connection therewith after they shall have purchased the same (all of which are in this section referred to as 'the said lands') ..."* A series of more specific powers are listed in ten subsections, including powers:

- a. to "*construct and maintain streets roads ...on any part of the said lands and may if they think fit ...take and recover reasonable tolls and charges for the use of any such street or road not dedicated to public use*" (s. 7(9)) and
- b. to "*appoint pay and remove officers servants and workmen to perform any services in connection with the said lands...*" (s. 7(10)).

55. Part III, comprising sections 11 to 13, is entitled "Private Roads".

56. Section 11 ("*Provisions with respect to scheduled roads*") states:

"From and after their conveyance to the Council the following provisions shall apply and have effect with respect to the scheduled roads (that is to say):-

- (1) The owner and the occupier of any premises fronting or abutting on any of the said roads or any of the scheduled premises and any other person with his permission shall for the purpose of going to or departing from such premises have the right of using with or without vehicles such of the said roads as may be convenient for that purpose but save as aforesaid the said roads shall remain private roads and no person except with the consent of the Council shall have any right of way or passage thereon or thereover. Provided that this subsection shall not affect any public rights of way for pedestrians on or over Warren Road or George Road which may exist at the date of the passing of this Act:*
- (2) The Council may maintain repair cleanse and scavenge the said roads in such manner and to such extent and erect and maintain gates stiles or posts thereon in such positions as they may from time to time determine and the total cost thereby incurred by the Council in any financial year together with such amount not exceeding one tenth part of such cost as the Council may from time to time determine to be necessary for the purpose of forming a reserve fund shall be apportioned by the Council as to such part thereof and in such proportions as the Council may from time to time consider reasonable on the scheduled premises and as to the remainder on the premises fronting or abutting on any of the said roads in proportion to the frontage of the respective premises:*
- (3) Any sum apportioned on any premises shall be payable in the case of premises owned by the Council out of the general rate fund and in the case of any other premises by the owner for the time being of such premises to the Council on demand and in default of payment may be recovered by the Council summarily as a civil debt:*
- (4) The Council shall prepare annually an estimate of the cost to be incurred by the Council in the ensuing financial year under subsection (2)...*
- (5) If the owner or occupier of any premises fronting or abutting on any of the said roads or any of the scheduled premises causes or suffer or permits to be caused to any of the said roads any damage by reason of excessive or unreasonable user of the same such owner or occupier shall pay to the Council on demand the cost incurred by the Council in repairing such damage and such cost in default of payment may be recovered by the Council summarily as a civil debt:*
- (6) If any new road is made which communicates with one or more of the scheduled roads the premises fronting or abutting on such new road shall for the purposes of this section be deemed to be scheduled premises :*
- (7) Any obligation of the owner of any premises fronting or abutting on any of the said roads or any of the scheduled premises to contribute towards the costs of the maintenance or repair of any of the said roads arising under any agreement or covenant entered into or made before the conveyance of the scheduled roads to the Council shall cease."*

57. Section 12 (*"Application of Private Street Works Act 1892 to scheduled roads"*) states: *"The scheduled roads shall for the purposes of the Private Street Works 1892 and any Act amending or modifying the same for the time being in force be deemed to be streets not being highways repairable by the inhabitants at large and the Council may at any time put into force as respects any of the said roads or any part thereof the provisions of the said Act or Acts. Provided that when any private street works have been completed as respects any of the said roads or any part thereof the provisions of [section 11] shall cease to apply to such road or such part thereof."*
58. Part IV, comprising sections 14 to 17, is entitled *"Improvement Rate"*. It provides for the payment by the occupiers of buildings on lands described in the Third Schedule of an *"improvement rate"* by bi-annual instalments from 1933 to 1954. It reflects the intention of the sponsors of the 1933 Act that the cost to the MCUDC of acquiring the Golf Courses and the scheduled roads should be recouped not from the MCUDC's ratepayers as a whole, but only from those who were occupiers of buildings on lands perceived to benefit from such acquisition. In the Third Schedule the relevant lands are listed under three Parts and attributed different improvement rates, reflecting different degrees of perceived benefit from the acquisition: the highest rate being imposed on lands in the First Part and the lowest on lands in the Third Part.
59. Under Part VII, comprising sections 45 to 48 and entitled *"Lands"*, the 1933 Act provides for the giving of a range of other powers to the MCUDC. These include the power in section 46 to grant easements over lands belonging to the Council, but specifically excluded from such lands are the scheduled roads as well as the Coombe lands and the scheduled premises. This exclusion has significance in the context of the Claimants' arguments in relation to prescription and lost modern grant, in that it militates against a conclusion of the MCUDC being a capable grantor and likewise its successor, the present Council. Also militating against the same conclusion is a proviso in section 47(1) which excludes the scheduled roads (as well as the Coombe lands and the scheduled premises) from the ambit of the power given to the MCUDC under the section to dispose of lands.

Part 11: Nature of the Claimants' rights to use the relevant roads

60. Section 11(1) unambiguously confers a statutory right to use the scheduled roads, with or without vehicles, upon two categories of persons. They are (1) each owner and occupier of any premises fronting or abutting the scheduled roads (*"frontager"*) and (2) any other person with a frontager's permission (*"frontager's licensee"*). I see no warrant for the suggestion in argument that, on its true construction, the section requires a frontager's permission be given in advance or be express. A frontager's implied permission suffices. What constitutes implied permission is a question of fact dependant on the nature of the frontager and the person claiming to have such permission. An owner or occupier is entitled to use the road or give permission to other persons to do so irrespective of the purpose for which the owner or occupier uses the premises in question. It may be for domestic or other purposes and however intensive the use of the premises in question. This last point has significance given the Claimants' particular uses of their premises.

61. The right of a frontager and a frontager's licensee to use the scheduled roads is limited in terms of purpose and particular road use. In terms of purpose, the right is to go to or depart from the premises of the frontager concerned. In terms of road use, it is to use such of the scheduled roads *"as may be convenient for that purpose"*. The clear intention that the use of the scheduled roads be so limited is emphasised by the subsequent words in section 11(1): *"save as aforesaid the said roads shall remain private roads and no person except with the consent of the Council shall have any right of way or passage thereon or thereover."* There is a proviso to preserve certain public rights of way for pedestrians.
62. Given that each Claimant is a body corporate and must necessarily act through human agents, the statutory right to use the scheduled roads by implication extends to its agents (in that capacity). There is scope for argument as to who are the relevant claimant's agents for this purpose. It is not necessary to decide the issue since the statutory right to use the roads extends to a far wider category of persons, Claimants' licensees, i.e. persons who have a Claimant's permission to access its premises. Not all licensees are agents of Claimants. Indeed, the vast majority are not (e.g. schoolchildren, parents, course attenders and deliverymen).
63. On the true construction of the 1933 Act, any pre-existing rights of way over the scheduled roads of the Claimants' predecessors in title were extinguished and were superseded by rights of use of the same roads conferred under the 1933 Act. I accept, as contended by Ms Laing, that that is the effect of the opening sentence of section 11 of the 1933 Act. Other provisions are consistent with the extinction of such pre-existing right of ways and their being superseded by a new regime. They include the power given to the Council under section 5 to manage and control the scheduled roads and under section 11(2) to erect and maintain gates, stiles or posts on the scheduled roads. Indeed the whole Act is consistent with the introduction of a new regime for the management of the scheduled roads and payment for their upkeep, albeit consistent with their retention as private roads.
64. It follows that I reject Mr Studer's argument that pre-existing private rights of way over the scheduled roads were not extinguished by the 1933 Act but rather survived its enactment to run parallel with the rights of use conferred by the Act. Lest I be wrong in that conclusion, I should record my finding on the evidence that before the 1933 Act the Claimants' predecessors-in-title did have pedestrian and vehicular rights of way over and along George Road and Warren Road.
65. I also reject Mr Studer's contentions that the Claimants, having each for upwards of 25 years enjoyed as of right and without interruption both pedestrian and vehicular rights of way over and along Warren Road and George Road, they are entitled to such rights under section 2 of the Prescription Act 1832 or by virtue of the doctrine of lost modern grant. Such contentions are necessarily predicated upon there being a capable grantor of such rights. Since the 1933 Act and the acquisition of the scheduled roads by the Council there has been no capable grantor. Mr Studer argued that section 11(1) indicated that the Council was a capable grantor, given the provision for the Council to consent to a person having a right of way or passage on or over the scheduled roads. I reject the argument on the basis that, as

contended by Ms Laing, the provision in question applies only to persons other than frontagers and their licensees. A clear purpose of the provision is to enable the Council to give such rights of way to employees of the Council for the purposes of carrying out the Council's various functions in relation to the roads and adjacent land. (The evidence indicated that the Council has given such consent, albeit limited in time, save in the case of certain local sheriffs where the consent was clearly essentially honorific in character and is not evidence of any wider practice.)

Part 12: Substantial interference with the Claimants' rights under the 1933 Act

66. I have no hesitation in concluding on the evidence that the proposed barrier, or more particularly the proposed electronic method of operation, would amount to a very substantial interference with the statutory rights of each Claimant and its licensees under section 11(1) of the 1933 Act to use the relevant private roads as may be convenient for the purpose for going to or departing from its premises. Such private roads are Warren Road and George Road, whether approached from any of the three entrances - the third entrance in particular. To say that access could be obtained by the first or second entrance when access cannot be gained from the third entrance due to the proposed barrier being in closed position, does not meet the objection that a Claimant's agents and licensees are entitled to access its premises from the third entrance if that is convenient to them.
67. The operation of the proposed barrier would amount to a substantial interference of the statutory rights of the Claimants and their licensees in that it would, in a large range of common circumstances, prevent or significantly impede several categories of the Claimants' agents and licensees from going to or departing from their premises. The sheer range and volume of persons visiting the Claimants' premises makes their position wholly different from that of residents of houses in domestic use. The Council says that effect should be given to the wishes of a majority of residents, but that is not the test of whether there is a substantial interference with the rights of the Claimants and their licensees.
68. The problems attendant upon the operation of the proposed barrier may be variously classified. I adopt Mr Studer's classifications in his closing speech.
69. (1) Unannounced visitors. Evidence was given on behalf of the Claimants that each regularly has unannounced visitors (albeit with implied permission to visit). Without the attendance of a gatekeeper or knowledge of the current access code, they would be prevented from gaining ready vehicular access via the third entrance if the proposed barrier were down. Mr Tarrant freely admitted that, given a code operated electronic barrier, there was no solution to dealing with such visitors other than telephoning (or emailing) the relevant code to such visitors in advance of their arrival. That is not a solution in relation to visitors who have no knowledge of the code or even of the need for a code to gain access and who give no advance notice of their visit.
70. (2) Unexpected events. The same applies in relation to unexpected events. An example given by Mr Carter in relation to Rokeby was that of the school having to move a sports event from its off-site sports ground to its on-site sports ground at short notice, with the

consequent need for pupils, parents and opposing teams and any accompanying teachers and parents to gain ready access to the on-site sports ground. Sister Kathleen in relation to Marymount described the frequent impact on the school of delayed international flights with pupils, parents and other visitors needing ready access outside expected times.

71. (3) Out of normal hours use. A consequence of such use of an institution's premises is the need for visitors to come at times when its reception is not manned or when there is nobody readily available at the end of a telephone or at a computer screen to receive emails. Instances were given of the forecourt of school premises being used as the meeting point for parents, frequently out of school hours, to bring or collect children to and from sports trips, theatre trips and other excursions. In relation to Rokeby, Mr Carter also instanced the use of Rokeby's on-site sports ground by local church football teams and their opponents. The individual identity of the children concerned, their parents and those accompanying them would not be known to Rokeby staff. In relation to Four Acres, Mr Hornsby explained that neither the daytime receptionist nor any nighttime employee had any computer responsibility.
72. (4) Future use. Witnesses for the schools referred to their future need to demonstrate compliance with a public benefit test which will inevitably result in an increase in the use of their facilities by outside visitors whose individual identity would not be known to school staff.
73. (5) General contractors and deliverymen. Witnesses for the Claimants explained that it was impossible to ensure that individual drivers would have access to a code owing to changes in personnel and the wide range of deliveries made. Sister Kathleen referred to regular deliveries of international mail and parcels by courier firms such as Fedex, DHL and TNT, each with frequent changes of personnel. Mr Tarrant's suggestions for prior notification of the relevant code to general contractors and deliverymen were wholly unrealistic in practical terms. He referred to a local department store, John Lewis, as a good example of a business which was readily accessible for receipt of delivery instructions and which complied with them. The example was not convincing as to the general standard of accessibility and compliance of businesses offering delivery services.
74. (6) Blocking and delay at the barrier. The proposed barrier would give rise to frequent causes of delay, blocking and possible consequent danger at or near the barrier itself. The need to tap in a code into a keypad would itself take time. However short the exercise on most occasions, on other occasions it might take considerably longer, especially if the driver had forgotten the code or had to telephone to ascertain it. The consequent delay might well result in a queue of vehicles behind, not only in Warren Road but also in Coombe Lane West, thus creating possible danger both to those vehicles and to other vehicles travelling along Coombe Lane West. The difficulties would be all the greater if a driver sought to turn around, for example because he or she had forgotten or been refused the code. That manoeuvre in turn might well give rise to traffic disruption and danger.

75. (7) Cost. The Council's case is that while there would be a significant initial outlay, there would be savings in the long run. But the Claimants would incur significant additional staff costs in disseminating the code and answering telephone calls from persons needing access but lacking the code. Unannounced visitors would have to telephone ahead resulting in inconvenience and expense which do not presently exist. A change of code would result in additional inconvenience and expense, as also would the recovery of zappers from people no longer needing access to the Coombe Estate.
76. (8) Hierarchy of control. Both Mr White and Mr Tarrant recognised that there would have to be an ultimate system controller who would have power to override other electronic instructions transmitted to the server for the barrier. This exercise of this could well result in a substantial interference with the rights of authorised users to use the relevant roads and consequent disputes. Mr White's suggestion of a system of arbitration to resolve such disputes is unrealistic. The draft operating procedures document, far from demonstrating the workability of the system for operating the proposed barrier, on any objective assessment amply demonstrates the sheer complexity of the system and the scope for problems and dispute.
77. Indeed, I conclude that a code-operated barrier is a recipe for chaos in many circumstances.
78. It may well be that in the present circumstances, in particular the intensification of the use of the Coombe Estate over the years and the prohibitive cost of a manned barrier, there may be no realistic alternative to abandoning any attempt to seek to control access to the estate by any form of barrier. There are already speed bumps. Different views were expressed as to the deterrent effect of speed bumps. Sister Kathleen who is used to walking the roads during evenings and weekends considered them to be relatively effective and was not as conscious of the use of the roads by through traffic as Mr Tarrant. He considered the road bumps to be a relatively insignificant deterrent to "rat-runners" and his perception of the intensity of through traffic was very different. I am persuaded that speed bumps do provide some deterrent against the use of relevant roads by vehicle drivers as a through route only.
79. I have no doubt that use of the relevant roads by unauthorised users is an irritant, and as perceived by many, a considerable irritant. It is not the function of the court or indeed within its capability to arrive at a solution which best salves the sensitivities of most owners and occupiers of the Coombe Estate. Its function is to resolve the dispute based on the relevant legal regime established by the 1933 Act. On that basis, I conclude that the implementation of a code-operated barrier would in practice result in a very substantial interference with the rights to use the relevant roads under the 1933 Act of the Claimants and of those using the relevant roads with the Claimants' express or implied permission. The Claimants have made out their case for an injunction to restrain the implementation by the Council of the proposed code-operated barrier.

Part 13: The unlawful financing argument

80. I reject Mr Studer's unlawful financing argument in the terms described (paragraph 6 above). Its premise is that the costs and expenses of a barrier operated by the manual

intervention of a gatekeeper in physical attendance at the site represent a limit on lawful expenditure on a barrier. Section 11 of the 1933 Act provides no basis for such a limit. The power given to the Council under section 11(2) to erect and maintain gates etc. and to apportion the cost thereof (plus an amount for the reserve fund) is wide, albeit that the power must be exercised consistently with not substantially interfering with the rights of owners and occupiers and their licensees to use the relevant roads under section 11(1). So long as the power is so exercised, there is no warrant within the Act for relating the cost of exercising that power to any particular means of operating the barrier, whether involving a gatekeeper or not.

Part 14: Conclusion as to the declaration sought by the Council

81. The Council seeks a declaration that it is entitled to debit the Coombe Estate Reserve Fund and to recharge the Claimants as frontagers for the purposes of section 11 of the 1933 Act with "*(a) all the costs and expenses of installing and operating an automatic barrier operable by means of a coded keypad or automatic tag and without the intervention of a gatekeeper; (b) alternatively with the costs of employing a gatekeeper or keepers, and (c), in any event, with the reasonable costs of this litigation, in so far as they are not recoverable pursuant to an order of the Court*".
82. A gatekeeper (or gatekeepers) has the advantage which I have noted in paragraph 32. By employing gatekeepers, the Council can exercise its powers consistent with the 1933 Act. For the reasons given in this judgment I conclude that the Council cannot exercise its powers consistent with the 1933 Act by installing and operating an automatic barrier operable by means of a coded keypad or automatic tag and without the intervention of a gatekeeper. As to the costs of this litigation, I have found for the Claimants and against the Council in all material respects. Nevertheless, I conclude that the costs which have been incurred by the Council and such costs for which it is liable to the Claimants in relation to this litigation, are costs related to ascertaining the scope of its powers and duties under the 1933 Act and reasonably incidental to those powers and duties. I have particularly in mind the Council's power under section 11(1) to grant or refuse consent and under section 11(2) to "*erect and maintain gates stiles or posts*" on the scheduled roads.
83. Accordingly, I conclude that the Council is entitled to a declaration that it is entitled to debit the Coombe Estate Reserve Fund and to recharge the Claimants as frontagers for the purposes of section 11 of the 1933 Act with the costs referred to in (b) and (c) of the declaration, but not with the costs and expenses referred to in (a).

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