PLANNING INSPECTORATE REFERENCE: ROW/3274679

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53

DORSET COUNCIL
(FOOTPATH FROM FOOTPATH 17 AT HIGHER HOLT FARM TO BRIDLEWAY 15 AT FUZZY GROUNDS, MELBURY OSMOND)
DEFINITIVE MAP & STATEMENT MODIFICATION ORDER 2020

PUBLIC INQUIRY, 20 SEPTEMBER 2022

STATEMENT OF CASE OF APPLICANT

—PART I—
INTRODUCTION

1. This Statement of Case is prepared by Mr Roger Caesley, applicant for the addition of the claimed route to the definitive map and statement. Assistance was requested, and provided by staff at the Ramblers central office[1].

2. The surveying authority, Dorset Council, have indicated that they are not supporting the Order, and that they will be taking a neutral stance at the Inquiry, hence the case for the Order will be presented by the applicant, with assistance from Mrs J Wardell, Ramblers Dorset Area Footpath Secretary.

The order

3. The order was made on 7 August 2020. If confirmed without modification it would add to the definitive map and statement a footpath in Melbury Osmond, Dorset, from its junction with Footpath 17, south west of Higher Holt Farm, grid reference ST 56370878, south

[1] The Ramblers' Association is a company limited by guarantee, registered in England and Wales. Company registration no. 4458492. Registered charity, England & Wales no. 1093577, Scotland no. SC039799. Registered office: 1 Clink Street, 3rd Floor, London SE1 9DG

along a gravel/stone surfaced track, hedged on the eastern side, to grid reference ST 56330858, then west to grid reference ST 56250857, and then southwards along the track, hedged on the eastern side, to grid reference ST 56230805, at the north western corner of Dole Copse. Continue south south west along the track, hedged on the western side to its junction with Footpath 16 at grid reference ST 56160786, then south along the track, hedged on the western side and fenced on the eastern side, to the north east corner of Fuzzy Grounds and its junction with Bridleway 15 at grid reference ST 56200751.

4. The route is shown as A-B-C-C1-D-E on the order-map (Ref 14/30/1) and sometimes in the Council's Reports dated 4 May 2021 and 31 July 2019 A-B-C-X-Y-D-E (Ref 14/30), with field gates at points A, C, X, Y, D and E. (Note: there is a DCC map *without* the points X and Y, but confusingly also referenced 14/30)

Authorities

5. In this Statement we refer to a number of judgments, copies of which the Inspector should find appended[2] in this bundle. These and other authorities are:—

Cases
R v Inhabitants of Southampton (1887) 19 QBD 590;
Mann v Brodie (1885) 10 App Cas 378;
Merstham Manor v Coulsdon and Purley Urban District Council [1937] 2 KB 77;
Jones v Bates [1938] 2 All ER 237;
Fairey v Southampton County Council [1956] 2 QB 439;
R v Oxfordshire County Council ex parte Sunningwell Parish Council [2000] 1 AC 335 ('*Sunningwell*');
R (Alfred McAlpine Homes Ltd) v Staffordshire County Council (2002) EWHC 104 (Admin);
R (on the application of Godmanchester Town Council and Dr Leslie Drain) v Secretary of State for the Environment, Transport and the Regions [2007] UKHL 28 ('*Godmanchester*');
Paterson v Secretary of State for the Environment, Food and Rural Affairs [2010] EWHC 394 (Admin);
Whitworth v Secretary of State for the Environment, Food and Rural Affairs [2010] EWCA Civ 1468;

[2] Except sometimes where a case is mentioned in illustration of what we dare think may be an uncontroversial point

R (Lewis) v Redcar & Cleveland Borough Council [2010] UKSC 11 ('*Redcar*');
London Tara Hotel Ltd v Kensington Close Hotel Ltd [2011] EWCA Civ 1356 ('*Tara*').

Commentary: quotations from:—
John Riddall and John Trevelyan, *Rights of way—a guide to law and practice,* 4th Edition published 2007 by the Open Spaces Society and the Ramblers' Association.

—PART II—

LEGAL PRINCIPLES

6. It being the applicant's case that there has been such unchallenged use of the claimed route by the public over a period of time as to give rise to the existence of a right of way on foot over it, it may assist the reader if we set out our understanding of the legal principles by which public rights of way come into existence through long usage by the public.

Common law

7. Public rights of way can arise under common law where there is implied dedication by the landowner, and acceptance by the public.[3] The onus of proof is on the affirmant of the existence of the right of way to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use had gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Provision by the landowner of openable gates or other aids to passage may (depending on all the circumstances) be evidence of the intention to dedicate; challenges to users, or signage worded inconsistently with an intention to dedicate, may demonstrate the contrary intention. Use of the claimed way by the public must be 'as of right', that is *nec vi, nec clam* and *nec precario* (without force, secrecy or revocable permission); we expand upon this below, particularly at paragraphs 39-41. There is no fixed period of use, and, depending on the facts of the case, this may range from a few years to several decades. Unlike the position with statutory deemed dedication, on which subject more below, there is no particular date from which use must be calculated retrospectively.

[3] And where there is an expressed dedication and evidence of acceptance by the public.

Deemed dedication under statute

8. A public right of way can also arise under statute: that is, under section 31(1) of the Highways Act 1980 ('the 1980 Act'), the wording of which subsection we reproduce here:—

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

9. The words 'unless there is sufficient evidence that there was no intention during that period to dedicate it' have become known as 'the proviso' and we propose below to refer to them where necessary by that name.

10. Below, we set out our understanding of section 31(1).

11. There must be actual and uninterrupted use by the public, as of right, for a full period of twenty years of a more or less defined linear route. Even where this occurs, there is a proviso that no right of way will come into existence where there is sufficient evidence that during the period there was no intention to dedicate. In general this must be overt acts directed at users of the way, or else the things mentioned in subsections (5) and (6) of section 31.

12. Apart from where the proviso is satisfied, where there is evidence of 20 years' uninterrupted public use, as of right, of a more or less defined linear route, then the way falls to be deemed to have been dedicated as a highway. There is no requirement about there having to be a person with capacity to dedicate in possession of the land. That requirement exists at common law because under common law, the right comes into existence because the landowner dedicates it, either expressly or by implication, even if that dedication is in ascribable to the landowner only in a fictional sense.

13. On the other hand, with statutory deemed dedication, no such thing as dedication takes place at all. People in referring to statutory deemed dedication sometimes inaccurately or in 'shorthand' speak about a way 'having been dedicated under section 31'. But dedication does not take place under section 31. What takes place is the deeming of the way to

have been dedicated: that is, treated as if the land was in the possession, whether it was or not, of someone with the capacity to dedicate and who had exercised that ability. Riddall and Trevelyan put this neatly when they ask[4]—

> When does dedication occur? At the start of the period of use, or at the end? Neither. Because dedication does not take place. Section 31 does not say that dedication occurs. What the section provides is that the end of the required period of 20 years, the way is to be deemed to have been dedicated. Deemed. I.e, treated as if it had been dedicated. By using the word 'deem', what the statute effects is that the result is to be the same as if the way had been expressly dedicated—namely that a public right of way comes into existence over the route concerned. So, as there is no dedication, there is no question as to its date. [Emphasis added.]

14. To give the same point a judicial reinforcement as well, we mention what Lord Justice Scott said about it in *Jones v Bates* [1938] 2 All ER 237,

> The phrase … 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of the law becomes a highway.

We ask that it be noted that Scott LJ did not say that it meant that the owner 'shall be held to have dedicated the right of way', or anything like that. The owner does not dedicate the right of way. Nobody does. The law's effect is that the way is to be treated as if somebody existed, even if they did not exist, who could have dedicated it, and had expressly done so. A more modern way of putting the position than Scott LJ's 'the phrase … "shall be deemed to have been dedicated" is merely an historical periphrasis for saying that the way thereupon by operation of the law becomes a highway' would be simply to say that following 20 years' uninterrupted public use as of right, the way is to be declared to be a highway. (Note: Scott LJ's judgment in *Jones v Bates* was quoted with approval by Lord Hoffmann in the leading case of *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335: he described it as 'a valuable exposition by Scott LJ of the background to the Act of 1932', i.e. the Rights of Way Act 1932, which introduced the principle of statutory deemed dedication.)

15. So the effect of section 31(1) is that (except where the proviso is satisfied) 20 years' uninterrupted public use renders a way public through the operation of the law, and not through dedication.

[4] At the end of their section 3.3.8.

The component parts of section 31(1)

'A way over any land …'

16. The land over which the public right is claimed to exist must, subject to the next paragraph, be 'a way over land'. 'Land' is defined as including land covered by water. By 'way' is meant a route along which people go, or went. 'It is an omnibus term,' say Riddall and Trevelyan, 'that can refer to a footpath, a bridleway or a carriageway. It can refer to use that is private or public (or permissive)'.[5]

'Other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication …'

17. The way cannot be a way 'of such a character that use of it by the public could not give rise at common law to any presumption of dedication'. This means no more and no less than that it must be a more or less defined route.

18. The puzzling sub-clause 'other than a way of such a character, *etc'* has been interpreted, by the writers of various well-respected text-books, in different ways. Riddall and Trevelyan in their section 3.3.5[6] say that it refers to ways on which it is a criminal offence to trespass, like on the railway, or to go in motor vehicles, where prohibited.[7] Stephen Sauvain QC, in his *Highway law,*[8] disagrees with Riddall and Trevelyan: he points out that neither example is of a way of such a *character* that its use at common law could not give rise to a presumption of dedication. He suggests it may apply to village greens, parks and some commons. Angela Sydenham, in *Public rights of way and access to land,*[9] tentatively offers the opinion that it covers situations where the landowner was statute-barred from express dedication, and that it may cover 'paths through churchyards', and says that it is clear that the words mean that section 31 does not apply to the acquisition of a right of navigation on water.

'Actually enjoyed by the public'

[5] Riddall and Trevelyan, section 2.1.
[6] Section 3.3.5, pages 44–45. (Their point is that motor-vehicular rights cannot be established through the unlawful activity of driving a motor vehicle on a footpath.)
[7] E.g., by section 34 of the Road Traffic Act 1988.
[8] Stephen J Sauvain, QC, MA, LlB, *Highway law,* Fourth Edition 2009, Sweet & Maxwell/ Thomson Reuters, paragraphs 2–59 to 2–62.
[9] Angela Sydenham, MA, LlB, *Public rights of way and access to land*, Fourth Edition published 2010 by Jordan Publishing Ltd: see section 3.5.8(2)(ii).

19. There must have been sufficient use by the public for the 20-year period. 'The motive in using the way is irrelevant. It will accordingly be sufficient for the purposes of establishing a right of way if the sole or predominant use was for pleasure or recreation,' say Riddall and Trevelyan.[10]

20. There is no statutory minimum level of use required for the purpose of raising the presumption of dedication, but it was held by Lord Watson in *Mann v Brodie* (1885) 10 App Cas 378 that the number of users must be such as might be reasonably expected if the way had been unquestionably a highway. We submit that this means a highway of the status claimed, in the present claim no more than a footpath; and we submit that this test must be in local context and depend on all the local circumstances, such as the number of people likely to be using any local highway of similar status in the first place.

21. We wish to make the further point that *Mann v Brodie* was decided before there was any statutory requirement to signpost public footpaths,[11] or to show them on a definitive map.[12] So more use can probably be expected nowadays of a mapped and signposted path (since people will be more likely to know of its existence) than of a non-definitive route, and we ask the Inspector in the present matter to read that factor against any 'test' to be found in *Mann v Brodie*. We also ask the Inspector to note that *Mann v Brodie* is a Scottish case, and that different principles apply in any case under Scots law in the establishment of rights of way to those in England.[13]

22. Aside from *Mann v Brodie*, there is little in the way of judicial authority on what is supposed to 'count' as a proper degree of public use. There is the decision of the Court of Appeal in *Whitworth v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 1468. In the Administrative Court below, Mr Justice Langstaff had declined to quash an Inspector's decision to confirm an order adding to the

[10] In their section 3.3.6, where they cite: *Hue v Whitely* [1929] 1 Ch 440; *Dyfed County Council v Secretary of State for Wales* [1990] COD; and *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 1.

[11] We believe that no such measure existed prior to the enactment of section 27 of the Countryside Act 1968.

[12] There was no such thing as a definitive map before the passage of the National Parks and Access to the Countryside Act 1949.

[13] See by way of illustration the discourses by Lords Hoffmann and Scott of Foscote at paragraphs 4, 5 and 60 of *R (on the application of Godmanchester Town Council and Dr Leslie Drain) v Secretary of State for the Environment, Transport and the Regions* [2007] UKHL 28.

definitive map a restricted byway, where the only evidence supporting restricted byway status was of one witness using a pony and trap—albeit very frequently, but not for a full 20-year period—and of use by two cyclists. Langstaff J upheld the Inspector's decision, saying

> … Mr Clay says that he used the pony and trap on a regular basis, it appears probably fortnightly, throughout the period from 1976 onwards. 1976 does not, so far as I can see, appear from his written material and must have been derived by the Inspector from what he said orally. I reject the suggestion that if one person uses a pathway so regularly, it cannot give rise to there being a carriageway, when use to a lesser extent in aggregate, but by several different users over the same period, might. What matters is the nature and quality of the use taken as a whole, and whether it is secretly, with permission, with force; those requirements which are well understood as necessary for the establishment of a right of way…

23. The Court of Appeal overturned Langstaff J's ruling, but principally on the footing in ground (i) that the Inspector erred in law in finding that use of a bicycle would be consistent with a finding that the route was anything more than a bridleway, since members of the public have a right to use bridleways for cycling in any case.[14] In passing, however, Lord Justice Carnwath had this to say on the issue of level of use (ground (ii)):—

> The conclusion on ground (i) makes it unnecessary to consider in any detail ground (ii), which involves a consideration of the evidence relating to the use by the two cyclists. I would only observe that I see some force in Mr Elleray's [for the appellant] submission that [the evidence] was on any view insufficient to support a finding of use as enjoyment as of right 'by the public'. Mr Roscoe was a close neighbour (at Craglands), and Mr Harding was his friend. The way through the farmyard would, it seems, have been a convenient route from this property on to the Fell.

We mention this simply because of the moderate terms in which Carnwath LJ dealt with the proposition that two cyclists and one pony-and-trap driver could raise the evidential presumption in section 31(1). He merely said that he 'saw some force' in the submission that this evidence was 'insufficient to support a finding of use … as of right "by the public"'. He did not say that it was a wildly fantastic proposition; merely that there was *some force* in the argument that the evidence was insufficient, especially when one of the cyclists was an immediate neighbour (i.e., so that the use was more likenable to that of a private easement), and the other was a friend (so there was an element of *precario*), and that the pony-and-trap use did not cover the full 20-year period.

[14] By virtue of section 30(1) of the Countryside Act 1968.

24. So we submit that *Whitworth* shows that even a small number of people *can* 'count' as the public. The result, even following the Court of Appeal's ruling, seems to be that where there are users who originate from more landholdings than would merely give rise to a private easement, then those users can be 'the public'. Why should a small number of members of the public not 'count' as 'the public' when they are members of it?

25. We note that paragraph 5.2.20 of the Planning Inspectorate's Consistency Guidelines[15] refers to *R (Lewis) v Redcar & Cleveland Borough Council* [2010] UKSC 11, and draws from that case a test that for use to 'count' as use for the purpose of establishing a right of way, there must be such use as mentioned by Lindley LJ in *Hollins v Verney* (1884) 13 QBD 304, 315, namely that 'the user is enough at any rate to carry to the mind of a reasonable person … the fact that a continuous right of enjoyment is being asserted, and ought to be resisted…'.

26. This is fallacious, and it is the view of the Ramblers that this should not appear in the Consistency Guidelines. In the first place, it does not make sense as a matter of vocabulary to say that people must appear to be asserting a right when, until the 20 years have expired, there is no right for them to assert. Indeed, when the use first starts, most users will know that they are in fact trespassers, if they give it any thought at all. To speak about them 'asserting a right' when there is none yet to assert implies that they have somehow deluded themselves into *believing* that they possess a right to assert, and it is well settled by *Sunningwell* that they do not need to believe that they have a right to assert: what matters is not their minds, but their feet. In the second place, Lindley LJ cited no previous authority for his assertion that it is how the matter appeared to landowner or to a reasonable person, and no authority exists. As J G Riddall put it in 2009 in an article in *The Conveyancer and Property Lawyer* back in 2009:—

> In the long history of prescription nothing resembling the appearance principle [i.e the notion that it must appear to the landowner that a right is being asserted] appears in Bracton, in Littleton or in Coke, or in *Gale on the law of easements*. The principle appeared on Lindley LJ propounding it.... What impression the use puts into the mind of the landowner is as irrelevant as whether users believe they have a right to use the path. To accept the

[15] Revised April 2016 https://www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines/wildlife-and-countryside-act-1981-definitive-map-orders-consistency-guidelines#contents .

appearance principle for which *Hollins* is cited as authority introduces the very kind of subjectivity so decisively rejected in *Sunningwell*. [16]

27. The interpretation of the law on this point in the Planning Inspectorate's Consistency Guidelines appears to be based on a misinterpretation of the decision by the Supreme Court in *Redcar*. That Mr Riddall is correct is now confirmed by the decision in the Court of Appeal in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356, as we seek to show next.

28. In *Tara*, Lewison LJ (Lord Neuberger MR and Aikens LJ agreeing) said this—

> [60] It is clear on high authority that the subjective state of mind of the person exercising the claimed right is irrelevant. The subjective state of mind of the owner is equally irrelevant....
>
> [63] In my judgment the key question is this: must the use in question bring it home to such a person that the person using the roadway is asserting a right to do so without permission? There is support in the authorities for Mr Gaunt's proposition that the answer is "Yes"....
>
> [64] This suggests that the nature of the use must be such as to make it appear to the reasonable landowner that the use is taking place on the basis that it is carried on in the exercise of a right to use without permission, as well as there being no permission in fact....
>
> [66] Although the law could have developed in the way that Mr Gaunt says that it has (and perhaps it would have been a rational development), in my judgment the decision of the Supreme Court in *Redcar* is clear authority that it has not. The issue before the court in that case was whether use was "as of right" for the purposes of section 15 of the Commons Act 2006 which lays down the test that has to be satisfied for the registration of a town or village green. No one suggests that a different test applies to the question whether a person has acquired an easement by prescription....
>
> [68] In the Court of Appeal Dyson LJ (with whom Rix and Laws LJJ agreed) had posed the question thus ([2009] EWCA Civ 3 [2009] 1 WLR 1461 (§ 40)):
>
> > "In principle, however, the question remains the same: has the user been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land?"
>
> [69] This, as it seems to me, is precisely the question that Mr Gaunt says is the real question. However, the decision of the Court of Appeal was unanimously reversed by the Supreme Court. Although Lord Walker of Gestingthorpe JSC quoted Ralph Gibson LJ's observations in *Bridle v Ruby* with apparent approval in *Redcar* (§ 34), his actual conclusion was (§ 20) that:

[16] J G Riddall, 'Miss Tomkins and the law of village greens', *The Conveyancer and Property Lawyer,* [2009] Conv Issue 4 326, 328.

"The proposition that "as of right" is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner) is established by high authority."

[70] Lord Hope of Craighead DPSC said (§ 67):

> "The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. …And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right…, the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter. There is no third question."

71] Lord Brown of Eaton-Under-Heywood JSC said (§ 100):

> "… were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold that more is required to be established by the locals merely than use of the land for the stipulated period *nec vi nec clam nec precario*. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case."

[72] He concluded (§ 107):

> "… I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker of Gestingthorpe JSC has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather, as Lord Hope of Craighead DPSC, Lord Walker and Lord Kerr of Tonaghmore JJSC make plain, the focus must always be

> on the way the land has been used by the locals and, above all, the quality of that user."

[73] Finally Lord Kerr of Tonaghmore JSC said (§ 116):

> "I am content to accept and agree with the judgments of Lord Hope DPSC, Lord Walker and Lord Brown JJSC that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test. The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands. Put simply, if confronted by such use over a period of 20 years, it is *ipso facto* reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration."

Lewison LJ concluded:—

> [74] In my judgment this is clear authority at the highest level that <u>if a use satisfies the tripartite test (not by force, nor stealth, nor the licence of the owner) then a prescriptive right will be established</u>. <u>There is no further criterion that must be satisfied</u>. As Lord Kerr put it, once those three criteria are established it is *ipso facto* reasonable to expect the landowner to challenge the use. In other words, once these three criteria are established the owner is taken to have acquiesced in the use. It follows, in my judgment that unless the use by KCL was forcible, stealthy or permissive a right of way will have been established. [Underlining added.]

29. Thus *Tara* very clearly shows that once use that is 'as of right' has occurred, then that is use enough to establish a right if it endures for the 20-year period. Volumes of use do not come into the question, as long as there is use enough for it not to be merely *clam*, that is by secrecy or stealth. So provided there is use capable of coming to a landowner's attention *if he chose to look,* then that is use enough to establish a right. Thus the test for adequacy is no more than that the use be *nec clam*. (We submit that this ruling by the Court of Appeal really does make sense. The Parliamentary draftsman seeks to avoid tautologies. If Parliament really meant it to be understood on the strength of *Hollins v Verney* that the words 'actually enjoyed' in section 31(1) seriously mean 'actually enjoyed to the extent that the landowner becomes aware of it and it appears to him that a right is being asserted', why did they also use the expression 'as of right'? Why not simply 'without force and without permission'? Including the *nec clam*

ingredient would be otiose if it were seriously already meant to be understood to be more than catered for within meaning of the 'actually enjoyed' criterion.)

30. For the reasons mentioned in paragraphs 27 to 29 above, we submit that how the matter appeared to the landowner is irrelevant and that the question in the Dorset County Council Public Rights of Way Evidence Form (at that time) which reads '7d, Do you believe the owner or occupier was aware the public was using the way? Yes/No' is also irrelevant and need not appear in the form..
.

31. Below in paragraph 52 we set out the amount of alleged use, and seek to show that (if accepted by the Inspector as having occurred as hitherto testified) it satisfies the test of being *nec clam* (as well as *nec vi* and *nec precario*) and that it endured for 20 years, and thus we demonstrate that the way has been actually enjoyed by the public for 20 years.

32. While there must be public use throughout the 20-year period, we submit that this does not mean anything like that there must be continuous use. Even if use is only intermittent, it can still measure up to such test as may appear in *Mann v Brodie,* above. We say that not least because in *Merstham Manor v Coulsdon and Purley Urban District Council* [1937] 2 KB 77 Mr Justice Hilbery acknowledged that 'public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the public make use of the way' (and that was a case about a 'roadway', in a more populated locality). Given that the Oxford English Dictionary defines 'intermittent' as: 'that intermits or ceases for a time'; 'coming at intervals'; and 'operating by fits and starts', we think that we can fairly claim that the alleged use in this case is adequate to bring into existence a public right of way.

'The public'

33. By 'the public' is meant the public at large. It is not sufficient if the use has been merely by a class of the public, 'such as the employees of a particular employer.'[17]

34. 'The public' can refer to use by local people alone, since, as Lord Chief Justice Coleridge said[18] in *R v Inhabitants of Southampton* (1887) 19 QBD 590:—

[17] Riddall and Trevelyan, section 3.3.6.
[18] Grove and Hawkins JJ and Pollock B concurring.

> user by the public has in all cases been treated as an element in determining the liability of the county to repair a bridge; but the word 'public' in this connection must not be taken in its widest sense … for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge.[19]

On the strength of that, we submit that use even by a small number of persons is still use by 'the public', if (depending on the circumstances of the case) that use is by a number of people who are using the way other than if it were a private easement appertaining to the property in which they live.

35. Neither need the applicants demonstrate that use has been for various purposes—*R v Broke* (1859) 1 F & F 514. Lord Justice Denning (as he then was) summarised *Broke* thus, in *Fairey v Southampton County Council* (1956):—

> [in *Broke*] seafaring men proved they had used the path without interruption for a great many years for the purpose of their calling. The landowner sought to rebut the public right by proving that he had turned back all persons who were not seafaring men: but it was held that that was not sufficient for the purpose [of rebutting the presumption]. Pollock CB[20] said that the user by the seafaring men was a user by the public and that long user by them gave the public a right of way. If the landowner wished to deny the public right, he ought to have made it clear to the seafaring men that they used it by his leave and not as of right.

Emboldened by that, we submit that even if use in the present case was purely recreational, it is still use by the public.

'Without interruption'

36. 'Interruption', in 'without interruption', means actual physical stopping or prevention of the public's use of the way by the landowner or somebody acting on the landowner's behalf. In the *Merstham Manor* case, Hilbery J said:—

> One can scarcely interrupt acts without some physical act which stops them…. The word 'interruption' in the expression in the Act 'without interruption' is properly to be construed as meaning actual and physical stopping of the enjoyment.

[19] Coleridge CJ's words as quoted here are taken directly from the reported judgment; they differ slightly though not in import from those which appear in the Planning Inspectorate's Consistency Guidelines.
[20] i.e., Chief Baron Pollock.

37. Hilbery J also said: 'it is … to the interruption of the enjoyment of the way and not to the period of time that the words are attached by way of qualification.' We submit that the burden of this is that interruption means deliberate prevention, and is nothing to do with any absence of continuity in *de facto* use. Indeed, as we said above, Hilbery J acknowledged that 'public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the public make use of the way.'

38. On the strength of that we submit not only that there is no requirement for use to have been constant, but that there could in certain cases be a very long period of even a year or more of non-use, provided that such use by the public as from time to time occurred was sufficient to satisfy the requirement that the way was actually enjoyed more than merely by stealth or in secrecy.

'As of right'

39. By 'as of right', we understand is meant *nec vi, nec clam and nec precario*. 'Without force, without secrecy and without permission. This is,' say Riddall and Trevelyan, 'the meaning of "as of right". No less. And no more.'[21] We submit that it is not for the applicant to prove the absence of force, secrecy or permission; it is for a party who denies the existence of a claimed highway to prove that the use involved force, secrecy or permission. We are fortified in that view by the words of Scott LJ in *Jones v Bates* (1938):—

> It is doubtless correct to say [of the words 'as of right'] that negatively they import the absence of any of the three characteristics of compulsion, secrecy or licence—'*nec vi, nec clam, nec precario*,' phraseology borrowed from the law of easements—but the statute does not put on the party asserting the public right the onus of proving those negatives[22]

and of Lord Hoffmann at paragraph 31 of *Godmanchester*, who said:—

> I cannot see why it should be an abuse for a landowner to say, after the expiry of the 20-year period, that although he did nothing to stop the public from using the way, this was due to tolerance, ignorance or inertia and without any intention to dedicate it as a highway. Such evidence would be an inherently plausible account of his state of mind. The only objection is that allowing the presumption to be defeated by such evidence would make nonsense of the Act.[23]

[21] Riddall and Trevelyan, section 3.3.6.
[22] See page 245 of the judgment, at letters E–F.
[23] I.e, it would make nonsense of section 31 of the Highways Act 1980.

40. The fact that some persons may have used a particular way with permission will not necessarily prevent use by the public in general from being without permission—*Beresford Trustees v Secretary of State for the Environment and Cumbria County Council* (unreported, 1995), in which Mr Justice Owen said that

> the public may be found to have enjoyed the way in the required [i.e, by section 31(1) of the 1980 Act] manner although other members of the public (and therefore the public) knew that they only enjoyed the same by permission.

41. For all that it has its origins in Roman law, the meaning of 'as of right' has proved to be a fertile area of litigation in very recent years. Above we have mentioned *Sunningwell*, and *Redcar*, and *Tara,* in this connection.

The proviso

42. The words 'unless there is sufficient evidence that there was no intention during that period to dedicate it' emphasise that proof of adequate use does no more than raise a presumption that is rebuttable by evidence of a contrary intention. The section provides certain statutory means by which a landowner satisfies the proviso: section 31(3) allows the erecting of a 'no right of way'-type sign visible to persons using the way; section 31(5) allows the notification of the highway authority that a particular path is not dedicated as highway, where a site-notice has been torn down or defaced; section 31(6) provides for the depositing with the highway authority a map of the land and a statement to the effect that no highways, or only certain ones, are recognised, and for following this up with a statutory declaration to make the deposit effective.

43. It is accepted that regular oral challenges, or barring of the way from time to time in such a way that this would interrupt actual use, and so come to the attention of users of the way, might also satisfy the proviso. It has been said, with reference to some words of Baron Parke in *Poole v Huskinson* (1843),[24] that 'a single act of interruption by the owner' is 'of much more weight upon the question of intention than many acts of enjoyment'. But since then there has been the pronouncement of Denning LJ in *Fairey*, whose *dictum*, upheld by the House of Lords in *Godmanchester,* was to the effect that an oral challenge must bring it home to all the users of the path, not just

[24] (1843) 11 M&W 827.

strangers but local residents as well, that they used the way by tolerance only, or that they had no right to use it:—

> Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to 'the public' that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it.… I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner. [Underlining added.]

Further on in *Fairey* Denning LJ, having noted that the landowner in that case had not availed himself of the standard methods of erecting a notice or barring the way, said that, therefore

> we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it.

While we do not for a moment contend that this means that every single user of the path must be told that no right of way exists, it is absolutely clear from these extracts that the occasional challenge even to a regular user of the path will neither bring the way's public status into question nor amount to evidence of a lack of intention to dedicate. The burden of the *dicta* is that it must be made clear to a large proportion of persons who use the path—in that case (said Denning LJ), to the villagers of Bossington, Houghton and Horsebridge. We submit that the effect of this is that if a landowner relies on oral challenge it must be made to as many (or just about as many) users as would see a notice displayed and maintained in place on the path itself, pursuant to section 31(3). So the oft-quoted point about a single act of interruption being 'of much more weight upon the question of intention than many acts of enjoyment' clearly cannot mean one single challenge. Applying Denning LJ's *dicta*, 'interruption' means more like an episode in the path's history in which just about all users are disabused of belief that they use the way as of right. We

submit that this view is supported as well by what Hilbery J said in the *Merstham Manor* case, which we noticed above in our paragraph 32.

44. It will not satisfy the proviso merely to provide evidence of no intention to dedicate. There must be *sufficient* evidence of no intention to dedicate. As Lord Hoffmann said at paragraph 33 of *Godmanchester*,

> . . . section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. . . . [T]here would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires 'sufficient evidence' that there was no such intention.

45. Except for the specific measures for which sections 31(5) and 31(6) provide, the evidence must comprise overt acts by the landowner which are directed at users of the way. It will not satisfy the proviso to adduce evidence which may not come to the attention of users of the way, such as memoranda to estate-staff instructing them to challenge users (if they never do), or correspondence with lawyers or even with the highway authority. The unanimous decision of the House of Lords in *Godmanchester*, which upheld the judgment of Denning LJ in *Fairey*, has made this as clear as may be, particularly in paragraphs 33–37, 47, 58, 69, 74, and 79–86.

46. In case it should be objected that *Fairey* and *Godmanchester* were about what satisfies the proviso in section 31(1) of the 1980 Act and its predecessor sections, and that it does nothing to codify the equivalent consideration at common law, we would point out this. In the course of the hearing of *Godmanchester* in the Court of Appeal, the court asked what evidence had been sufficient to displace any inference of an intention to dedicate in the days before statutory deemed dedication was introduced by the Rights of Way Act 1932. Counsel on neither side could find a single instance of a case cited in any of the textbooks,[25] or

[25] A lengthy adjournment between the second and third day of the hearing in the Court of Appeal allowed counsel to do extensive research on this point. The textbooks and the cases unearthed included: Chapter II ('Dedication of Highways') from Pratt and Mackenzie's *Law of Highways,* 18th Edition 1932 and published before the 1932 Act was passed. The equivalent chapter of the 19th Edition, 1952. Halsbury's *Laws of England*, (1911), volume XVI Part III ('Origin and Proof of Highways'). The equivalent chapter of Halsbury's *Laws of England*, 2nd Edition (1935). *Rugby Charity Trustees v Merryweather* (1790) 11 East 375. *R v Lloyd* (1808) 1 Camp 260. *Trustees of the British Museum v Finnis* (1833) 5 C&P 460. *Barraclough v Johnson* (1838) 8 Ad & El 99. *R v East Mark* (1848) 17 LJ QB 177. *R v Broke* (1859) 1 F&F 514. *Healey v Corporation of Batley* (1875) LR 19 Eq 375. *Vernon v Vestry of St James, Westminster* [1880] 16 Ch D 449. *Chinnock v Hartley Wintney RDC* (1899) 63 JP 327. *Moser v Ambleside UDC* (1925) 89 JP 59. *Leckhampton Quarries Ltd v Ballinger* (1904) 20

any in any law library or otherwise reported, in which acts or statements by a landowner which were not directed at users had been held sufficient to rebut an inference of dedication. In all of these cases it seems to have been taken for granted that to be effective at common law as evidence of lack of intention to dedicate, the evidence had to be directed at and apprehended by the public.

47. It was partly on that basis that the House of Lords based its decision in *Godmanchester*, i.e. that Parliament could not have intended acts (save for those mentioned in the section) not brought to the attention of users to begin to count as evidence of no intention to dedicate, let alone amount to sufficient evidence, since that had never been the position beforehand. See for example what Lord Neuberger of Abbotsbury said at paragraph 81 of the Speeches:—

> . . . As Lord Hoffmann's analysis of the cases prior to the [Rights of Way Act 1932] shows, the common law appears to have required some form of act or statement communicated to users of the way, so that evidence of the subjective uncommunicated intention of the landowner would not have been enough (or even admissible) to rebut a presumption of dedication.

48. In due course we will ask the Inspector to find that no action was taken during the material period of 1987 – 2007 which could be said to have satisfied the proviso by providing sufficient evidence that there was no intention to dedicate.

—PART III—

THE ISSUES IN THE PRESENT CASE, VIEWED AGAINST THE LEGAL BACKGROUND

The date of '**bringing into question**'

49. Section 31(2) provides that the 20 year period is to be calculated backwards from the date on which the public right is brought into question. This is an issue for the Inspector to resolve.

50. We invite the Inspector to find that the path's status as a public right of way was brought into question in 2007, by way of a statutory deposit dated 20 July 2007 (the Declaration being dated 23 July 2007). Notwithstanding that notices were not erected until 2009, stating "Ilchester Estate Private Land No Access Please Only Use Marked

TLR 559. Phipson on Evidence, 7th Edition (1930). *Brocklebank v Thompson* [1903] 2 Ch 344. *Coats v Herefordshire County Council* [1909] 2 Ch 579.

Public Rights of Way" at points A, D and E, we have taken the known date of 20 July 2007, from which to calculate backwards for the 20 year period. The application was submitted in 2011, the reasons for the delay being explained at paragraph 58 below. We therefore invite the Inspector to find that the 20-year period is 20 July 1987 – 20th July 2007.

Evidence of public use of the claimed way

51. Copies of user evidence forms (UEFs) which at the time of writing have been completed and signed by people who testify to having used the route are to be found in this submission in file no 5, and the map to which they relate is file no 4. The maps attached to the UEFs identify the user's route either by highlighting, or annotating, but they all relate to the order route (or in one case part of it). We ask the Inspector to consider this evidence, in addition to any that may be given orally at the inquiry. (Note: the copies in this submission are with the signatures and other details redacted; we suppose that the Council will make the originals available at the inquiry.)

52. We will here attempt a brief and approximate summary of the user evidence available to date. From the evidence forms, this appears to be:—

Witness	Years of use (1987-2007)		Comments/frequency p.a.
Mr R Caesley	25	(20)	Pleasure – approx. 30
Mr John Forrest	13	(11)	Pleasure – 50 -150
Mrs Geraldine Peach	42	(20)	Pleasure – 30-40
Mrs Muriel Williams	20	(18)	Pleasure – 40-50
Mr David Dixon (Dcd)	25	(16)	Pleasure – 20
Mrs Susanna Roriston	1		Pleasure – 1-2
Mrs Helen McNab	11	(9)	Pleasure – 20-30
Mr Peter Preston	15	(13)	Pleasure – 12-18

53. At the time of writing it is anticipated that some of those who completed user evidence forms will testify at the inquiry. (The widow of the deceased witness will appear.) Evidence by witnesses who testify at an inquiry and whose accounts can be tested in cross-examination is generally accorded greater weight than written testimonies. But we do not think we are being over-bold if we ask the inspector to accept the user evidence forms at their face value. We ask that, because it is not as though those who have completed user evidence forms are, in testifying to use of the route, asserting some unlikely or improbable fact. This is the very type of route which people like to access, to use to exercise themselves and their dogs, and the path has the merit of

linking footpath 17 with bridleway 15, and crossing footpath 16, thus making practical circular walks.

54. Most of the witnesses say that others used the route, either on foot or horseback, but due to the inadequate phrasing of the question on the (then) DCC form, we should not assume that that means they have seen others using the route, unless specifically stated. Nonetheless, we think that we can claim that this tends to corroborate the evidence given in most of the forms, and there is some support for us so contending in the *dicta* of Mr Justice Sullivan (as he then was) in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* (2002) EWHC 104 (Admin). In a village-green matter it was argued on behalf of a developer that the evidence of six witnesses out of a local population of 20,000 should have been treated as inadequate to substantiate the claim. The judge rejected that submission, saying:—

> Mr Wolton's [for the developer] criticisms of the inspector's conclusions are not well founded. It is quite unrealistic to refer simply to the six witnesses or to deal with the matter on the basis that they are only six out of 20,000 or one out of 200, and that such numbers are not significant. I accept that, if all of those six witnesses had said that they had not seen others on the land over the 20-year period, then it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant. But the fact of the matter is that they did not give such evidence: they were able to give evidence, not merely about what they did themselves, but what they saw others doing on the meadow over the 20-year period. [Underlining added.]

55. In support of what we say in paragraph 53 about the value of untested, written evidence, we wish to observe that in *McAlpine*, above, Sullivan J went on to say this, which we submit enhances to some extent the value of statements made by people who for one reason or another are not able to testify in person at the inquiry:—

> In addition to the oral evidence, the inspector had the written evidence. Clearly, he had to treat that evidence with caution because it was not subject to cross-examination but, having looked at the totality of that evidence, he was entitled to conclude that it was largely consistent with and supportive of the oral evidence given by the applicant's witnesses to the effect that many local people from Leek had been using the meadow for informal recreation for more than 20 years without permission or objection.
>
> In short, all of the pieces of evidence referred to above fitted together and pointed in the same direction. That is to say that there had indeed been use for 20 years or more by a significant number of the inhabitants of Leek and of the adjoining estate. Far from being an unreasonable conclusion based upon speculation, the inspector's conclusion is in my judgment amply supported by a painstakingly careful analysis of all the evidence before him.

Use 'as of right' in the present case

56. We invite the Inspector to find that all use in the present case falls within the description of use 'as of right' for the purpose of establishing a public right of way by inferred dedication at common law or through the effect of section 31(1) of the 1980 Act. It was open, it was without revocable permission and it involved no force.

Objections or representations to the effect that the order should not be confirmed

57. At the time of writing we have had the benefit of seeing the letter of objection to the making of the order, this being included in the papers submitted by Dorset Council, as displayed on the Council's website[26]. We trust that it will be in order to comment on this here and to reserve the right to amplify our comments at the inquiry and to address any further objections or representations made in the meantime or accepted for consideration at the inquiry. If we do not comment here on a point raised so far in representations or objections, it does not follow that we agree with it.

58. The Objector comments on the length of time between signs being erected by the Estate at some point in 2009 (which we note was itself two years after the Declaration dated 23 July 2007) and when the application was made in 2011. The very straightforward explanation is that when Melbury Osmond Parish Council (MOPC) were first made aware that signs described in paragraph 50 above had been erected, they attempted to negotiate with Ilchester Estates about the possibility of 'reopening' the claimed footpath. The response from Ilchester Estates was that they would be prepared to consider it, were three public footpaths extinguished. There followed protracted unsuccessful negotiations, following which the application was made on 11 July 2011.

59. The Objector questions the amount of evidence, stating that it is 'insubstantial', 'insufficient' and 'negligible'. If we are right above in paragraphs 27, 28 and 29 about the effect of the *Tara* case, what is needed is for the amount of use to be such for the landowner (if there is one) to be aware of it if he chose to look. We ask the Inspector to find that this occurred here. As stated by Mr Yates in the Appeal

[26] https://www.dorsetcouncil.gov.uk/documents/35024/1014233/Document+Reference+4+-+Objection+Letter.pdf/fd18f06c-6870-a755-2fc7-21c1650d87c8

decision, dated 14 February 2020[27] *Furthermore, a lack of observed use does not mean that the claimed use did not occur*.

60. We submit that any assertion by a person that they have seldom or never seen members of the public using a particular route needs to be judged against (among other factors) the opportunity that person had in which to have become aware of any use. It is the experience of members of the Ramblers, and no doubt of other walkers as well, that it is possible to walk great distances on well-trodden, well-established and obviously well-used paths without encountering another person, walker or resident. On some paths one rarely encounters other users, even where, from their well-trodden appearance, the paths are clearly well-used. Use evidently does not have to be frequent or readily observable in order for it to occur. One can in places go for miles without seeing a farmworker. It must follow that many landowners, local residents, farmers and farmworkers are genuinely not aware of how much use is being made of the paths in their localities.

61. The Objector states that Estate staff have confronted trespassers, and will testify to that. We do not dispute that some challenges may have occurred, but we contend that it was inadequate. In particular it cannot be said to measure up to the test set by Denning LJ in *Fairey* about turning people off the land 'in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right' to use the path crossing it. Moreover it appears on balance of probability that such challenges as occurred took place subsequent to the 20-year period. This, like all the issues of fact, is a matter for testing at the inquiry. But *prima facie* it seems to be the position that any challenge during the material time was insignificant.

62. The point that it is to users of the way that the negativing acts must be directed, is reinforced many times in *Godmanchester.* In the first place the House of Lords confirmed the authoritative *dicta* of Denning LJ in *Fairey*, mentioned above, who in two passages repeatedly said that it was to users, and no-one else, to whom communication of the negative intention must be made: 'They were the members of the public most concerned …, because they were the persons who used the path.… They were the persons to tell.… It was no good the landowner speaking to a stranger who knew nothing of the public right and would not be concerned…'. Later, Denning LJ describes the meaning of 'the public at large' as 'the public who used the path, in this case the villagers.' So

[27] Appeal ref FPS/C1245/14A/12

communication with the public equals communication with users of the path.

63. The House of Lords in *Godmanchester* reinforced that many times over. At paragraph 12, Lord Hoffmann notes that all reported cases resolved under the common law, prior to the enactment of the Rights of Way 1932, indicate that 'the judges were looking at how the matter would have appeared to users of the way.' The same law lord at paragraph 32 says that '"intention" means what the relevant audience, namely users of the way, would reasonably have understood the landowner's intention to be.' He added:—

> The test is, as Hobhouse LJ said,[28] objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending … to 'disabuse [him]' of the notion that the way was a public highway.' [Underlining added.]

It is significant that Lord Hoffmann said 'reasonable user', and not 'reasonable person'. Further, in paragraph 33, he ruled that the negativing acts must be 'perceptible by the relevant audience', i.e, not by *any* audience; and he uses the expression 'users of the way' again in paragraphs 36 and 37. Notification which the public cannot actually see, adds Lord Hope of Craighead in paragraph 58, 'will not do. This is because it will not be effective to communicate the landowner's intention to those who wish to assert the right to use the way unless they can see it.' Lord Scott of Foscote weighs in at paragraph 69 saying that acts not communicated to users would not suffice to satisfy the proviso because 'they would do nothing . . . to disabuse users of the path of any belief that they had a right to use it, or to make clear to those users who did not … give a thought … that they were trespassers.' Lord Neuberger in paragraph 81 notes that under common law, communication to users of the way was necessary, and adds that it would be surprising if section 31(1) changed the law so radically in that respect, given that to do so would have been counter to the section's overall purpose. (The underlining in this paragraph is added.)

64. To that last point it might be objected that this is precisely what happens with deposited notices under section 31(5), and statutory deposits and declarations made under section 31(6). In case such a point is made, we point out that the House of Lords very specifically singled out the depositing of documentation mentioned in those

[28] In *Beresford Trustees v Secretary of State for the Environment and Cumbria County Council* (unreported, 1995)

provisions as being the *only* kind of action which is not necessarily going to come to the attention of users of the way which can satisfy the proviso. So in no sense can a document which is not in the format specified in subsections 31(5) or 31(6) count as any evidence, let alone sufficient evidence, capable of defeating a claim. Why would Parliament have so carefully codified, for example, the terms in which a statutory deposit is to be made, if any other paperwork would be just as good? Lord Hoffmann at paragraph 35 of *Godmanchester* puts it better:—

> The same point may be made about the elaborate provision for maps, statements and statutory declarations in section 31(6). What would be the point of all this if Parliament was using the word "intention" in a subjective sense which could be proved by any relevant evidence? And why did Parliament … insert a new section 31A … into the Act to establish a register of the maps and statements deposited under section 31(6) and require that it should be available for inspection free of charge?

Lord Hope of Craighead at paragraph 58 likewise points out that 'the elaborate process of depositing a map and other documents with the appropriate authority that section 31(6) describes would be a pointless exercise', and Lord Neuberger of Abbotsbury at paragraph 85 observes that the provisions of section 31(3), 31(5) and 31(6) 'seem pretty extraordinary' if anything else would do just as well.

65. Indeed, not even a statutory deposit will oust a claim if it is not properly executed, even though the attempt to make one undoubtedly points up the landowner's subjective intention. If, at a public inquiry, it is contended that a statutory deposit under section 31(6) of the 1980 Act exists to defeat a claim, the presiding Inspector will require it to be produced and to be in proper form. Even if documentation which very strongly suggests that a statutory deposit existed during a period of alleged use, the inquiry will not accept this unless there is evidence that it was properly executed. Here is an illustration. In the inquiry by Inspector Mr Peter Millman BA into the East Sussex County Council (Public Footpath Withyham No. 86) Definitive Map Modification Order 2009,[29] it was urged on behalf of the objectors that the period was partially covered by a section 31(6) deposit. The Inspector asked why he had not been provided with copies of the statutory declarations which would have rendered the deposits valid for the purposes of defeating the claim. Staff from that order-making authority appeared to have taken it for granted that the statutory deposit itself would

[29] Planning Inspectorate reference FPS/G1440/7/11, order decision issued 3 February 2010.

suffice, and could not produce copies of the statutory declarations for certain of the deposits. (It appeared in fact that none had been made.) The Inspector ruled these deposits to be of absolutely no effect. [30]

66. That this approach by the Inspector was correct (if there were the slightest doubt about it) was, we submit, confirmed (in a different matter) in *Paterson's* case. In *Paterson,* the landowner had applied for the quashing on various grounds of a decision (based on 20 years' use in recent times) by an Inspector to add a right of way to the definitive map; the grounds of challenge included that the Inspector should have treated a letter written to Henley Rural District Council in 1934, the text of which was inconsistent with dedication as a right of way, as a 'notice' under the then equivalent provision of section 31(5) of the Highways Act 1980,[31] i.e, section 1(3) of the Rights of Way Act 1932. This, it was contended, would have the effect of ousting any claim based on use *later* than the date of the letter. Sales J rejected this on two grounds, one of which was that since it did not comply[32] with the requirements of section 1(3) of the 1932 Act, it was invalid for any purpose. The other ground of rejection was that even if the notification had been properly executed, the writing of that letter was evidence of no intention to dedicate only up to its date and could not be used as evidence of no intention to dedicate subsequently. Sales J said:—

> In light of [Lord Hoffmann's, at paragraphs 32–34 of *Godmanchester*] reasoning I consider that for the proviso in section 31(1) to operate there must be sufficient objective indications of an appropriate kind given at some stage <u>in the relevant period to indicate to the relevant audience</u> that the landowner had no intention to dedicate the land as a public right of way…. Sections 31(3), (5) and (6) make further detailed provision as to how sufficient relevant evidence of

[30] Paragraph 19 of Inspector Mr Millman's decision reads: 'I asked the representative of [East Sussex County Council] why it had been reported that there had been declarations in 1993 and 1998, since I had been provided with no copies of them. During the course of the inquiry the records of ESCC were searched, but no statutory declaration dated 1993, 1994 … or 1998 was found. Since the 2003 declaration refers directly to the 1994 deposit, it seems likely to me: first, . . . that officers of ESCC did not appreciate the distinction between deposited statements and statutory declarations as far as evidencing a lack of intention to dedicate is concerned; and second that there was probably only one statutory declaration, dated 2003, and that there had not been one prior to 2000. There is no evidence that the deposited map and statement in 1994 were publicised.'

[31] This is the kind of notice which a landowner, having first erected a notice under section 31(3), can deposit with the highway authority if the site-notice is torn down or defaced.

[32] The 1932 Act required that such a notice be sent both to the county council *and* the urban or rural district council, and in *Paterson's* case it had been sent to only the RDC, not the County Council. This strict approach confirms (if confirmation were needed) the correctness of Inspector Mr Millman's approach to an improperly-made statutory deposit in the Withyham case mentioned by way of illustration above.

intention may be provided. It is clear from the speeches in *Godmanchester* that evidence in the form of erection and maintenance of signs under section 31(3) or the locking of gates once a year (which is a common way of providing another form of sufficient evidence of the relevant intention referred to in the proviso in section 31(1)) has to be available in the course of the relevant 20 year period. Reading section 31(5) together with the proviso in section 31(1), I think it is clear that the same basic rule as applies in the other cases applies to the evidence in the form of a notice given to an appropriate authority under section 31(5): a notice under section 31(5) will count as sufficient evidence of the requisite intention provided it is given in the relevant period. It does not avail a landowner to say that a notice under section 31(5) was given many years, perhaps decades, before the relevant period. [Underlining added.]

This point is reinforced by the fact that the 1932 Act combined what is now section 31(3) and section 31(5) in a single provision (section 1(3), which is the predecessor of section 31(5)). It is not plausible to suppose that Parliament in that provision intended any different rule to operate depending on whether 'sufficient evidence' of the requisite intention was to be provided by means of a sign erected on the land or by the secondary means of sending a notice to the appropriate authority. Nor is it plausible to suppose that when section 1(3) of the 1932 Act was re-enacted with limited modifications in section 31 of the 1980 Act Parliament intended to change the operation of the notice regime now contained in section 31(3) and (5) in any material respect.

The scheme of section 31 also points strongly to the same conclusion. As Lord Hoffmann pointed in *Godmanchester* at [34], a notice under section 31(5) provides a second-best mechanism of providing sufficient evidence of an intention not to dedicate a way to the public which becomes available if the primary mechanism of erecting signs under section 31(3) is defeated by those signs being torn down or defaced. It would be strange if the second-best form of evidence of a notice under section 31(5) could have greater practical effect than the primary form of evidence of a sign erected under section 31(3), which does have to have been in place during the relevant period. Moreover, there is no reason to assume that because a sign was torn down or defaced in, say, 1960 that it would be torn down many years later in a 20 year period (say, in 1979). Since the object of the Act is to provide for acts of the landowner to have effect only if they are appropriate to disabuse a reasonable user of the notion that a way is a public highway (see *Godmanchester* at [32]), one would expect the Act to provide an incentive for the landowner to try erecting signs again after a period of time has elapsed, as the best means of informing the relevant audience that there is no public right of way. The construction of section 31(5) advanced by Mr Simpson [for the landowner], however, would remove all incentive for a landowner to do that (indeed, on that construction, it would be in the interests of a landowner to arrange for a sign to be torn down or defaced in order to trigger his rights to a superior form of protection in section 31(5)).

To give a notice under section 31(5) this extended temporal effect would also undermine the general object of section 31 to operate as a regime for the acquisition of rights drawing on the model of the prescription regime introduced by the Prescription Act 1832, based on a presumption arising from long user by the public. This object naturally suggests that there should be a focus on objective matters—acts and omissions—capable of being known to relevant landowners and the users of the way in the relevant 20 year period. To give section 31(5) the extended temporal effect for which Mr Simpson

> contends would mean that one could not stop at investigating what happened in the relevant 20 year period before some objective act bringing the right of way into question, but would have to extend the investigation of the facts over a much more extended period of time. Section 31(5) is part of a regime intended to facilitate issues of proof in relation to dedication of a public right of way, so I do not think that Parliament intended it to have this effect. [Underlining added.]
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> Further, it is difficult to reconcile an interpretation of section 31(5) which gives it an extended temporal effect with section 31(6). Section 31(6) also provides a mechanism for a landowner to protect himself by giving notice to the appropriate council. To do so, the landowner must send the appropriate council a map marking the highways on his land and a declaration of an absence of intention to dedicate highways other than those shown on the map. That protection is expressly stated to operate for a period of ten years (when the 1980 Act was first enacted the period was six years). This provision reinforces the impression that the act affording sufficient evidence referred to in section 31(5) is to be taken to operate as at the time it is carried out (i.e. when the notice is sent) and not as having continuing temporal effect. Where an act of notification of an appropriate council is to have an extended temporal effect, the 1980 Act makes express provision for that as in section 31(6). [Underlining added.]

67. We are sorry about the length of that quotation, but in our view it re-inforces our contention that if documentation which is not likely to come to the attention of users of the way—as opposed to 'No right of way'-type notices, barring the way or oral challenges to users—is to serve as a means of satisfying the proviso by showing that use made is not as of right, then it must be the kind mentioned in the statute. If an instrument specifically prescribed by Parliament as a means of defeating a claim cannot count for that purpose if it is improperly executed, even though its subjective intended negativing effect cannot have been in doubt, then neither can any other kind of documentation. If it could, section 31(6) would be a dead letter and might as well have been repealed long ago; but far from repealing it, Parliament have amended it several times, showing its on-going validity.

68. We say that statements, or other representations must be capable of satisfying the landowner's proviso. To say that 'everyone knew it was estate policy' is not good enough. It is people like the Estate staff who will be made aware of the policy, and these are not recreational users of the way. Nor is it acceptable to simply state that 'It was well known locally that in 1978 there was a Public Inquiry held in the Melbury Osmond Parish Hall, at which the Agent for the Estate spoke in denial of a public footpath on this route.'

—PART IV—

CLOSING

69. We invite the Inspector to find that, taken together, the user evidence coherently shows uninterrupted public use as of right for 20 years before the public's right was questioned, while there is no (let alone sufficient) evidence relating to that period to negate an intention to dedicate.

70. For that reason we ask the Inspector to confirm the order.