Neutral Citation Number: [2010] EWHC 394 (Admin)

Case No: CO/11081/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2010

Before :

THE HONOURABLE MR JUSTICE SALES

Between :

Mr Brian Paterson	**Claimant**
- and -	
The Secretary of State for the Environment, Food and Rural Affairs	**Defendant**
- and -	
(1) Oxfordshire County Council	**Interested**
(2) The Ramblers' Association	**Parties**

(Transcript of the Handed Down Judgment of
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Mr Edwin Simpson (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Ms Lisa Busch (instructed by **DEFRA Law and Corporate Services**) for the **Defendant**
Ms Clare Parry for the **Ramblers' Association**

Hearing date: 17/2/2010

Judgment
As Approved by the Court

Mr Justice Sales:

Introduction

1. This is an appeal brought under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 ("the 1981 Act") in relation to an order made by Oxfordshire County Council ("the County Council") adopting a definitive map which identifies a footpath with public rights of way in Shiplake near Henley on Thames. The Appellant, Mr Paterson, is the landowner of part of the land over which the identified footpath runs. He says that no public right of way over that footpath has been properly established and seeks to maintain his rights as a private landowner in respect of the footpath. He accepts that certain residents who live nearby have rights of way over the footpath by reason of private easements which they enjoy, but he says that there is no public right of way over the footpath.

2. The footpath in question extends from a road to the west, past a chapel called at various times the Mission House or Lashbrook Chapel, through a way enclosed on either side which extends past Mr Paterson's house (called "Brookfield") and which then issues onto open fields which run down to the River Thames. The fields are traversed by a railway line, partly carried on a viaduct under which the footpath goes. Thereafter the footpath continues on a section of the route referred to as "Route 37" which is a public right of way.

3. When Mr and Mrs Paterson acquired "Brookfield" in 1996 they took steps to put up notices disputing the right of the public to walk along that part of the footpath on his land. There was a history of some notices being put on the path at times in the past, to which I refer below. A local resident, Mr Jones, who had a link with the Ramblers' Association, sought to maintain that there was a public right of way over the land. It seems he did research into old maps and documents to gather material in support of that case.

4. The position of footpaths with public rights of way is required to be set out in definitive maps maintained for that purpose by local authorities pursuant to the 1981 Act. Section 53 of the 1981 Act provides in relevant part as follows:

> "…
>
> (2) As regards every definitive map and statement, the surveying authority shall –
>
> *(a)* as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of he events specified in subsection (3); and
>
> *(b)* as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and

> statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> (3) The events referred to in subsection (2) are as follows - …
>
> *(b)* the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;
>
> *(c)* the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –
>
> (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; …
>
> (5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph *(b)* or *(c)* of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.
>
> (6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph *(a)* of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2)."

5. Section 56(1)(a) of the 1981 Act provides that a definitive map and statement shall be conclusive evidence of a highway over which the public have a right of way on foot. The reason section 53(3)(c)(i) refers to a right of way which "subsists or is reasonably alleged to subsist" is because the making of an order for modifications of a definitive map is only the first step in the process whereby those modifications are examined and confirmed or rejected according to the procedures in Schedule 15 to the 1981 Act.

6. In this case, Mr Jones originally approached the County Council to request that a modification be made to the definitive map for the area to identify a public right of way over the footpath. It seems that this approach was made on two bases: first, that the maps and documents Mr Jones had identified showed that there had in the past been an effective dedication of a public right of way over the footpath and, secondly, that a public right of way over the footpath should be presumed by reference to the statutory provisions concerning long user of ways over land contained in section 31 of

the Highways Act 1980 ("the 1980 Act"). Mr Jones invited the County Council to make an order modifying the definitive map relying on section 53(3)(c)(i), on the basis of the newly-discovered historic maps and documents he had found, but also relying on evidence available showing long user of the footpath as a public right of way. The claim based on long user might more naturally have been put on the basis of section 53(3)(b), but it has not been suggested that it could not also be put forward in the circumstances of this case on the basis of section 53(3)(c)(i), as happened here.

7. The County Council originally declined Mr Jones' request to make an order for modification of the definitive map to show a public right of way over the footpath. However, he was successful in appealing to the Secretary of State under Schedule 14 to the 1981 Act in respect of that decision and therefore the County Council did eventually make an order to modify the definitive map as he requested. This was on the basis that it accepted that a public right of way was reasonably alleged to subsist over the footpath (section 53(3)(c)(i)). The making of the modification order then triggered the operation of the regime in Schedule 15 for a detailed examination to be carried out whether the claimed public right of way was established or not.

8. Schedule 15 to the 1981 Act provides for notice to be given of a modification order and for there to be an opportunity for objections to be made to it. Paragraph 7 provides:

> "(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.
>
> (2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either –
>
> > *(a)* cause a local inquiry to be held; or
> >
> > *(b)* afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.
>
> (3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications."

9. Paragraph 10 provides:

> "(1) A decision of the Secretary of State under paragraph 6, 7 or 8 shall, except in such classes of case as may for the time being be prescribed or as may be specified in directions given by the Secretary of State, be made by a person appointed by the Secretary of State for the purpose instead of by the Secretary of

> State; and a decision made by a person so appointed shall be treated as a decision of the Secretary of State. …"

10. Paragraph 12 provides:

> "(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.
>
> (2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provisions of the order, either generally or in so far as it affects the interests of the applicant.
>
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

11. Mr Paterson entered objections to the modifications in the order. He maintained that there was no public right of way over his land. The County Council adopted a neutral stance. Mr Jones had moved out of the area, but the task of arguing in support of the modification order was taken on by Mr Ramm, who also had some connection with the Ramblers' Association. Mr Mark Yates was appointed as the inspector to decide the case. He conducted a public inquiry and visited the site.

12. The inspector properly identified the issue he had to decide at paragraph 5 of the decision letter:

> "I need to be satisfied that the evidence, when considered with all other relevant evidence, is sufficient to show that, on the balance of probabilities, a footpath, which is not shown in the definitive map and statement, subsists."

13. The inspector correctly identified two possible bases for finding that a public right of way subsisted which he had to consider, namely whether the provisions in section 31 of the 1980 Act regarding a presumption of grant of a public right of way based on long user were satisfied and whether an inference could be drawn by reference to common law principles and evidence of historic maps and documents and user that there had been a grant of a public right of way over the footpath at some point in the

past. The inspector rejected the claim made by reference to common law principles and historic maps and documents. However, he accepted the claim made by reference to long user according to section 31 of the 1980 Act.

14. Section 31 of the 1980 Act provides in relevant part as follows:

> "(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
>
> (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.
>
> (3) Where the owner of the land over which any such way as aforesaid passes –
>
> > *(a)* has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
> >
> > *(b)* has maintained the notice after the 1st January 1934, or any later date on which it was erected,
>
> the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway. …
>
> (5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.
>
> (6) An owner of land may at any time deposit with the appropriate council –
>
> > *(a)* a map of the land on a scale of not less than 6 inches to 1 mile, and
> >
> > *(b)* a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

> and, in case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time –
>
> > (i) within ten years from the date of the deposit, or
> >
> > (ii) within ten years from the date on which any previous declaration was last lodged under this section,
>
> to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.
>
> (7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above "the appropriate council" means the council of the county or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the way or land is situated in the City, the Common Council. …"

15. Section 31 re-enacted with limited changes provisions first contained in the Rights of Way Act 1932 ("the 1932 Act"). The background to the 1932 Act and the 1980 Act is described in the speeches in ***R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs*** [2007] UKHL 28; [2008] 1 AC 221 ("*Godmanchester*"). For present purposes it is relevant to set out section 1(3) of the 1932 Act, which provided:

> "(3) A notice by the owner of the land over which any such way passes inconsistent with the dedication of the way as a highway, placed before or after and maintained after the commencement of this Act in such a manner as to be visible to those using the way, shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention to dedicate such way as a highway, and where a notice has been placed in the manner provided in this subsection and is subsequently torn down or defaced, notice in writing by the owner of the land to the council of the county and of the borough or urban or rural district council in which the way is situate that the way is not dedicated to the public shall, in the absence of proof of a contrary intention, be sufficient evidence

> to negative the intention of the owner of the land to dedicate such way as a highway."

16. The result of the decision of the inspector is that, subject to this appeal, the order made by the County Council to modify the definitive map to show the footpath as a public right of way will take effect. The map will then be conclusive evidence that there is a public right of way over the footpath.

17. Mr Paterson appeals under paragraph 12 of Schedule 15 to the 1981 Act, set out above. This is a provision in similar terms to the right of appeal contained in section 288 of the Town and Country Planning Act 1990 in relation to planning decisions. It is common ground that the approach I should adopt on the appeal to determine whether the inspector acted within the powers of section 53 of the 1981 Act is to apply usual public law principles equivalent to those applicable in judicial review.

The Inspector's Decision

18. In the course of reviewing the historic documentary materials in his decision, the inspector said this at paragraphs 22 to 24:

> "22. A number of extracts have been provided from the minutes of the meetings of Shiplake Parish Council. The minutes from the 1930s and 1940s record that issues in relation to the claimed route were considered. Reference is made by certain parties to the claimed route being a private right of access for the owners of certain properties. The minutes note that an owner of a proportion of the land crossed by the route (Mr Lowe) had written to the Henley Rural District Council stating that there was no public right of way from Mill Road to the River Thames. A copy of a letter of 10 September 1934 from Mr Lowe to the District Council has been supplied and this also mentions the existence of an old notice board at the entrance to the path, which stated *"Trespassers will be Prosecuted"*. This had been removed but immediately replaced.
>
> 23. There is also a reference in the minutes to the placing of a sign at the entrance to the claimed route, apparently by a Mr Davies of Brookfield, which stated *"Private – Rights of way Act 1932"*. The issue of a right of way to the Mission Hall was discussed on a number of occasions and this led the Parish Council in 1940 to arrange for a notice to be erected at around point A, which stated *"Shiplake Parish Council Right of Way to the Mission Hall"*. It appears to me that the Parish Council accepted that there was no public right of way in relation to the claimed route but that the initial section served as a means of access to the Mission Hall.
>
> 24. It is apparent that Henley Rural District Council did not place the claimed route on the map of public rights of way in

connection with the 1932 Rights of Way Act. In addition, the route was not subsequently claimed or recorded at any stage of the process in relation to the production of the original definitive map and statement for the area. I find there to be no substantive evidence in support of use of the claimed route to access the Ferry across the River Thames, prior to it ceasing to operate."

19. For the purposes of the appeal it is relevant to set out the terms of the letter of 10 September 1934 from Mr Lowe to Henley RDC:

> "To The Clerk of the Rural District Council Henley on Thames …
>
> Dear Sir,
>
> Further to my interview with you on the 7th instant, when I was surprised to find that the Shiplake Parish Council had made a claim that there was a Public Right of Way from the High Road by Burnbank, over my Private Occupation Road, through Mr Knight's fields, under the Great Western Rly line & from here to the River Thames.
>
> I must point out that there is not & never has been a path from this point on the High Road to the River Thames. There is from that point on the High Road a Private Right of Way & along a path to a Private piece of land, which is my property over which certain rights have been conveyed by deeds to certain persons by the late Col Baskerville.
>
> In 1889 or 1890 Col Baskerville sold some land in Shiplake. Again in 1896 he had further sales by Public Auction. This land is frequently referred to as the Baskerville Estate. As these pieces of land had no access to the River Thames, Col Baskerville conveyed to all these purchasers & their successors in title, the right to use this Private meadow about an acre in extent. I have purchased the soil of this meadow from Col Baskerville, subject to the above mentioned rights. Rights to use this land have never been conveyed to anyone except these purchasers of land on the Baskerville Estate. Anyone else coming on this land is a trespasser.
>
> To enable purchasers of the sales made in 1889 to 1896 to reach this Private Land, a Private Path was made to it, as I have described above, but the path ended at a gate giving access to this Private Meadow.
>
> There is an old notice board at the entrance to this path from the Private Occupation Road, stating that "Trespassers will be

> prosecuted". Recently someone wrenched off this board & threw it into a ditch, but it was immediately replaced.
>
> To enable your Council to appreciate fully the position, I enclose a sale catalogue of the late Mr Tom Dixon's land with map attached showing this Private Right of Way to my land. Please return this. I shall be glad to hear from you that your Council has ordered the removal of this claim from your map. It appears to me this claim could not have been made, if the Parish Council had taken the slightest trouble to enquire from any of the occupiers of the land on the Baskerville Estate as to their rights. Under the circumstances I think a letter of regret is due to me from the Parish Council for the trouble & annoyance that I have been caused by their neglect."

20. Having rejected the claim to a public right of way based on common law principles and documentary evidence, the inspector turned to consider the user evidence and the question of "statutory dedication" under section 31 of the 1980 Act. He began by considering the question of when the status of the claimed route was first brought into question. At paragraphs 28 to 31 of the decision he said:

> "28. Mr Maroudas [who presented the case at the Inquiry on behalf of Mr Paterson] refers to the notices that were erected in the 1930s, which are detailed in paragraphs 22 and 23 above, and he believes that they were not consistent with the dedication of a highway. Mr Maroudas also submits that the letter from Mr Lowe to the Henley Rural District Council in 1934 could have served as a notice under Section 31(5) of the 1980 Act.
>
> 29. I have doubts regarding how effective the wording of these notices would have been in bringing home to the public that there was a lack of intention to dedicate the claimed route. This particularly applies to the notice erected by Mr Lowe. The evidence of the users of the route only points to clear signs and other measures being adopted to challenge use of the route after Brookfield was purchased by Mr and Mrs Paterson. In addition, I am not satisfied that the information supplied by Mr Low in his letter could be interpreted as being equivalent to a notice under Section 31(5) of the 1980 Act.
>
> 30. Mr Maroudas' alternative position is in line with Mr Ramm's view that the claimed route was brought into question in 1996. I accept that a sign erected by Mr and Mrs Paterson clearly challenged use of the claimed route and this action and subsequent acts were recognised by a proportion of the users of the route. …

> 31. Therefore, I conclude, on balance, that the claimed route was first brought into question by the action taken by Mr and Mrs Paterson, following their purchase of Brookfield in August 1996."

21. It is a little unclear why the inspector focused in this passage on the notices erected in the 1930s - presumably he did so in order to deal with submissions made by Mr Maroudas. However, section 31(1) refers to use by the public "as of right and without interruption for a full period of 20 years" (emphasis added). In order for the presumption in section 31(1) to operate, it is only necessary to identify *some* period of 20 years spanning back from any relevant date when the right of the public to use the way was brought into question (see section 31(2)). Even if the erection of the signs in the 1930s had qualified as acts bringing into question the right of the public to use the way, that would only have triggered a possible examination of what had happened in the 20 years up to that time. It would not have precluded Mr Jones and Mr Ramm from seeking to rely upon a different 20 year period of unchallenged user as of right by the public occurring subsequent to the 1930s: see in particular *Godmanchester* at [55] (Lord Hope). This is in accordance with the natural language of section 31(1) and with the object of that provision and its predecessor as originally enacted in the 1932 Act to allow for the existence of public rights of way to be established by reference to proof of long user on a model drawn in part from the Prescription Act 1832 (see *Godmanchester* at [8]). In the event, this is what the inspector found that Mr Jones and Mr Ramm were able to establish, taking as the relevant date on which the right of the public to use the way was brought into question the time in August 1996 when Mr and Mrs Paterson took steps to challenge such user.

22. Thereafter the inspector properly focussed on the application of section 31 for the period between 1976 and 1996 ("the relevant period"): see paragraph 32 of the decision. The inspector first considered the evidence of use of the footpath by the public. At paragraphs 33 to 34 the inspector referred to user evidence forms ("UEFs") submitted by a range of people who claimed to have used the footpath, nine witnesses who gave evidence at the inquiry about their use of the footpath and letters in support from some users. Assessing the evidence overall, he found that a total of 99 people had provided evidence of use during the relevant period.

23. The inspector then addressed an important submission by the objectors that it was difficult to be confident that the users of the footpath had been using it as members of the public as of right as a highway rather than by virtue of private rights granted over the footpath in favour of certain local residents with homes on land (formerly called "the Big Field") which had been sold and developed with the benefit of such easements: paragraphs 35 to 38 of the decision. At paragraph 39 he said:

> "39. In light of the above, I consider that I should discount the evidence of use from the people who lived in a property sited on the former Big Field during the relevant period or those users who confirm that they had a private right of way over the claimed route. I accept that, in some cases, it is not possible to be certain that a person did not enjoy a permissive right of way, or the length of time that they resided at a particular property,

from the details provided. In that sense, I may have slightly underestimated or overestimated the number of users who have enjoyed a permissive right of way over a proportion of the claimed route. Overall, I find that approximately fifty people have used the claimed route during the relevant period without apparently enjoying a private right of access. In addition, there is no evidence to show that formal permission was granted by the landowners for these users to use the claimed route."

24. The inspector then considered evidence regarding the route of the footpath (paragraphs 40 to 44). At paragraphs 45 and 46 he said:

> "45. There is some evidence from local residents regarding a lack of public use, or little public use, of the claimed route being observed. However, it is apparent that a proportion of the evidence, notably the detailed knowledge of Mr and Mrs Paterson, relates to a period after the route was brought into question. I accept that it may be the case that the number of daily users was not great as many of the UEFs were completed by people who used the route only a few times during the course of a year. However, the number of people using the route during the relevant period suggests that some of this use ought to have been evident to the landowners. Although, it may be difficult for a person to be in a position to accurately determine the level of use. The situation is also blurred by the fact that a private right of way exists over a proportion of the claimed route.
>
> 46. Whilst a proportion of the users are not claiming to have used the route for a period of twenty years, when taken as a whole, I find that there is evidence of use from a number of people throughout the relevant period. I consider that the user evidence is supportive of use of a route between points A, B, C, D and E with reference to specific features and structures at certain points. I have given consideration to the issues raised by the objectors in terms of the route used and I do not rule out the possibility that people may have, on occasions, deviated away from the claimed route, particularly between points D and E. However, I consider, on balance, that the user evidence is supportive of public use of the claimed route throughout the relevant period."

25. Having reached this conclusion on public use of the claimed route throughout the relevant period, the inspector turned at paragraphs 47 to 57 to consider the proviso contained in section 31(1) of the 1980 Act, namely the question whether any landowner had demonstrated a lack of intention during the relevant period to dedicate the route in question as a public right of way. The inspector referred to the fact that

Mr Varian had acquired Brookfield in 1971 and purchased an adjacent plot of land in 1977 from Dr Elliott. He referred to certain documents emanating from various relevant landowners but found that they were not communicated to users of the route (paragraph 49).

26. At paragraphs 50 and 51 of the decision the inspector dealt with evidence about representations made in the relevant period by a local landowner, Mr Varian, to Shiplake Parish Council and the Countryside Commission:

> "50. There were discussions in the 1980s regarding a number of proposals in connection with the long distance Thames Path. One proposal involved the claimed route and Mr Varian's evidence form states that he objected to the Thames Path following this route on privacy grounds. A minute in relation to the meeting of Shiplake Parish Council on 9 June 1986 records that the route of the proposed path was circulated to members, which was approved and supported. The minute also records that *"The extension was a private right of way for Ferry Cottage and Lashbrook Chapel"*. The subsequent consultation report that was published by the Countryside Commission in 1987 refers to Mr Varian's preference for an alternative route. This report also mentions that the claimed route had been permissively used for some years but was not a public right of way. The proposed Thames Path was referred to the Secretary of State in 1989.
>
> 51. I consider that there is a distinction between the response to the consultation involving the proposed creation of a footpath and the making of a clear statement to users that there was no intention to dedicate the route. I do not doubt that the general nature of the Thames Path was known about by a proportion of local residents at the time and extracts have been provided from the local press regarding this issue. However, even if a user had taken the time to read the detailed reports that were produced in relation to the Thames Path, the relevant sections only mention Mr Varian's preference for a particular route. Overall, I do not find that the discussions and subsequent reports produced in connection with the Thames Path would have clearly indicated to those people who were using the claimed route, at the time, that there was no intention to dedicate the route. I am also not satisfied that the references in some of the documents to the existence of private rights would prevent the establishment of a public right of way unless it was clearly conveyed to users that there was no intention to dedicate the route."

27. Mr Simpson, for Mr Paterson, emphasised the wide consultation that had been conducted by the Countryside Commission in relation to the Thames Path. He pointed out that the consultees included in particular the County Council, Shiplake

Parish Council, the Ramblers' Association and residents associations notified by local authorities. He pointed out that the Ramblers' Association had made representations to suggest that the Thames Path could take the path past Lashbrook Chapel and Brookfield (i.e. the route of the footpath) and that Mr Varian's objection to this was recorded in the following terms:

> "Prefers [a different] route which uses the bottom of his garden to the original proposal which would have used his private access road past the Chapel."

28. The inspector then went on at paragraphs 52 to 57 to consider evidence of signs erected by the footpath and evidence of challenges to members of the public using the footpath by local landowners from time to time:

> "52. Dr Elliott says that a private sign was affixed to a tree alongside the claimed route near to the Lashbrook Chapel (point B) when he sold the land in 1976. He believes that the sign was erected by his grandparents (Mr and Mrs Lowe). Whilst Mr Varian recalls that this sign stated *"Private, No Tipping"*, he could not remember it being in place when he returned to the area in 1978. At the Inquiry, Mr Paterson mentioned additional information from Dr Elliott regarding a sign that could indicate a lack of intention to dedicate the route; however, there is no evidence in support of Mr Paterson's statement. I consider that there is a lack of clear information regarding the existence of signs during the relevant period. In particular, the evidence provided is not indicative of signs that were worded to clearly demonstrate to the public that there was no intention to dedicate the claimed route. I noted on the site visit the presence of an additional notice but it was apparent that this related to the railway and not the claimed route.
>
> 53. Mrs Varian acknowledges, in her evidence form, that the claimed route was used by dog walkers and people heading towards Footpath No. 37 but she says that it was difficult to distinguish between local residents and the general public. In addition, Dr Elliott states that he did not challenge people as he was aware that a lot of people had a private right of access. There is also an acceptance by Mr Varian that occasionally local people would walk their dogs in the fields, as outlined in his letter of December 1999 to the Council. He says that he did not prevent this use as it was not intrusive but he was unaware of any regular tours by walkers. However, he refers, in his subsequent evidence form, to challenging approximately two people a year who he did not recognise. There is a reference in a Council telephone note to Mr Doble stating that in the past he had challenged people he did not recognise but he was unable to provide any details regarding these challenges.

> 54. Two witnesses (Mr Ball and Mrs Shankland) gave evidence at the Inquiry and they both state that they were informed that no public right of way existed when walking the claimed route. Mrs Shankland believes that she spoke to Mr and Mrs Varian and this encounter occurred between 1986 and 1992. She says that her husband was also informed during this period that the route was not a public right of way. The written evidence form completed by Mr Thorburn provides no details regarding use of the path but it states that he was challenged in May 1995.
>
> 55. The applicant for the Order (Mr Jones) approached Mr Varian about the claimed route in around November 1995. It appears that Mr Jones made a request for the route to be added to the definitive map and statement and that Mr Varian did not agree to this request. There is no evidence to indicate that this conversation was communicated to users of the route, either as individuals or as members of a group. I also note that Mr Jones has not provided evidence to show that he used the claimed route.
>
> 56. I find that the written submissions of the landowners are not clear regarding users of the route being informed that there was no intention to dedicate the claimed route. Furthermore, none of the users' evidence that was submitted in support of the Order mentions verbal challenges being issued until after the route was brought into question. However, as detailed above, there is some evidence to show that when people approached Mr Varian about the route they were informed that it was not a public right of way. In addition, he made other statements to indicate that he did not want it to become a public right of way.
>
> 57. In my view, there is evidence to show that Mr Varian did not wish the claimed route to be a public right of way. However, I have doubts regarding how effective he was in communicating this view to the public. In contrast, there is clear evidence of action being taken following the sale of Brookfield to Mr and Mrs Paterson, which would indicate a lack of intention to dedicate the route. I find that, given the number of people claiming to have used the route, there is only clear evidence of isolated occurrences of people being informed that the claimed route was not a public right of way. Therefore, having regard to the Godmanchester judgment, I conclude, on the balance of probabilities, that the landowners did not take sufficient action to inform the public that there was no intention to dedicate the claimed route during the relevant period."

29. I was referred to the witness statement of Dr Elliott before the inspector which stated that when he sold the land in 1976 (according to the evidence of Mr Varian, this may have been 1977) there had been a sign next to the footpath which simply said

"Private". This was the evidence of Dr Elliott referred to by the inspector in paragraph 52 of the decision.

The Grounds of Challenge

30. I turn to consider the grounds of challenge to the inspector's decision put forward by Mr Simpson for Mr Paterson. First, Mr Simpson maintained a submission (albeit faintly) that the inspector had focussed on the wrong 20 year period and should instead have focused on the 20 years up to the erection of the notices in the 1930s referred to in paragraphs 23 to 24 of the decision. For the reasons given in para. [21] above, I think that this complaint is misconceived. Under section 31(1) it was only necessary for the inspector to identify "a" full period of 20 years of user by the public as of right and this he properly did in relation to the period 1976 to 1996 (counting back from the date when Mr and Mrs Paterson brought the right of the public to use the way into question in 1996).

31. Second, Mr Simpson submitted that the signs erected by Mr Lowe and Mr Davies in the 1930s should have been taken to have amounted to sufficient evidence that there was no intention to dedicate the footpath for public use during the relevant period. I do not accept that submission. The erection of signs in the 1930s was long before the relevant period of 1976 to 1996 and there was no evidence that those signs remained in place up to and into that period. No-one at the inquiry suggested that they did remain in place in the relevant period. On the contrary, the evidence relevant to that period was to the effect that a different sign was present in the early part of the relevant period which either simply said "Private" or "Private, No Tipping".

32. The inspector properly reviewed and considered this evidence at paragraph 52 of the decision, set out above. He was entitled to come to the conclusion he did in that paragraph. He had visited the site and was well placed to assess how a user of the footpath might interpret such signs in that particular context. The inspector was entitled to find that signs in such terms did not unambiguously provide sufficient evidence or notice that there was no intention that the footpath be dedicated to public use. A sign saying only "Private" could simply have been indicating that the land a short way further down the footpath (which was open fields) was private so that people should stick to the footpath. In that regard, the inspector was entitled to accept the submission by Mr Ramm that virtually all rights of way are over private land so that a simple sign saying "Private" does not clearly indicate that there is no public right of way along a marked footpath. Similarly, the inspector was entitled to conclude that a sign saying "Private, No Tipping" did not clearly indicate that there was no public right of way over the footpath (it might more naturally be taken to refer to what should not be done on the fields at the end of the path). Moreover, I consider that the inspector was entitled to take into account the evidence of users that they did not understand any signs erected before Mr Paterson came on the scene in 1996 to challenge the public use of the footpath (paragraph 29 of the decision). How a range of members of the public have in fact understood signs in a particular context may well be a helpful indicator how a reasonable person would interpret a sign in that context. In my view, therefore, there is no error of law in paragraph 52 of the decision letter. There was material available to the inspector on the basis of which he could reasonably make the evaluative judgment in that paragraph.

33. Strictly, it was unnecessary in terms of application of the 1980 Act for the inspector to assess how the public would reasonably have understood the different signs erected in the 1930s referred to at paragraphs 22 and 23 of the decision letter. However, for completeness I would add that in the context of a path leading to open fields on a site which the inspector had visited and was well placed to assess, I think it was legitimate for him to express the doubts he did about those earlier signs at paragraph 29 of the decision.

34. Third, Mr Simpson submitted that Mr Lowe's letter of 10 September 1934 to Henley RDC served as a notice under section 1(3) of the 1932 Act (now section 31(5) of the 1980 Act) and continued to have effect as relevant and sufficient evidence for the purposes of the proviso in section 31(1) of the 1980 Act to the effect that there was no intention to dedicate the footpath for public use during the relevant period. For this submission he relied in particular upon a dictum of Lord Neuberger in *Godmanchester* at paragraph [91].

35. I do not accept this submission for three reasons. First, in my judgment the language and scheme of both the 1932 Act and now the 1980 Act do not provide for a notice given under what is now section 31(5) of the 1980 Act to have the continuing temporal effect as evidence of a challenge to public use of a footpath for which Mr Simpson contends. For the proviso in section 31(1) of the 1980 Act (and in section 1(1) of the 1932 Act before it) to operate to displace the presumption that there is a public right of way arising from long user, there must be sufficient evidence indicating that there was no intention during that period to dedicate it. Whether there was such an intention during that period not to dedicate a public right of way is to be assessed as an objective matter on the basis of acts of the landowner evincing such an intention to the relevant public audience: see *Godmanchester*, especially the speech of Lord Hoffmann at [1] to [38]. The other members of the Judicial Committee all agreed with Lord Hoffmann as well as advancing reasons of their own.

36. At [32] to [34] Lord Hoffmann said:

> "32. My Lords, in my opinion the law as stated by Denning LJ in [*Fairey v Southampton County Council* [1956] 2 QB 439] and by Hobhouse LJ in [*Secretary of State for the Environment v Beresford Trustees*, Court of Appeal, 31 July 1996, unreported] was correct and the Court of Appeal [in *Godmanchester*] was wrong. I think that upon the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, 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, as Lord Blackburn put it in *Mann v Brodie* (1885) 10 App Case 378, 386, to "disabuse [him]" of the notion that the way was a public highway. The Court of Appeal said that this would involve reading words into the Act; placing a gloss on the statute. But, outside the criminal law and parts of the law of torts, it is common to use the word intention in an objective sense, as in

the intention of Parliament, the intention of the parties to a contract and, even in Latin, the animus possidendi which a squatter must have to acquire a title by limitation.

33. It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there 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. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in [*R v Secretary of State for the Environment, ex p. Billson* [1999] QB 374]) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.

34. Such a construction is in my view supported by reading section 31 as a whole. The primary example of an act which would negative an intention to dedicate is the erection and maintenance of a notice inconsistent with dedication "in such manner as to be visible to persons using the way": section 31(3). If the notice is torn down or defaced, notice to "the appropriate council" will have the same effect: section 31(5). If any overt act would do, why should the notice have to be given to "the appropriate council"? A notice to an inappropriate council, or to the landowner's solicitor or friend, would be just as good. In the Court of Appeal, Auld LJ said that a notice to the appropriate council would be unlikely to come to the attention of the public using the way and this was an indication that, in general, the landowner's intention did not have to be communicated to users of the way. I disagree. A notice to the council under section 31(5) is plainly regarded as second best and is only allowed when the original notice has been torn down or defaced, just as substituted service is allowed only when there is good reason to dispense with personal service. It is true that users of the way are not very likely to call at the County Council offices to ask whether any notices under section 31(5) have been lodged, but a well-advised defender of rights of way, such as the Ramblers' Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner's intention can come to their attention or not."

37. In light of this 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 in the relevant period to indicate to the relevant audience that the landowner had no intention to dedicate the land as a public right of way.

38. Sections 31(3), (5) and (6) make further detailed provision as to how sufficient relevant evidence of 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.

39. 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.

40. 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, 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)).

41. 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.

42. 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).

43. For all these reasons I consider that the indicators in the legislation contrary to Mr Simpson's submission are strong. I also think that Lord Hope's analysis of section 31 of the 1980 Act in *Godmanchester* at [53]-[55] tends to support this view of the effect of section 31(5). In that passage, having reviewed the operation of the provisions of section 31 in detail, Lord Hope concludes, "So all the landowner need do is ensure that no 20 year period goes by without his taking overt acts to challenge the use of the way by the public". It seems to me that Lord Hope treats the giving of a notice under section 31(5) as one of the relevant "overt acts" which might be significant provided it is taken in the relevant 20 year period.

44. Against that background I turn to consider the relevant part of Lord Neuberger's speech in *Godmanchester*, at [87] to [91]:

> "*Other issues: the meaning of "during", and manifesting the intention*
>
> 87. The second question is whether the phrase "during that period" in the proviso to section 31(1) means "during the whole of that period", as the appellants argued, or "at some point during that period", as was contended by the respondents. As a matter of ordinary language, it appears to me clear that it has the latter meaning.

88. First, the former interpretation would lead to wholly unrealistic results. It would mean that signs referred to in section 31(3) (combined, where appropriate, with the documents referred to in section 31(5)), and the documents referred to in section 31(6), would be ineffective unless they were in place for the whole of the twenty year period. Mr Laurence was forced to concede that it would therefore be necessary to imply some sort of period of grace, based on reasonableness, but that is not warranted by the wording of the section, and it would be a recipe for uncertainty and dispute.

89. Secondly, it is clear that an interruption of the user at some point during the relevant twenty year period, such as the landowner locking a gate and preventing access, will defeat an argument based on use "as of right" under section 31(1) during that period. Traditionally, one day a year is the norm – see for instance Merstham Manor Ltd v Coulsdon and Purley UDC [1937] 2 KB 77 at 85. However, it may depend on the facts of the particular case whether this is enough to amount to a sufficient interruption; that was the view taken by the Court of Appeal in Lewis v Thomas [1950] KB 438. Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of twenty years in order to defeat user as of right. It would be inconsistent if the sign contemplated by section 31(3), or any other action or communication invoked as evidence of lack of intention, had to be in place for the whole of the twenty years.

90. This is not the occasion to discuss how long a sign would have to be present, or when the documents referred to in sections 31(5) and (6) would have to be lodged, during the twenty years relied on in any particular case. It is conceivable that one day in twenty years would be enough in a particular case, and it even may be the case, I suppose, that it would be enough as a matter of principle, but it may well be that what constitutes a sufficient period will depend on the facts of the particular case – see the discussion in Lewis.

91. It is fair to add that this conclusion can, at any rate at first sight, be said to sit a little uneasily with the procedures set out in sections 31(5) and (6). They appear to contain somewhat elaborate requirements if all that is needed is, for instance, the erection of a notice for a relatively short period under section 31(3). The answer, I think, is this. A landowner who wishes to protect his position over many decades may be concerned that he or his successors will forget to keep checking that a section 31(3) notice remains intact, and that, following a defacing of a notice, he may let twenty years uninterrupted use occur. Such a landowner may be glad to be able to protect his position by taking advantage of section 31(5). As to section 31(6), it

> appears to be aimed primarily at large estates, and enables a landowner to protect himself, inter alia, in relation to potential rights of way which he may not even know are in the process of being acquired under section 31(1)."

45. No other member of the Committee associated themselves with this part of Lord Neuberger's speech, although Lord Scott expressed agreement with Lord Neuberger's reasons for coming to the same conclusions as Lord Hoffmann (paragraph [71]). Lord Neuberger agreed with the speeches of Lord Hoffmann and Lord Hope (paragraph [77]).

46. It seems to me that Lord Neuberger's discussion of the operation of section 31(3) and (5) in paragraphs [88] and [89] is consistent with (and, indeed, tends to support) the approach to the operation of section 31(5) I have indicated above.

47. At paragraph [90] Lord Neuberger makes it clear that he is not going to attempt an authoritative exegesis of the operation of section 31(5) or (6), so it is clear that what he says in paragraphs [90] and [91] is obiter. But in paragraph [90] it seems to me he also contemplates that a notice under section 31(5) would have to be lodged "during the twenty years relied on in any particular case". That again is consistent with, and supports, the view of section 31(5) I have set out above.

48. In paragraph [91], however, it is fair to say that Lord Neuberger appears to contemplate that a landowner might protect his position "over many decades" by means of a single notice given under section 31(5). That is the passage on which Mr Simpson relies as supporting his submission about the extended temporal effect of section 31(5). I think that observation in paragraph [91] is in tension with Lord Neuberger's other observations in paragraphs [88] to [90]. I think it is also in tension with Lord Hope's speech at [55], as set out above. Lord Neuberger's observation in paragraph [91] is obiter. He does not embark upon an extended examination of arguments for and against giving a notice under section 31(5) the sort of extended temporal effect he appears to contemplate at this point in his speech. I have done my best to evaluate those arguments for myself and have come to the clear view that they are against Mr Simpson's submission on this point. Notwithstanding the great respect due to any passage in a judgment of Lord Neuberger, I feel compelled to conclude that on this occasion Homer may have nodded. Accordingly, Mr Simpson's submission on the extended temporal effect of a notice given under section 31(5) falls to be rejected.

49. The second reason for rejecting Mr Simpson's submission based on Mr Lowe's letter in 1934 is that the letter did not purport to be a notice given in the circumstances identified by section 31(5). In my view, although section 1(3) of the 1932 Act and section 31(5) of the 1980 Act do not require any particular form of words to be used to give a notice to the appropriate council, the words which now open section 31(5) ("Where a notice erected as mentioned in subsection 3 above is subsequently torn down or defaced …") indicate that the notice to the appropriate council to which those provisions refer has to be given by reason of the tearing down or defacing of the notice or sign referred to in what is now section 31(3) of the 1980 Act with the object of making good the absence of the sign which has thereby arisen. Mr Lowe's letter

was not sent for that reason nor with that object in view. As Mr Lowe said in the letter, the notice which had been torn down had been immediately replaced. By the time the letter was written there was a sign in place which had not been torn down. The object Mr Lowe had in writing the letter, as is evident from its terms, was not to provide a form of substituted notice to the public in place of the sign (cf. *Godmanchester* at [34]), but to remonstrate with the Rural District Council about something the Parish Council had done in claiming that there was a public right of way over the footpath.

50. Thirdly, and in any event, the 1934 letter did not comply with the relevant notice provisions set out in section 31(5) of the 1980 Act, nor with those in place at the time it was sent contained in section 1(3) of the 1932 Act. The letter was sent only to the Rural District Council, not to "the council of the county" (see section 1(3) of the 1932 Act and sections 31(5) and (7) of the 1980 Act).

51. Mr Simpson sought to meet this objection by contending that the inspector should have found on the facts that a separate letter was also sent by Mr Lowe to the County Council, alternatively that there was substantial compliance with the requirements of section 31(5) or section 1(3) even though the notice had only been sent to the Rural District Council. I do not agree with either of these contentions. As regards the first, there is no evidence whatever that Mr Lowe intended to send a similar letter to the County Council. On the contrary, it appears that the reason he wrote the letter (to remonstrate with the Rural District Council about something done by the Parish Council) had nothing to do with the County Council and could not have led to any inference that he wrote to the County Council as well. In the absence of any evidence that Mr Lowe intended to or did write to the County Council, the inspector did not have to speculate about that and was fully entitled to proceed on the basis that he had not written to the County Council.

52. So far as the second contention is concerned, a preliminary point arises as to whether one should examine this issue by reference to section 31(5) and (7) of the 1980 Act or section 1(3) of the 1932 Act. In the event, I do not think it makes any difference which provision is considered. I should indicate, however, that I consider that the better view is that the relevant test is contained in sections 31(5) and (7) of the 1980 Act and that it is not relevant to look back to the earlier Act (even though it was in force at the time the letter was sent in 1934). It is the regime of presumptions and evidence set out in section 31 of the 1980 Act which now governs how a question of public rights of way should be determined by examination of any relevant 20 year period – which obviously may include periods of time prior to 1980. Section 31(5) is one of the provisions which sets out the proper approach to evidence about what happened in any such period. It is sufficient if, looking at the matter now, by reference to section 31(5), it can be seen that a relevant notice was given to "the appropriate council", namely the County Council (section 31(7)). Mr Lowe's letter was not sent to the County Council, so section 31(5) has no application. It cannot be said that a complete failure to satisfy the terms of that provision constitutes substantial compliance with it.

53. Even if, contrary to my view above, it were right to focus instead on section 1(3) of the 1932 Act, the same conclusion would follow. The terms of section 1(3) are clear. There has been a complete failure to comply with part of the notice requirement (namely, the giving of notice to the County Council), and compliance with another

part (notice to a Rural District Council) does not constitute substantial compliance with the whole provision. Moreover, the object of the notice requirement in section 1(3) by reference to the relevant County Council and Rural District Council was to define the appropriate representatives of the public to whom substituted notice could be given where a sign had been torn down (compare *Godmanchester* at [33]-[34] and [53]). Under the 1932 Act members of the public would think they could safely check the records of either the Rural District Council or the County Council. A failure to send the relevant notice to the County Council as required by the subsection would potentially defeat the requirements of notice to the relevant audience of the public in a serious way. In my view, this again indicates that compliance with that notice requirement was essential for a notice under section 1(3) to have the effect provided for in that subsection. That reasoning applies still more strongly if it is only section 31(5) and (7) which is relevant here, as I consider to be the case, since guiding themselves by reference to those provisions the public would think to search only in the records of the County Council.

54. Mr Simpson then turned to focus on the steps other than erection of signs which were taken by landowners in the relevant period, 1976 to 1996. Here he emphasised the context in which the present case arose, where there was a substantial body of people in the locality who had private rights of way over the footpath by reason of easements. This made it difficult for landowners to know when a person was in substance purporting to exercise, or was asserting, a public right of way when walking over the footpath and so made it difficult for landowners to know when to challenge anyone using the path. Mr Simpson submitted that the inspector failed to assess the evidence of users correctly in the light of this context.

55. When considering this part of the case, I should say at once that the inspector was fully alive to these points and clearly had them well in mind when assessing the evidence in the case (see in particular paragraphs 33 to 39, 45 to 46 and 53 of the decision). Mr Simpson submitted that of the eight supporters of the claim who gave evidence at the inquiry, six of them could be shown to have had some basis for using the footpath other than as a public right of way. He submitted that the inspector should have inferred from this that far fewer users than he identified in paragraph 39 of the decision had used the footpath as a public right of way.

56. I do not accept this. In my view, the assessment made by the inspector was reasonably open to him on the evidence he had before him. The assessment of and weight to be attached to each item of evidence was a matter for him. He plainly made a very careful assessment of the evidence having this issue very much at the forefront of his mind. There was nothing irrational or otherwise unlawful in the conclusions he arrived at in paragraph 39 of the decision and elsewhere in the decision.

57. Next, Mr Simpson submitted that the inspector erred in failing to take the background of extensive private easements over the footpath properly into account when he concluded that the relevant landowners had not effectively communicated their challenges to any public right of way to the relevant audience of the users of the way (see especially paragraph 57 of the decision). I reject this submission.

58. The inspector was entitled on the evidence to conclude at paragraphs 45 to 46 of the decision that there was sufficient notice to the landowners of use of the footpath as a public right of way to alert them to the need to take action if they wished to challenge

that (see e.g. *R v Oxfordshire County Council, ex p. Sunningwell Parish Council* [2000] 1 AC 335, 350H-351A *per* Lord Hoffmann). The legal requirement under the proviso in section 31(1) of the 1980 Act that a landowner must engage in objective acts perceptible to the relevant audience of users of the footpath to disabuse them of the notion that the way is a public highway was authoritatively explained by the House of Lords in *Godmanchester* (see in particular [32] and [33], set out above). The existence of extensive private rights of way in this case clearly did pose a problem for landowners who wished to make it clear to the relevant audience that there was no public right of way, and the inspector had that in mind (see in particular paragraph 53 of the decision). But that did not remove the requirement that effective notice of a challenge to any public right of way be given to the relevant audience. It would not be sufficient to turn back a stranger on an isolated occasion (see the passage from *Fairey v Southampton County Council* quoted at length in *Godmanchester* at [19]). The inspector here was clearly entitled on the evidence to find that that was all that had happened in this case and that the evidence did not indicate that sufficient notice of challenges to any public right of way had been given to the relevant audience (see especially paragraph 57 of the decision). There was no proper reason for dispensing with that basic requirement. (It may be added that the unusual and difficult circumstances of this particular case did not make it impossible for landowners to make effective challenges to any public use of the footpath: they could have deployed clear and effective notices to achieve that objective as Mr and Mrs Paterson did from 1996).

59. As a third point in relation to notice given to the public of challenges to any public right of way, Mr Simpson relied upon the consultation on the Thames Path and the materials referred to in paragraphs 50 and 51 of the decision. He submitted that in the unusual context of this case, where there were extensive private rights of way, greater reliance could be placed on notice being given by landowners to public authorities such as the Countryside Commission (as in Mr Varian's stated position referred to in para. [27] above) and on apparent acceptance by those bodies that public rights of way do not exist. In that regard, Mr Simpson relied in particular on the observations of Lord Hoffmann and Lord Hope in *Godmanchester* at [34] (set out above) and [53] respectively. At paragraph [53] Lord Hope said:

> "53. The common law has not laid down fixed rules as to what the owner may do to disabuse the public of the belief that the way has been dedicated for use by the public. The statute clarifies the law in this respect too. The erection and maintenance of a notice which is inconsistent with the dedication of the way as a highway which is visible to persons using it will, in the absence of proof of a contrary intention, be sufficient evidence: section 31(3). If it is torn down or defaced, a notice to the appropriate council that the way is not dedicated as a highway will have the same effect: section 31(5). So too will the deposit with the council by the owner of a map and a statement indicating which ways, if any, he admits to have been dedicated as highways, so long as this is backed up every ten years by a declaration that no additional way has been dedicated in the meantime: section 31(6). The appropriate council is, in effect, the guardian of the public interest in these

> matters. In country areas, it is the council of the county in which the way or the land is situated: section 31(7)."

60. In these passages, Lord Hoffmann and Lord Hope were addressing the effect of section 31(5) and (6) of the 1980 Act. They did not purport to lay down any general approach that notice to an appropriate council or to any public body will count as sufficient notice to the relevant audience of the public. In my view, whether it does or not will depend on the particular facts of the individual case. In the present case, the inspector plainly had the relevant test taken from *Godmanchester* well in mind; he made a reasonable assessment of the position, including taking into account the position in relation to the public bodies referred to in paragraph 50 of the decision; and his assessment cannot be said to have been irrational or otherwise unlawful. So this challenge also fails.

61. Mr Simpson also sought to rely on the cumulative effect of these matters to suggest that the inspector had erred in law. I do not think that adding the points together makes any difference. The inspector directed himself properly by reference to the guidance in *Godmanchester* and reached reasonable conclusions on the evidence before him. The evaluation of that evidence in light of that guidance was a matter for him and it is not for the court to intervene.

62. At the hearing I gave leave to Mr Paterson to add the following as an additional ground of challenge. There was evidence that Mr Jones had approached Mr Varian in relation to the claimed route in November 1995, on which occasion Mr Varian did not agree to the route being added to the definitive map: see paragraph 55 of the decision. At the hearing before me the Ramblers' Association applied for leave to intervene as an interested party, which I granted. In the supporting statement adduced in support of that application it was stated that Mr Jones was a footpath worker for the Ramblers' Association. Mr Simpson fastened upon that in order to submit that when Mr Varian turned down Mr Jones's request in 1995 to include the footpath in the definitive map that action constituted notice of objection to the Ramblers' Association. Mr Simpson then sought to rely on paragraph [34] in *Godmanchester*, where Lord Hoffmann explained that in the context of the operation of section 31(5) the substituted notice provided for in that provision might come to the attention of the relevant audience via a body like the Ramblers' Association, and submitted that the inspector should have found that the exchange between Mr Jones and Mr Varian in 1995 was an act constituting sufficient evidence to the relevant audience of the public via the Ramblers' Association that the landowner objected to any public right of way over the footpath.

63. I do not accept this submission. It fails on the facts as found by the inspector in paragraph 55 of the decision, set out above. There was no evidence to suggest that the conversation between Mr Jones and Mr Varian was communicated to users of the route. The inspector was entitled to treat that as decisive.

64. It may also be added that it does not appear that Mr Varian purported to give notice to the Ramblers' Association as such or treated Mr Jones as their representative. Moreover, it could not reasonably be suggested that a landowner could always provide sufficient evidence of a challenge to an asserted public right of way simply by

writing or speaking to the Ramblers' Association. Whether such a letter or conversation was or was not effective would critically depend on the particular circumstances of any individual case. In this case the inspector was entitled to find that the conversation between Mr Varian and Mr Jones in 1995 was not effective to give sufficient notice to the relevant audience of the landowner's objection to use of the footpath as a public right of way.

Conclusion

65. For the reasons set out above, I dismiss Mr Paterson's appeal.