SECTION 5 DEDICATION / USER EVIDENCE

REFERENCE MATERIAL

Statutes

Law of Property Act 1925 section 193

Rights of Way Act 1932

National Trust Act 1939

Countryside Act 1968 section 30

Highways Act 1980 section 31

Wildlife and Countryside Act 1981 sections 53(3)(b), 53(3)(c) and 66(1)

Road Traffic Act 1988

Charities Act 1993 section 36

Case Law

Poole v Huskinson (1843) 11 M & W 827 - common law dedication – intention to dedicate – interruption – limited dedication

Hollins v Verney 1854 - sufficiency of user

Dawes v Hawkins [1860] 8 CB (NS) 848 - no time limit on dedication – once a highway etc

Mann v Brodie 1885 - common law dedication – sufficiency of user – presumption – Scottish law – (Lord Blackburn on the difference of English law)

R v Residents of Southampton 1887 – 'the public'

Sherrington UDC v Holsey 1904 - physical character of a way

Thornhill v Weekes (1914) 78 JP 154 - physical character of a way

Moser v Ambleside RDC (1925) 89 JP 59 - effect of ancient maps, modern – culs-de-sac surveys, interruptions, noticeboards – pleasure user

Hue v Whiteley [1929] 1 Ch 440 - 'as of right'

Merstham Manor v Coulsdon and Purley UDC [1937] 2 KB 77 – ROW Act 1932 – 'as of right' – 'without interruptions'

Jones v Bates [1938] 2 All ER 237 - dedication at common law – meaning of as of right (ROW Act 1932) – burden of proof – bringing into question

Lewis v Thomas 1950 1 KB 438 - interruption – intention to dedicate

Fairey v Southampton County Council [1956] 2 QB 439 – whether ROW Act 1932 is retrospective – intention to dedicate – differentiation between common law/statute law dedication – burden of proof

Davis v Whitby [1974] 1 All ER 806 - 20 years user

Dyfed County Council v SSW (1989) 58 P & CR 68 – use of foreshore for recreational activities

British Transport Commission v Westmorland County Council [1957] 2 All ER 353 – dedication must be compatible with purpose of land held

R v SSE ex parte Cowell [1993] JPEL 851 - Toll – annual manifestation of non-dedication

Jaques v SSE [1995] JPEL 1031 - common law dedication – true construction of S31 HA80 – no intention to dedicate – burden of proof – effect of requisitioning

Robinson v Adair (1995) Times 2 March 1995 -illegal vehicular user post 1930 – effect in relation to s31(1) HA80

Stevens v SSETR (1998) 76 P & CR 503 - rights along RUPPs – effect of Road Traffic Act 1930 on vehicular user evidence

R v SSE ex parte Billson [1998] 2 All ER 587 - duration of no intention to dedicate - rights over common land

R v Isle of Wight CC ex parte O'Keefe 1997 unreported (QBCOF 94/1223/D) – evidence of intention – meaning of as of right

R v Wiltshire CC ex parte Nettlecombe [1998] JPEL 707 – definition of BOAT – current user

Masters v SSE [2000] 4 All ER 458 (CA) - definition of BOAT – balance of predominant user - 1929 Handover map – OS maps

R v Oxfordshire CC ex parte Sunningwell PC [1999] 3 All ER 385 – history of prescription of dedication – belief element of as of right

R v SSETR ex parte Dorset CC [1999] NPC.72 - bringing into question – no intention to dedicate

Buckland and Capel v SSETR [2000] 3 All ER 205 - meaning of BOAT – discourse on *Nettlecombe* and *Masters* judgments

Masters v SSETR [2001] QB 151 (CA) - Court of Appeal judgment on meaning of BOAT

R v Planning Inspectorate Cardiff ex parte Howell (2000) unreported – vehicular use post 1930 (see also *Robinson v Adair; and Stevens v SSETR*)

Rowley and Cannock Gates Ltd v SSTLR [2002] EWHC (Admin) – positive actions of a tenant

R v City of Sunderland ex parte Beresford 2003 UKHL 60 – the proposition that use pursuant to permission given by the landowner is always *precario* is not correct. Also toleration equates with acquiescence; not permission

Bakewell Management Ltd v Brandwood [2004] UKHL 14 – presumed dedication of a public vehicular right of way

R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA and R (on the application of Drain) (Appellant) v SSEFRA [2007 UKHL 28 – lack of intention to dedicate – overt acts by the landowner to be directed at users of the way – duration of no intention to dedicate

Ramblers' Association v SSEFRA (2008) a cul-de-sac is capable of being dedicated as a highway

Planning Inspectorate Guidance

Rights of Way Advice Note No.12 – Wildlife and Countryside Act 1981 – Vehicles and Rights of Way

Other Publications

Halsbury's Laws of England Vol.21 paragraphs 65-86

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association)

The following, articles which are of interest, have appeared in the RWLR

'Section 31 of the Highways Act 1980' - David Braham - Oct 1990 (Section 6.3)

'Section 31: update' - David Braham - April 1998 (Section 6.3)

'Dedication: the common law approach' - David Braham - Oct 1991 (Section 6.2)

'Public Access to Common Land' - Gerard Ryan – Jan 1995 (Section 15.4)

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Introduction

5.1 Dedication of rights of way to the public can arise under statute law (s31 HA80) and under common law. The references above provide a good basis for understanding a subject which continues to arouse controversy. There has been frequent recourse to the Courts, which has provided a rich seam of judicial interpretations. Inevitably some of the dicta contained in earlier judgments have been superseded. The cases recommended for full reading reflect current judgments of which *'Sunningwell'* is a particularly helpful history of the prescription of dedication; Godmanchester and Drain [2007] provides the leading judgement on the operation of the proviso to HA80 s31 (1). These judgments will generally lead Inspectors to the other relevant case law listed (see Section 3 'Case Law').

5.2 These guidelines initially concentrate on issues affecting the interpretation of s31 HA80 then recommend rigorous testing of the user evidence forms, which almost invariably feature in claims for dedication under statute law. Finally, they address some aspects of deemed dedication at common law. Comment on specific topics is found later on in this section.

'The Public'

5.3 There appears to be no legal interpretation of the term *the public* as used in s31. The dictionary definition of the term is *the people as a whole, or the community in general.* Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the people as a whole/the community in general. However, Coleridge LJ in *R v Residents of Southampton 1887* said that *user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.* Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local people as a whole/the local community.

5.4 It was held in *Poole v Huskinson (1843)* that *there may be a dedication to the public for a limited purpose ... but there cannot be a dedication to a limited part of the public.*

Currency and Balance

5.5 Dedication of a highway of a particular status will depend, amongst other things, on the type of public user. In this matter the definitions of minor highways in s66(1) WCA 81 are

particularly relevant. The definition of a BOAT has proved troublesome.

5.6 However, the Court of Appeal settled the matter in *Masters v SSETR* (2000). Roch LJ held: *It is in my judgment clear that Parliament did not contemplate that ways shown in definitive maps and statements as RUPPs should disappear altogether from the maps and statements simply because no current use could be shown, or that such current use of the way as could be established by evidence did not meet the literal meaning of s66(1)* and that *Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic.*

5.7 Thus for reclassification of RUPPs to BOATs under section 54 of the WCA 81, the position seems clear: the decision depends solely on the test of whether public vehicular rights exist and does not require current vehicular (or any other) use. For orders recording BOATs under section 53, public vehicular rights must be shown to exist but to satisfy the description BOAT as defined in s66(1) of the Act, the question of its use should still be addressed but in the light of Roch LJ's interpretation in the *Masters* judgment.

Duration

5.8 Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (*Davis v Whitby (1974)*). However, use of a way by trades-people, postmen, estate workers, etc., generally cannot be taken to establish public rights. Wandering at will (roaming) over an area including the foreshore (*Dyfed CC v SSW 1989*), cannot establish a public right (Halsbury's Laws of England, Vol.21, paras 2 and 4 refer), and use of an area for recreational activities cannot give rise in itself to a presumption of dedication of a public right over a specific route (see RWLR article 'Dedication – the Common Law Approach').

Sufficiency

5.9 There is no statutory minimum level of user required for the purpose, and the matter does not appear to have been tested in the courts. However, it is clear that Inspectors must be satisfied that there was a sufficient level of use for the landowner to have been aware of it, and have had the opportunity to resist it if he chose. In *Hollins v Verney (1884)* it was said that: *No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment* and *that no actual user can be sufficient to satisfy the statute ... unless the user is enough to carry to the mind of a reasonable person (owner, etc.) the fact that a continuous right of enjoyment is being asserted and ought to be*

resisted..... It follows then that use of a way is less cogent evidence of dedication if the landowner is non-resident – at any rate, if the owner had no agent on the spot – than if he is resident. If the landowner did not know that the way was being used, no inference can fairly be drawn from his non-interference.

5.10 Use of the way should also have been by a sufficient number of people to show that it was use by the public – representative of the people as a whole, or the community in general (see 'The Public' above) – and this may well vary from case to case. Very often the quantity of valid user evidence (see 'User evidence,' below) is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.).

5.11 It was held in *Mann v Brodie 1885* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. Watson J said: *If twenty witnesses had merely repeated the statements made by the six old men who gave evidence, that would not have strengthened the respondents' case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence.* Arguably, therefore, the evidence contained in a few forms may be as cogent – or more cogent – evidence than that in many. However, Dyson J in *Dorset 1999* did not question that the Inspector had found the evidence contained in five user statements insufficient to satisfy the statutory test, even though the truth of what was contained in them had been accepted.

Subjective Belief

5.12 For many years before 1999, it was held that use as of right entailed use that was open, not by force and not by permission *('nec vi, nec clam, nec precario')*; furthermore, users had to have an honest belief that there was a public right of passage. Hence, it was necessary to prove that users believed that they had a right to use the way.

5.13 However, in *Sunningwell 1999* it was held that there is no requirement to prove any such belief, but only that the use was without force, without stealth and without permission. Hoffman LJ said: *To require an enquiry into the subjective state of mind of the users would be contrary to the whole English theory of prescription, which depends upon acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose the actual state of mind of the road user is plainly irrelevant ..... in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in Hue and Whiteley (1929) has led the courts into imposing upon the time-honoured expression 'as of right' a new and additional requirement*

of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription ... user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.

5.14 However, if a user admits to private knowledge that no right exists, it could be that the explanation may have an important bearing on the second limb of the statutory test, the intention of the owner not to dedicate. Inspectors should investigate where appropriate.

Landowner's Toleration

5.15 In the same judgment, and in the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Hoffman LJ also held that toleration by the landowner of use of a way is not inconsistent with user as of right. In effect it is not fatal to a finding that use had been as of right. In R *(Beresford) v Sunderland CC [2003]*, Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Although the *Sunningwell* judgment is silent on the relationship between claimed toleration and acquiescence, Lord Scott stated in the *Beresford* case *I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e. toleration or acquiescence, is consistent with the use being "as of right".*

5.16 However, it is clear that permission may be implied from the conduct of a landowner in the absence of express words. Lord Bingham, in the same judgment stated that *a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, record, that the inhabitants' use of the land is pursuant to his permission.* But encouragement to use a way may not equate with permission: As Lord Rodgers put it in *Beresford, the mere fact that a landowner encourages an activity on his land does not indicate ... that it takes place only by virtue of his revocable permission.* In the same case, Lords Bingham and Walker gave some examples of conduct that might amount to permission, but the correct inference to be drawn will depend on any evidence of overt and contemporaneous acts that is presented. (see also 'No Intention to Dedicate' below).

'Bringing into Question'

5.17 *R v SSETR ex parte Dorset County Council 1999* is the most recent case addressing the meaning of s31(2) HA80; specifically what act or acts constitute 'bringing into question.'

5.18 Dyson J was not satisfied that the unusual circumstances pertaining, a landowner's letter to DoE subsequently passed to the OMA but not communicated to the users, satisfied the spirit of s31(2). Inspectors may be perplexed at the fine line drawn between these circumstances and those instanced in s31(6), but the principle emanating from the judgment is clear. The test to be applied is that ennunciated by Denning LJ in *Fairey v Southampton County Council 1956*. Dyson J's interpretation of that judgment is that: *Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway.*

5.19 However, an action which of itself is insufficient to bring a right into question may well be sufficient to demonstrate an intention not to dedicate (see later paragraphs).

5.20 There is no rule of law that the "bringing into question" has to result from the action of the owner of the land or on their behalf. This issue was considered in *Applegarth v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 487* (28 June 2001). The owner of a property whose means of access was via a track claimed to be a public bridleway, challenged the public use of the track even though he was not the owner of it. In this case, Munby J stated: "Whether someone or something has "brought into question" the "right of the public to use the way" is, as it seems to me, a question of fact and degree in every case." Thus any action which raises the issue would seem to be sufficient. In this context the application for or making of a modification order under WCA81 s53 would not normally by itself constitute a "bringing into question" for the purposes of s31. However, where there is no identifiable event which has brought into question the use of a path or way, s31 ss (7A) and (7B) of HA80 (as amended by s69 of NERC06) provides that the date of an application for a modification order under WCA81 s53 can be used as the date at which use was brought into question.

5.21 The Inspectorate considers that the non-existence or disappearance of the landowner is not sufficient to defeat a presumption of dedication. Once use is established as of right and without interruption, the presumption arises. If there is no contradictory evidence in accordance with the proviso to s31(1) deemed dedication is made out and the Order should be confirmed. This is so whether there is an owner who cannot provide sufficient evidence of lack of intention or whether there is no owner available to produce such evidence.

'No Intention to Dedicate'

5.22 Section 31 expressly provides for methods by which to show that during the period over which the presumption has arisen there was in fact no intention on the landowner's part to dedicate the

land as a highway. For instance, under section 31(3) a landowner may erect a notice inconsistent with the dedication of a highway, and if that notice is defaced or torn down, can give notice to the appropriate council under section 31(5). Under section 31(6), an owner of land may deposit a map and statement of admitted rights of way with "the appropriate council". Provided the necessary declaration is made at ten yearly intervals thereafter, the documents are (in the absence of evidence to the contrary) "sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways". This is for the period between declarations, or between first deposit of the map and first declaration.

5.23 The interpretation of the phrase "intention to dedicate" was considered by the House of Lords in R (on the application of Godmanchester and Drain) v SSEFRA [2007] and is the authoritative case which deals with the proviso to HA80 s31. The House of Lords reversed the earlier judgement of the Court of Appeal and rejected the judgements of Sullivan J in R v SSE *ex parte Billson* [1999] and Dyson J in R v SSETR *ex parte Dorset CC* [1999] which had held that a landowner did not need to publicise his lack of intention to dedicate to users of the way. In his leading judgement, Hoffmann LJ approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council* [1956] who held "in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate".

5.24 Hoffmann LJ held 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 owner's intention to be. The test is ... 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), to 'disabuse' [him]' of the notion that the way was a public highway".

5.25 In both *Godmanchester* and *Drain*, evidence in the form of letters between the landowner and the planning authority, and the terms of a tenancy agreement were held by the House of Lords to be insufficient evidence of a lack of intention to dedicate. As these documents had not been brought to the attention of the public the users could not have understood what the owner's intention had been.

5.26 For a landowner to be able to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no such intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must

have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify actions which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".

5.27 *Godmanchester and Drain* upheld the earlier decision of Sullivan J in *Billson* that the phrase "*during that period*" found in s31 (1) did not mean that a lack of intention had to be demonstrated "*during the whole of that period*". The House of Lords did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient; what would be considered sufficient would depend upon the facts of a particular case.

5.28 However, if the evidence shows that the period is very short, questions of whether it is sufficiently long *('de minimis')* may well arise, and would have to be resolved on the facts.

5.29 In the Court of Appeal case *Lewis v Thomas 1949*, Cohen LJ quoted with approval the judgment of MacKinnon J in *Moser v Ambleside UDC 1925*:

> *It was said, very truly, in the passage of Parke, B in Poole v Huskinson (1843) that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner – I mean the owner himself – and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge.*
>
> *The fact that the owner, as is so constantly done, locks the gates once a year and that sort of thing is, or may be, a periodic intimation by the owner that he is not intending to dedicate a highway, but it must be an effective interruption; it must be by the owner himself, because if you have evidence of an interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or again, if it is an attempted interruption by a tenant without the assent or authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication.*

This judgment established a number of principles that still endure.

5.30 However, in the subsequent case *Rowley v SSTLR & Shropshire County Council May 2002*, Elias J held that the acquiescence of a tenant may bind the landowner on the issue of dedication of a public right of way (for example in the case of long public user), but also that in the absence of evidence to the contrary, there is no automatic distinction to be drawn between the actions of a tenant acting in accordance with his/her rights over the property and that of the landowner in determining matters under s31HA80.

> *...seemed acquiescence of the tenant was the basis of the case for the assertion that there was user as of right...it would surely be implied that the tenant would have the right to decide who should be entitled to go on to his land and whom he may forbid. I find it difficult to see why the tenant's acquiescence should bind the landlord, but not positive acts taken by the tenant in accordance with the exercise of his rights over the property, to exclude strangers.*

Elias J continued:

the conclusion...that there was no evidence that any turning back had in any event been authorised by the freeholder involved an error of law. A similar argument was advanced in Lewis v Thomas [[1950] 1 K.B 438] and rejected, the court apparently taking the view that if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that.

No intention to dedicate

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In cases where a claimed right of way is in more than one ownership and only one of the owners has demonstrated a lack of intention to dedicate it for public use, the Inspector should explicitly consider whether it is possible that public rights have been acquired over sections of the way in other ownerships, even if this would result in cul de sac ways being recorded in the Definitive Map and Statement.

User Evidence

5.31 Claims for dedication having occurred under s31 HA80 will usually be supported by a number of user evidence forms.

5.32 The Inspector's own analysis of the forms is vital, so that omissions, lack of clarity, serious inconsistencies, possible collusion between witnesses and other anomalies may be identified. The analysis also allows the Inspector to reject invalid claims (e.g. no signature, no clear description of the way or of how it was being used) and to note the questions to raise at the inquiry. A similar analysis should be made of other types of user evidence that may be tendered, such as sworn statements, letters and the landowner's evidence. It should also be noted that user evidence forms are not standardised, and pose differing questions of varying pertinence and precision. Some are better than others in terms of specifying the evidence required.

5.33 If the potential value of user evidence forms is to be realised in full they must be completed with due diligence. All questions should be answered as accurately and as fully as possible. If questions which, from the claimed duration and extent of use, appear capable of being answered yet are not, it is open to the Inspector to assume that the respondent's recall was insufficient to provide this information. The Inspector may then question whether the claimed use is accurately recalled and the evidential weight of the form may well be reduced.

5.34 Similarly if an overall picture emerges from a variety of sources which differs significantly from the respondents' recollections, or if a particular difficulty which must have been encountered during claimed user is not mentioned, the Inspector may well wonder whether the claimed use is accurately and honestly recalled.

5.35 It is sometimes the case that objectors do not seek to challenge user evidence in cross-examination. If so, the Inspector needs to do so, in order to be in a position to decide what evidential weight to place on the witnesses' claims. If few, or none, of the users attends the inquiry, the Inspector should pose questions to the party presenting the evidence, so that the evidential weight can be determined. As with other evidence, user evidence tested in cross-examination generally carries significantly more weight than untested evidence. While questioning of witnesses needs to be incisive and thorough, Inspectors should be aware that members of the public giving evidence may be nervous or anxious and should deal with them accordingly.

Dedication at Common Law

5.36 'Rights of Way: A guide to law and practice' is a useful source of information. The referenced RWLR article 'Dedication: the common law approach' discusses the relevant principles, and shows how they were applied in practice by giving detailed consideration to the salient facts in reported cases.

5.37 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938*, both quoted with approval by Laws J in *Jaques v SSE 1994*, who described the former's summary as *a full and convenient description of the common law*. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC 1956*, *Mann v Brodie 1885* and *Poole v Huskinson 1843*. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute.

5.38 Halsbury states – "*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance.* And - *An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;* and *At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication".*

5.39 Sometimes dedication at common law will be argued as an alternative, in case the s31 claim fails. In any event, the Inspector should consider common law dedication where a s31 claim fails. Whilst the above principles affecting dedication by landowners and acceptance by user will normally apply in both situations (even though there is no defined minimum period of continuous user in common law), there is an important difference in the burden of proof. As Denning LJ made clear in *Fairey v Southampton County Council 1956 The Rights of Way Act 1932 has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved...* In later describing the effect of the 1932 Act he said: *It reverses the burden of proof; for whereas previously the legal burden of proving dedication was on the public who asserted the right... now after 20 years user the legal burden is on the landowner to refute it.*

5.40 From these comments it follows that, in a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant. For the reasons given by Scott LJ in *Jones v Bates 1938*, this is a heavy burden and, in practice, even quite a formidable body of evidence may not suffice. However, should it be asserted in rebuttal that there was no one who could have dedicated the way, the burden of proof on this issue would rest with the asserting party (Halsbury, above, refers).

5.41 The principles established in *Rowley* (see paragraph 5.24) may, arguably, apply to equivalent issues arising under common law.

Land Held in Trust or Mortgaged

5.42 Halsbury gives useful guidance; Volume 21 para 73 states: *Where a mortgagor (borrower) is still in possession of the mortgaged land it would seem that the mortgagee's (lender's) assent to a dedication is necessary, and that a dedication cannot be inferred from user unless the mortgagee can be shown or presumed to have had knowledge of it.* Trustees of land held on trust for sale generally have power to dedicate on their own provided that no incompatibility is introduced (Halsbury Vol.21 para 74 refers). For leaseholds and copyholds the consent of both landlord and lessee or copyholder would usually be required for dedication. However, Inspectors should always check the detailed wording and provisions of the trust or mortgage document pertaining to the case before them, in case there are specific requirements for enabling powers. A public body can in general create a right of way, provided that the public use would not be incompatible with the purpose of the body. (See also 'Legal capacity to dedicate' in the referenced RWLR articles 'Section 31 of the Highways Act 1980' and 'Section 31: update' and note the provisions of HA80 s31(8)).

Vehicular use post 1930

5.43 Use without lawful authority of mechanically propelled vehicles adapted or intended for use on the roads on footpaths, bridleways and elsewhere than on roads became a criminal offence in 1930. The Countryside and Rights of Way Act 2000 extended this provision to all mechanically propelled vehicles.

5.44 However, lawful authority may be granted by a landowner, and Lord Scott, in *Bakewell Management Ltd v Brandwood* [2004] (in the context of the acquisition of an easement to drive over common land) held that if such a grant could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed. In overruling *Robinson v Adair* (1995), in which it had been held that no presumption of dedication could arise following long illegal user by motor vehicles, Lord Scott stated that

> *However, it was, so I assume for there is nothing to suggest the contrary, open to Mr Adair or his predecessors in title to have dedicated the road as a public highway. Such a dedication would have constituted 'lawful authority' for section 24(1)* [of the Road Traffic Act 1988] *purposes. The dedication would have been effective. That being so, I can see no reason why*

public policy would prevent a presumption of dedication arising from long use.

5.45 A grant would not be lawful if, for example, it gave rise to a public nuisance. The granting of vehicular rights over an existing footpath might constitute a public nuisance to pedestrians using that path.

5.46 Whilst it is therefore possible for long use of bicycles on a footpath or bridleway (subject to paragraph 5.43 below) to give rise to a claim for a BOAT, Inspectors will need to consider whether vehicular use of the way in question has given rise to or is likely to give rise to, a public nuisance i.e. if the use of bicycles has given rise to, or the use in the future of bicycles and/or any other vehicles on the way is likely to give rise to, a public nuisance, the claim for a BOAT must fail. The public nuisance issue is one to be determined by Inspectors by reference to the particular facts before them.

5.47 Use of bicycles on a public bridleway after 3rd August 1968 (the date on which section 30 of the Countryside Act 1968 came into force) cannot give rise to a claim, or be used to support a claim for vehicular rights.

Crown Land

5.48 The Highways Act 1980 does not apply to land belonging to (or held in trust for) the Crown, except under a special agreement as described in HA80 s327. Consequently, there cannot be a presumption of dedication of such land under s31.

5.49 It seems likely that s31 does not apply to land leased to the Crown, because the existence of the lease would take the land outside its scope. Furthermore, the creation of a right of way would adversely affect the Crown's leasehold interest. These arguments do not appear to have been tested in the courts, but, even if they were accepted, they would not prevent an effective presumption of dedication under s31 for a period before or after the Crown's ownership or leasehold of land.

5.50 Under common law, there can be a presumption of dedication of a way over Crown Land. However, there cannot be such a presumption over land requisitioned by the Crown, as there would be no one with power to dedicate *(Jaques 1994).*

Common Land

5.51 Public rights of way over defined routes can and do exist on common land and can be established by deemed dedication through user over a number of years. However, the effect of s193 of the Law of Property Act 1925, which creates (often restricted or conditional) public *rights of access for air and exercise*, may sometimes have to be considered, since it is believed to apply to a

substantial number of commons. This issue is addressed in detail in *R v SSE ex parte Billson 1998*, and useful background information can be found in the RWLR article 'Public Access to Commons' (particularly pages 5,6).

The National Trust

5.52 The Trust has power to dedicate highways by virtue of s12 of the National Trust Act 1939. However, Trust bylaws may be in place and operate as a conditional permission to use the land. Such bylaws prevent a presumed dedication under s31, whether users were aware of them or not. Useful reference can be made to *National Trust v SSE* [1999] JPL 697, holding that the permissive nature of the use of NT land precluded user as of right.

Charities

5.53 Dedication requires the consent of the Charity Commissioners under s36 of the Charities Act 1993, unless the charity is within an exemption granted by or under that section.

Physical Characteristics of a Claimed Way

5.54 In some circumstances the physical characteristics of a way can prevent a highway coming into existence through deemed or inferred dedication. In *Sheringham UDC v Holsey 1904* it was held that use by wheeled traffic of a public footway appointed by an Inclosure Award at 6 feet wide had always been an illegal public nuisance in view of the obstruction and danger to pedestrians, and no length of time could legalise it. Furthermore, there was no one with power to dedicate. Hence there could not have been any dedication of the way as a vehicular highway. In *Thornhill v Weeks 1914*, Astbury J observed that: *it seems impossible that a lady who resided there would at once start dedicating a way through her stable yard ... In trying to form an opinion whether an intention to dedicate has existed, one must have some regard to the locality through which the alleged path goes. The fact that it goes through the stable yard* [close to the house] *is strong enough to raise a presumption against an intention to dedicate.*

5.55 Where physical suitability of a route is argued by parties, referring to gradient, width, surface, drainage, etc., Inspectors should be aware that what may now be regarded as extremely difficult conditions may well have been relatively commonplace and frequently met by stagecoaches, hauliers and drovers in times past, and that special arrangements were often in place to negotiate them.

June Jones v Welsh Assembly Government

CO/8942/2006

High Court of Justice Queen's Bench Division Administrative Court

15 December 2008

[2009] EWHC 3515 (Admin)

2008 WL 5940678

(His Honour Judge Vosper QC sitting as a Deputy Judge of the Queen's Bench Division)

15/12/08

Judgment on the Terms of Relief Pursuant to Written Submissions

His Honour Judge Vosper QC

1 On 28th January 2004 the Ceredigion County Council made an order (Ceredigion County Council (Footpath 49/29/M) Definitive Map Modification Order 2004) under Section 53(2)(b) of the Wildlife and Countryside Act 1981 . The order affected the Claimant's land and she objected. In January 2006 an inspector appointed to consider her objections held an inquiry after which he issued an interim decision letter dated 14th February 2006 in which he stated his intention to confirm the order subject to modification with respect to the route of the footpath. After receiving further written submissions he issued a decision letter dated 28th July 2006 in which he confirmed the order without modification of the route. Significantly, the Claimant's contention that the use of the footpath had been interrupted by the construction of a building on ground over which the footpath is said to run, though irrelevant to the modified route, was relevant to the route as shown in the Council's order and as confirmed. Different dates on which the right to use the footpath was called into question, applied to the different routes. The Claimant contended, as one of her grounds of complaint, that the inspector had failed sufficiently to deal with this interruption.

2 On 16th September 2008 I gave judgment in this case. I decided that the inspector had failed adequately to deal with the question of interruption of the use of the footpath and that his decision could not stand.

3 After giving judgment I asked counsel for their views on the terms of the order. I understood them to be in agreement that all that was required was an order quashing the decision of the inspector. That was the order which I intended to make. I took it that it was agreed that it would be necessary for the inspector to reconsider the evidence relating to interruption of use of the way.

4 It is now contended on behalf of the Claimant that I had no power to quash only the decision of the inspector. Mr Green, counsel for the Claimant, submits that the inevitable consequence of my decision is that the Council's modification order must be quashed. The Defendant disagrees and contends that there are good practical reasons why a court has power to quash only the decision of the inspector leaving the process by which the Council arrived at its modification order intact.

5 I note that an order drafted after I gave judgment purports to quash the decision of the Defendant dated 26th October 2006. Some clarification of that order is required in any event.

6 I have received submissions in writing by Mr Green and Mr Coppel on behalf of the Defendant.

7 The procedure under Schedule 15 to the Wildlife and Countryside Act 1981 , as it applied in the present case, is set out in Mr Coppel's written argument at paragraph 10. It involves eleven stages. In summary the County Council, having come to the

conclusion that there is evidence which shows that a right of way not shown on the definitive map is reasonably alleged to exist and having consulted with every affected local authority, must make an order modifying the definitive map and publicize that order. If there is any objection the Secretary of State (or in Wales the Welsh Assembly Government) must appoint an inspector to hold a local inquiry or to hear representations, and having received the inspector's decision may confirm the order with or without modification. The lengthy and expensive step is plainly the holding of the local inquiry.

8 The Claimant's submissions are based upon the words of paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 , which is in the following terms:

> (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 provision 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.

9 Mr Green submits (at paragraph 10 of his written argument): • 1) that paragraph 12 provides the exclusive means of challenge where a modification order has been made by the Secretary of State; and

• 2) that the only form of relief provided in paragraph 12(2) is an order quashing part or all of the modification order.

10 Mr Coppel submits that the better reading is that paragraph 12(2) is a " dispositive" provision: it confers on the court a power to quash which is not limited to the inspector's decision (the decision directly under challenge) but extends to the Council's modification order. The court's power to quash the inspector's decision is a consequence of the court's jurisdiction to review that decision. It is not restricted by paragraph 12(2) . (See paragraphs 5 to 8 of his written argument.)

11 Counsel have failed to identify any decision of the High Court or of the Court of Appeal in which this issue has been argued and determined. Mr Green, however, relies upon the following decisions which, he submits, are consistent only with, or supportive of the construction of paragraph 12 for which he contends.

12 In Dyfed County Council v Secretary of State for Wales (1990) P&CR 275 the council had made an order under section 53 of the Act modifying the definitive map to show five footpaths including that which was the subject of the appeal. An inspector had refused to confirm three of the footpaths, including the one in dispute in the appeal, and in accordance with his decision the Secretary of State had confirmed the order subject to that modification. The council applied under Schedule 15 to quash the order. The council failed at first instance but succeeded in the Court of Appeal because the inspector had failed to give sufficient reasons to enable the Court to determine whether or not his decision was right in law. At page 280 Sir Nicholas Browne-Wilkinson V-C said:

> " It follows in my judgment (and the Secretary of State does not dissent) that there has been a failure to comply with the requirements of Schedule 15 to the Act of 1981 since there has been a failure to conduct a proper local inquiry. That failure has substantially prejudiced the interests of the county council. Accordingly under paragraph 12 of schedule 15 we have power to

quash the order. In my judgment the order should be so quashed in this case for the reasons that I have given.

Normally I would reach that conclusion with considerable regret, given the time expense and trouble that has already been expended on this case in seeking to establish whether a public right of way exists. However, in this case my regret is tempered by the fact that I suspect that hitherto the matter may have been approached on the wrong basis. It may be helpful to the parties, if they are going to re-consider what should happen in the future, if I explain the doubts which I have."

13 Sir Nicholas Browne-Wilkinson then set out in detail his evaluation of the evidence in the case. He concluded with the words relied upon by Mr Green:

" I have only dealt with the matter at such length in the hope that may help resolve for the future the nature of the rights around this lake rather than give rise to yet further litigation such as that with which we have been dealing.

For myself I would allow the appeal and quash the order made and confirmed by the Minister, leaving it open for the matter to be started afresh."

14 In this case there were five footpaths to be considered, of which only two were confirmed by the Secretary of State, and the Court had doubts about the evidence. This was not a case in which an order quashing only the inspector's decision was likely to be a helpful or suitable remedy, nor did counsel for either party contend for it. Plainly the Court thought that the guidance given would resolve the issue.

15 Mr Green next relies upon R v Cornwall County Council ex parte Huntington [1994] 1 All E R 694 . There the Court of Appeal decided that no application for judicial review could be made before the Secretary of State had confirmed a modification order. There are good reasons why that should be so, not least the desire to avoid delay in the Schedule 15 procedure. However, the Court did not decide that a successful challenge to the order, after it has been confirmed, has the consequence that the procedure must begin afresh.

16 In Jacques v Secretary of State for the Environment [1995] JPL 1031 Laws J allowed an objector's challenge to the decision of an inspector confirming various modification orders and quashed the orders. He said that it was common ground that any order made under the statute [sc on an application under paragraph 12 of Schedule 15] had the effect not merely of quashing the act of confirmation by the Secretary of State's inspector: it meant that the original orders made by the council would be quashed so that the council would have to embark on the statutory process again from the beginning if they sought to persist in the designation of the footpaths as public rights of way. It will be apparent that there was no argument about the powers of the court.

17 In Maltbridge Island Management Company v Secretary of State for the Environment 31st July 1998 CO 540/98 Sullivan J quashed a modification order which had been confirmed by the inspector. He said:

" It is a matter of considerable regret that I do not have power under the 1981 Act to remit the decision [sc of the inspector] for reconsideration. My only power is to quash the order. [Counsel for the Secretary of State] did not submit that I should decline to quash the order in the exercise of my discretion if I concluded that the Secretary of State had erred in law on either of the two grounds that I have identified. It follows that the order must be quashed and this lengthy process must be begun afresh."

18 It seems to me to be plaint that, if he had thought that he had power to do so, Sullivan J would have quashed only the decision of the inspector and remitted the matter for reconsideration by him.

19 In The National Trust v Secretary of State for the Environment [1999] JPL 697 an inspector had confirmed a modification order made by the County Council but it was conceded by the Secretary of State that that his decision could not stand. There was disagreement however about the grounds on which the decision fell to be quashed. Kay J therefore considered the grounds to assist the County Council in considering whether a fresh order should be made in an attempt to avoid further litigation.

20 This was a somewhat unusual case. Kay J was not called upon to consider the remedy. The approach is consistent with Mr Green's submission but not in my judgment inconsistent with the alternative.

21 In Norman v Secretary of State for the Environment, Food and Rural Affairs [2006] EWHC 1881 **(Admin)** , Collins J, having concluded that the decision of an inspector confirming a modification order was flawed, said that it should be quashed and the matter remitted for reconsideration. Leading counsel for the objectors thereupon submitted that the consequence of the decision was that the order was quashed; that there was no order and that the council had to consider whether to start again. Counsel for the Secretary of State did not suggest otherwise.

22 Mr Green also relies upon the decisions of the High Court in Marriott v Secretary of State for the Environment, Transport and the Regions [2001] JPL 559 (in which Sullivan J again quashed an order with regret but did not consider any alternative) and in Todd v Secretary of State for the Environment, Food and Rural Affairs [2004] 1WLR 2471 in which Evans-Lombe J quashed an order.

23 Mr Coppel submits that in none of these authorities was the issue the subject of detailed argument. He refers to the decision of Kay J in Buckland and others v Secretary of State for the Environment Transport and the Regions [2000] EWHC Admin 279 (11th January 2000) in which the Judge quashed the decision of the inspector. It is difficult to know whether, when the order reflecting Kay J's decision came to be drawn up, it provided for remitting the matter to the inspector for reconsideration or whether the modification order was simply quashed.

24 He also refers to Rowley & Anor v Secretary of State for Transport Local Government and the Regions [2002] EWHC 1040 (Admin) (24th May, 2002) . There an inspector after holding an inquiry had confirmed the decision of the county council to make an order modifying the definitive map by the inclusion of a footpath over the objectors' land. Elias J concluded that the decision by the Secretary of State (through the inspector) to confirm the county council's order was made contrary to law. He quashed the confirmation of the order " with the consequence that the modification of the definitive plan and statement resulting from that confirmation shall not take effect." Again it is not entirely clear what were the terms of the order.

25 It might be noted that in both these cases counsel who appeared had also appeared for the Secretary of State in the Maltbridge Island case in 1998 and was counsel for the objector in Norman v Secretary of State in 2006.

26 Mr Coppel also refers to Applegarth v Secretary of State for the Environment Transport and the Regions [2001] EWHC Admin 487 (28th June, 2001) . In that case Munby J upheld the decision of the Secretary of State, based upon an inspector's inquiry, to confirm the modifying order, so the issue which I have to consider did not arise. However the inquiry with which Munby J was concerned was the second inquiry. A different inspector at an earlier inquiry had concluded that the modifying order should not be confirmed. That decision had been challenged by the county council before Carnwath J who had made an order by consent quashing the decision so that the question of confirmation of the order therefore fell to be redetermined by the Secretary of State. The objector and the county council had agreed to proceed before the second inspector by way of written representations rather than by public inquiry. Mr Green would contend that the quashing of the inspector's decision by

Carnwath J lay outside Schedule 15 .

27 At paragraph 11 of his judgment Munby referred to the relief which he had jurisdiction to grant. He said:

> " ... I should make clear the nature of the court's function. [The objector] does not have a right to " appeal" to the High Court. Paragraph 12 of Schedule 15 to the 1981 Act gives him, as a " person aggrieved" a right to " make an application to the High Court" . The effect of paragraphs 12(2) and 12(3) is that I cannot interfere, whatever my own view of the merits of [the objector's] contentions might be, unless I am " satisfied" either (i) that the modification order made by [the council] on ... is not within the powers of sections 53 and 54 of the Act or (ii) that [the objector's] interests have been " substantially prejudiced" by a failure to comply with the requirements of Schedule 15. Even if I am so satisfied my only power is to " quash" the modification order in whole or part. It follows that I have no power to grant [the objector] any declaration or other relief."

28 I agree with Mr Coppel's submission that in none of these authorities was there detailed argument on this issue. He submits that they are indecisive and that the issue falls to be determined. He refers to the general principle that on an application to quash " reconsideration will be the normal course of events" (De Smith 6th Edition paragraph 17-025), and that the court in construing a statute should seek to avoid an impracticable or pointless result (Bennion on Statutory Interpretation 5th Edition pages 971 and 999).

29 He further submits that the inconvenience and expense of beginning the Schedule 15 procedure again, when the only criticism relates to one part of the inspector's decision, is a good policy reason for construing paragraph 12 of Schedule 15 as permitting the court to quash only the inspector's decision.

30 I agree with these arguments and, but for the decision of Sullivan J in the Maltbridge Island case, I would accept Mr Coppel's submissions, quash the decision of the inspector and direct that he redetermine the issue of the interruption of use of the way, either upon the evidence he has already heard or upon such further evidence as he might consider necessary.

31 However that is precisely the course which Sullivan J would have followed in the Maltbride Island case if he had felt able to do so. Although there was no argument on the point before him, he plainly considered that the words of paragraph 12 precluded the making of such an order. That is a conclusion to which he must have come after giving the matter careful consideration even in the absence of argument.

32 The Maltbridge Island case is not binding upon me but I should follow what I infer to be the basis of the decision unless I am persuaded that it is wrong. None of the other authorities leads to that conclusion. Indeed Norman v Secretary of State supports Sullivan J's approach.

33 Accordingly I conclude that Mr Green's submissions are correct. The order must be an order quashing the Ceredigion County Council (Footpath 49/29/M) Definitive Map Modificatio .

34 Further I accept that the Claimant has succeeded on these written submissions and that she should recover her costs of making them.

35 However, I am satisfied that permission to appeal against my decision as to the terms of the order (but not the decision as to the error by the inspector) should be granted if the Defendant wishes to pursue this point. I see no purpose in awaiting an application by the Defendant with its additional costs and delay, when I would grant such permission if sought.

36 Accordingly the order will be in the terms of the draft submitted by Mr Green save that paragraph 4 will provide:

" The Defendant's application for permission to appeal against the finding that the inspector erred in law is refused but the Defendant has permission to appeal as to the terms of the order granting relief."