*727 Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs
Regina (Drain) v Same

Negative Judicial Consideration

Court
Court of Appeal (Civil Division)

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Court of Appeal

Auld , Arden LJJ and Bennett J

2005 Feb 1, 2; July 18; Dec 19

Highway—Right of way—Dedication—Application for modification order adding public footpath to definitive map and statement—Whether overt acts required as sufficient evidence of intention not to dedicate footpath—Whether necessary for evidence of intention not to dedicate to have been brought to users' notice throughout whole of relevant period— Highways Act 1980 (c 66), s. 31

In both cases, an application by the claimant to the surveying authority for a modification order under section 53 of the Wildlife and Countryside Act 1981 to add a public footpath to the definitive map and statement of the local area was refused, but following a successful appeal the Secretary of State for the Environment, Food and Rural Affairs directed the making of the order. When the landowner in each case objected, the order was submitted for confirmation to the Secretary of State whereby an inspector was appointed and a public local inquiry was held. In each case the inspector concluded that, in relation to the proviso in section 31(1) of the Highways Act 1980 [1] , there was sufficient evidence of a lack of intention to dedicate a footpath during the relevant 20-year period and that the order should not be confirmed. The claimant in both cases sought judicial review of the inspector's decision. The Divisional Court of the Queen's Bench Division dismissed the claims for judicial review.

On the claimants' appeals—

Held , dismissing the appeals, that the words "unless there is sufficient evidence that there was no intention during that period to dedicate" in section 31(1) of the 1980 Act were not intended to make it easier for the public to establish a way as a highway when confronted with a landowner's contrary intention; that they were concerned with the landlord's intention and its proof and did not require the landlord to have communicated to users his lack of intention to dedicate; that there was no statutory threshold as to sufficiency of evidence nor any restriction on the type of evidence required, and it was for the fact-finder to determine in the particular case, usually as a matter of weight, whether the evidence was sufficient to rebut the presumption, though it would be rare for evidence to be regarded as sufficient without proof of some overt and contemporaneous act;

that the word "during" in the proviso did not mean "throughout", so that a landlord could satisfy the proviso by showing no intention to dedicate in the same period as the user relied on, which could be manifested by a single act; and that, therefore, the inspector's decisions had been correct in law (post, paras 57, 60, 63–64, 76, 78, 84, 86, 96, 98, 101, 102).

R v Secretary of State for the Environment, Ex p Billson [1999] QB 374 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396 approved* .

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Dictum of Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439, 458, CA disapproved* .

Decision of the *Divisional Court of the Queen's Bench Division [2004] EWHC 1217 (Admin); [2005] 1 WLR 926; [2004] 4 All ER 342 affirmed* .

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Barraclough v Johnson (1838) 8 A & E 99
Blount v Layard (Note) [1891] 2 Ch 681, CA
British Museum (Trustees of the) v Finnis (1833) 5 C & P 460
Fairey v Southampton County Council [1956] 2 QB 439; [1956] 3 WLR 354; [1956] 2 All ER 843, CA
Jaques v Secretary of State for the Environment [1995] JPL 1031
Jones v Bates [1938] 2 All ER 237, CA
Mann v Brodie (1885) 10 App Cas 378, HL(Sc)
R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)
R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587
R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101
R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851, CA
R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396
R (Ashbrook) v East Sussex County Council [2002] EWCA Civ 1701; [2003] 1 P & CR 191, CA
R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)
Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996, CA
Ward v Durham County Council (1994) 70 P & CR 585, CA

The following additional cases were cited in argument:

Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425; [1991] 3 WLR 1126; [1992] 1 All ER 230, HL(E)
Brocklebank v Thompson [1903] 2 Ch 344
Coats v Herefordshire County Council [1909] 2 Ch 579
Folkestone Corpn v Brockman [1914] AC 338, HL(E)
Healey v Batley Corpn (1875) LR 19 Eq 375
Huddersfield Police Authority v Watson [1947] KB 842; [1947] 2 All ER 193, DC
Hue v Whiteley [1929] 1 Ch 440
Lewis v Thomas [1950] KB 438; [1950] 1 All ER 116, CA
O'Keefe v Secretary of State for the Environment [1996] JPL 42

Poole v Huskinson (1843) 11 M & W 827
R (Kadhim) v Brent London Borough Council Housing Benefit Review Board [2001] QB 955; [2001] 2 WLR 1674, CA
R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102
Vernon v Vestry of St James, Westminster (1880) 16 Ch D 449
Williams-Ellis v Cobb [1935] 1 KB 310, CA

The following cases, not cited in argument, were referred to in skeleton arguments:

Chinnock v Hartley Wintney Rural District Council (1899) 63 JP 327
Leckhampton Quarries Co Ltd v Ballinger (1904) 20 TLR 559
Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77; [1936] 2 All ER 422 ****729***
Moser v Ambleside Urban District Council (1924) 89 JP 59
R v Inhabitants of East Mark Tithing (1848) 11 QB 877
R v Lloyd (1808) 1 Camp 260

APPEALS from the Divisional Court of the Queen's Bench Division

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs

By a claim form filed on 19 June 2003 the claimant, Godmanchester Town Council, sought judicial review of the decision contained in a letter dated 21 March 2003 of Helen Slade, an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs by which she had refused to confirm the Cambridgeshire County Council (Public Footpath No 15 Godmanchester) Definitive Map Modification Order 2002, made on 20 March 2002 following the claimant's application to the council as surveying authority for a modification order adding to the definitive map and statement a public footpath around the perimeter of Monks Pit, Godmanchester, linking two points already shown on the Cambridgeshire definitive map as Public Footpath No 4 Godmanchester. On 22 July 2004 the Divisional Court of the Queen's Bench Division dismissed the claim.

By an appellant's notice dated 25 August 2004, and pursuant to permission granted by the Court of Appeal (Clarke LJ) on 4 October 2004, the claimant appealed on the grounds that the Divisional Court had erred in law in failing to hold (1) that on a true construction of section 31(1) of the Highways Act 1980 the proviso applied only where there was evidence of some acts on the part of the landowner showing that he had no intention to dedicate the way during the relevant 20-year period which were overt in the sense that they came or were likely to come to the attention of users; and/or (2) that "during [that period]" in section 31(1) meant "throughout that period".

The facts are stated in the judgment of Auld LJ.

R (Drain) v Secretary of State for the Environment, Food and Rural Affairs
By a claim form filed on 27 August 2003 the claimant, Leslie Ernest Drain, acting on behalf of the Ramblers' Association, claimed judicial review of a decision contained in a letter dated 9 June 2003 of Helen Slade, an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs by which she had refused to confirm the West Berkshire District Council Definitive Map and Statement Modification Order 2000, made on 4 September 2000 following the claimant's application to Berkshire County Council, the then surveying authority, for a modification order adding to the definitive map and statement a public footpath in the parishes of Streatley and Aldworth linking Byway 24 Aldworth to Footpath 7 Streatley. On 22 July 2004 the Divisional Court of the Queen's Bench Division dismissed the claim.

By an appellant's notice dated 25 August 2004, and pursuant to permission granted by the Court of Appeal (Clarke LJ) on 4 October 2004, the claimant appealed on grounds similar to those advanced in the appeal of Godmanchester Town Council. The appellant also sought permission to appeal on the additional ground that clause 17 of a 1950 tenancy agreement between the then landlord Lord Iliffe and a tenant could not be adduced as ****730*** evidence of the intentions of the interested party, the current landlord, Yattendon Estates Ltd.

The facts are stated in the judgment of Auld LJ.

George Laurence QC and *Ross Crail* for the claimants. The proviso to section 31(1) requires evidence of public acts by the landowner showing an intention not to dedicate. Denning LJ's view in *Fairey v Southampton County Council [1956] 2 QB 439*

, 458 is to be preferred to that of Laws J in *Jaques v Secretary of State for the Environment [1995] JPL 1031* , Sullivan J in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* and Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , 855–857. [Reference was also made to *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* ; *Ward v Durham County Council (1994) 70 P & CR 585* ; *O'Keefe v Secretary of State for the Environment [1996] JPL 42* and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* .] A purely private intention not to dedicate cannot satisfy the proviso.

The Divisional Court was constrained to follow the approach adopted in *Dorset* and *Billson* unless "convinced" that those cases were wrongly decided: see *Huddersfield Police Authority v Watson [1947] KB 842* . [Reference was also made to *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board [2001] QB 955* .] The Court of Appeal, as a court of superior jurisdiction, is free to revisit the question of construction. The word "during" in the proviso means "throughout". There must be sufficient evidence of an intention not to dedicate for the whole 20-year period.

Where the common law required an inference of an "actual" dedication rather than toleration from long user as of right (see *Mann v Brodie (1885) 10 App Cas 378* , 386; *Folkestone Corpn v Brockman [1914] AC 338* , 352–358, 361–367, 375; *Trustees of the British Museum v Finnis (1833) 5 C & P 460* ; *Barraclough v Johnson (1838) 8 A & E 99* and *R (Beresford) v Sunderland City Council [2004] 1 AC 889*) section 31 gave rise to a presumption of dedication from long and uninterrupted user as of right in the absence of specific rebutting evidence: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 358–359. [Reference was also made to *Vernon v Vestry of St James, Westminster (1880) 16 Ch D 449* ; *Lewis v Thomas [1950] KB 438* ; *Healey v Batley Corpn (1875) LR 19 Eq 375* ; *Coats v Herefordshire County Council [1909] 2 Ch 579* ; *Williams-Ellis v Cobb [1935] 1 KB 310* and *Brocklebank v Thompson [1903] 2 Ch 344* .] The object of the 1932 and 1980 Acts was to facilitate establishment of prescriptive rights to public ways: see *Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425* , 432. It focused on what the landowner did rather than what he thought. "Sufficient" evidence to satisfy the proviso is proof of acts that were (1) overt, (2) contemporaneous and (3) came, or were likely to come, to the attention of users of the way in question. The pre— *Sunningwell* cases were decided in the context of a misapprehension that the concept "as of right" entailed a subjective belief on the part of users of the way that they had a right to use it: see *Hue v Whiteley [1929] 1 Ch 440* ; *Jones v Bates [1938] 2 All ER 237* and *R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102* .

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The inspector in the Godmanchester case was wrong in law to conclude that the letter of 27 July 1990 amounted to "sufficient evidence" to satisfy the proviso, and the Divisional Court erred in law in upholding her decision. The letter was not a document that users of the way in question saw or were likely to see. Even if it was otherwise otherwise sufficient, it could not satisfy the proviso because it was written over 11 years into the material 20-year period, since the intention not to dedicate had not been present throughout the period. The provisions in section 31(3)–(6) show that the kinds of evidence that will suffice are acts of a public nature likely to bring the matter to the attention of users of the way. By no means all acts of landowners directed to users of their intention not to dedicate would be sufficient to bring home to the public that they had no right to use the way or that it was being challenged for the purpose of section 31(2) . The word "during" may mean "at some time or times during" or "throughout". As part of the expression "during that period" the word is more consistent with "throughout". This would mean that evidence would satisfy the proviso only if its effect subsisted throughout the 20-year period. The proviso could be satisfied by a continuous intention not to dedicate: see *Ex p Cowell [1993] JPL 851* and *Fairey v Southampton County Council [1956] 2 QB 439* . The effect of the acts relied on must cover the whole period.

Between 1932 and 1949 section 1(1) of the 1932 Act contained a second proviso, in which the word "during" appeared and clearly meant "throughout". The deletion of the second proviso by the National Parks and Access to the Countryside Act 1949 cannot have altered the meaning of the word "during" in the section as it now stands, which must also be read so as to mean "throughout".

Timothy Mould for the Secretary of State. The Divisional Court decision was correct. Nothing in the proviso requires publication to any third party. Section 31(1) should be read in conjunction with the examples in section 31(3)(6) of what will amount to sufficient evidence not to dedicate. The example of notice to a local authority made no provision for the absence of intention to dedicate to be drawn to the attention of users of the way. The purpose of section 31(1) was to relieve those asserting the public right of way on the basis of public enjoyment of it from having to prove actual dedication: see *Fairey v Southampton County Council [1956] 2 QB 439* , 460.

At common law the creation of a highway always depended on the landowner being shown to have had the intention to dedicate the way as a highway: see *Poole v Huskinson (1844) 11 M & W 827* , 830; *Folkestone Corpn v Brockman [1914] AC 338* ,

352–353 and *Mann v Brodie 10 App Cas 378* , 386. But juries were at liberty to infer toleration rather than dedication: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 352–353.

Whether the evidence adduced by a landowner to show lack of intention to dedicate is sufficient is a matter of fact to be determined in each case: see *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* . The proviso enabled the landowner to show by overt and contemporaneous act that he had not intended to dedicate the way: see *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* . [Reference was also made to *Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425* and *Jones v Bates [1938] 2 All ER 237* .]

Edwin Simpson , for Yattendon Estates Ltd as an interested party, adopted the submissions of the Secretary of State.

Laurence QC replied.

Cur adv vult

19 December. The following judgments were handed down.

AULD LJ

Introduction

1. In both of these appeals, which come to this court by permission from Clarke LJ, the appellants, Godmanchester Town Council ("Godmanchester") and Dr Leslie Ernest Drain, raise two main questions on the interpretation and application of what is frequently referred to as "the proviso" in the concluding words of section 31(1) of the Highways Act 1980 . Section 31(1) , which repeats an earlier provision in section 1(1) of the Rights of Way Act 1932 , provides a rebuttable presumption of the dedication of a way as a highway after user of it by the public as of right and without interruption for 20 years.

2. Part III of and Schedule 15 to the Wildlife and Countryside Act 1981 impose on a local authority, as a surveying authority for the purpose, a duty to maintain a definitive map and statement of public rights of way within its area. It also has a duty to modify the map and statement when there arises under section 31(1) and (2) of the 1980 Act an unrebutted presumption of dedication of a way as a public footpath as a result of 20 years' public use of a way as of right and without interruption, the 20 years ending with the date when the right of the public to use it was brought into question. If a local authority makes such an order, either of its own volition or, after its refusal to do so, by direction of the Secretary of State, it does not take effect in the event of objection until confirmed by the Secretary of State.

3. Section 31(1) and (2) provide:

> "(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* ." (My italics.)
>
> "(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…"

Thus, these provisions enable the deemed dedication of a way as a highway if: (1) it is of such a character that use of it by the public could give rise at common law to a presumption of dedication; (2) it has been enjoyed by the ***733*** public for a full period of 20 years ending at the date when the public right to use it was "brought into question"; (3) such enjoyment has been "as of right"; (4) such enjoyment has been without interruption; and (5)-the proviso-there is no "sufficient" evidence that there was no intention during that period to dedicate it as a highway.

4. The two main questions raised by the appeals are: (1) whether evidence, to be capable of sufficiency for the purpose of the proviso, must be of communication of no intention to dedicate to members of the public using the way or of conduct that was likely to bring such intention to their notice; and (2) whether it is enough for the landowner to establish that there was no

intention to dedicate for a part or parts of the period, or whether he has to show that there was no such intention throughout the full period-in short, whether in this context, "during" means "throughout".

5. In Dr Drain's case, there is a further subsidiary issue raised by way of an application for permission to appeal adjourned to this court by Clarke LJ, arising out of the particular facts and a finding of the inspector. It is whether the terms of a tenancy granted by the owner of a freehold reversion constituted evidence from which it could be inferred that the owner had had no intention to dedicate the way to the public.

6. These issues came before a Divisional Court consisting of Maurice Kay LJ and Richards J, by way of claims for judicial review of decisions of the inspector appointed by the Secretary of State not to confirm modification orders, made pursuant to section 53 of the 1981 Act, to add public footpaths to the definitive map and statement of rights of way maintained by the relevant authority.

7. The Divisional Court *[2005] 1 WLR 926* found against Godmanchester and Dr Drain respectively on all three issues. On the two main issues it held, approving and following decisions of Sullivan J in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , and Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , that the proviso's requirement of "sufficient evidence" of an intention not to dedicate, does not require a landowner: (1) to have taken steps to communicate that intention to public users of the way, or to have taken such other steps as were likely to bring it to their attention; or (2) to show a continuous intention throughout the 20 year period not to dedicate-in short, that "during" does not mean "throughout".

8. On Dr Drain's subsidiary issue, the court upheld the inspector's reasoning on the facts of the case, "not as a bare finding on the legal consequences of succession to and continued existence of the tenancy agreement", but on the basis that there had been an overt and contemporaneous expression by the landowner of its intention not to dedicate.

9. In the Godmanchester claim for judicial review, there was one interested party, Cambridgeshire County Council, the relevant surveying authority, but it took no part in the proceedings before the Divisional Court or on this appeal. In Dr Drain's claim, the interested party is the landowner, Yattendon Estates Ltd ("Yattendon"), which, through counsel, Mr Edwin Simpson, took part in both proceedings in support of the Secretary of State's case.
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The facts

The Godmanchester appeal

10. In August 1999 Godmanchester applied to the Cambridgeshire County Council for a modification order to add to the Cambridgeshire Definitive Map and Statement a public footpath around a pool known as Monks Pit in Godmanchester. The proposed public footpath linked two points on another footpath, already shown on the definitive map and statement as "Public Footpath No 4 Godmanchester". On 20 March 2002 the council made the order sought. The owners of the land over which the existing and proposed public footpaths run, the Church Commissioners, objected. On submission of the matter to the Secretary of State for confirmation, he appointed an inspector, Helen Slade, to conduct a public local inquiry. By a decision letter of 21 March 2003, following such inquiry, the inspector declined to confirm the order.

11. The inspector, in her decision letter, found that the proposed public footpath had been used by the public as of right and without interruption for 20 years up to April 1999. That was the date upon which the public's right to use the way had been brought into question under section 31(2) of the 1980 Act by the Church Commissioners' erection of a fence across its route. In para 24 of her decision letter, having directed herself to the guidance of Sullivan and Dyson JJ by reference to the latter's judgment in *Ex p Dorset County Council [2000] JPL 396* , she proceeded on the basis that the intention not to dedicate referred to in section 31(1) of the 1980 Act had to be overt as well as contemporaneous, but not necessarily communicated to users of the way. And, in para 30, she found that there was sufficient evidence of no such intention, namely a letter from Smiths Gore, the Church Commissioners' land agents, of 27 July 1990 to the County Planning Officer commenting on certain landscaping proposals of the council for the area around Monks Pit. The letter included the following note of concern about the use of the perimeter of the pool as a footpath:

> "A point of major concern to us is trespass which seems to have increased significantly since the improvements to the surface of the footpath were carried out in 1989. Despite our attempts thus far to prevent it, trespass seems to continue and

there has even been some illegal use of the water area… We are somewhat reluctant to erect security fencing to prevent pedestrian trespass around those parts of the pit which are not designated as a public footpath but clearly something has to be done to prevent illegal access to land if the public is unwilling to restrict its movement to the definitive line of the footpath. Your comments on this point, in particular, would be appreciated."

12. The inspector interpreted those expressions of concern as indicating that the Church Commissioners did not want any pedestrian access around the pool and that, on their own, they were sufficient evidence of lack of intention to dedicate for the purpose of section 31(1) :

"30. …this letter is contemporaneous as it was written during the period of 20 years' use prior to 1999. It is also overt in that it was a letter written openly to a local authority department as part of the planning process connected with the permission to reinstate the area, following the ***735** remedial road works to the A14. As I have indicated in para 24 above, it is not necessary for the contents of this letter to have been made known to the users of the path for it to satisfy the criteria of the 1980 Act. I must therefore conclude that it does constitute evidence of a lack of intention to dedicate, expressed during the relevant period, and thus the claim does not satisfy section 31 of the 1980 Act."

13. Accordingly, the inspector concluded that the presumption under section 31(1) of dedication of the way as a public footpath by reason of 20 years' public user as of right and without interruption had been rebutted by the Church Commissioners under the proviso. She also found that it had not been dedicated as a highway at common law, with the result that she declined to confirm the council's modification order.

Dr Drain's appeal

14. Dr Drain, who acts on behalf of the Ramblers' Association, appeals from a decision by the same inspector, of 9 June 2003, not to confirm a modification order made by the West Berkshire District Council to modify the Definitive Map and Statement for West Berkshire by adding a public footpath over Westridge Manor Farms, part of the Yattendon Estate, Streatley in Berkshire.

15. The evidence before the inspector established to her satisfaction that: on 31 October 1950 Lord Iliffe, the then owner of the Yattendon Estate, granted an agricultural tenancy to Mr Thomas Maidment; in 1955 Yattendon was formed to manage the affairs of the estate, and it became Mr Maidment's landlord by assignment of the reversion to the tenancy; and the agreement was still in force in 1986 when Mr Maidment retired. Clause 17 of the tenancy agreement had obliged him:

"To warn and keep off all unauthorised persons from… trespassing over any part of the farm to give notice to the landlord of any continued acts of trespass and not to allow any footpaths to be created. To permit the landlord to take proceedings against trespassers… in the tenant's name. To lay information and give evidence and sign if required notices to trespassers and others to keep off the farm."

16. The inspector concluded that the way in question had been used by the public as of right and without interruption for a period of 20 years up to 1992, when Yattendon, by the erection of signs, had brought into question the public's right to use it as a footpath. However, she concluded that the proviso was satisfied because, although Yattendon had not before 1992 communicated its intention to users of the way not to dedicate it, the agreement of 31 October 1950 had remained in force until about 1986, that is, for a substantial part of the relevant 20 years' period. In the circumstances she held that the provisions of clause 17 of the lease had amounted to an overt and contemporaneous expression by Yattendon of an intention not to dedicate. In doing so, she again relied, in paras 50 and 51 of her decision letter, upon the guidance of Sullivan J in *Ex p Billson [1999] QB 374* and of Dyson J in *Ex p Dorset County Council [2000] JPL 396* . The core of her reasoning is to be found in para 51: ***736**

"As the agreement was still extant in 1986, it was in force for a substantial part of the 20-year period I am considering… The tenancy agreement was therefore in my view an overt and contemporaneous expression of the wishes of the landlord in respect of the tenant's management of the property. The judgment in *Billson* makes it clear that the lack of intention to dedicate does not have to be demonstrated throughout the whole period of 20 years, as long as it is manifest for a sufficient part of it. I consider that 14 years (1972 to 1986) is a sufficient period to qualify. The accepted interpretation of

> the proviso means that to satisfy the requirements of section 31 of the 1980 Act the tenant did not need to put the terms of the clause sufficiently into practice to bring home to users that his landlord had no intention of dedicating any public rights of way across the land… I conclude that the existence of clause 17 in the tenancy agreement is sufficiently overt and contemporaneous to satisfy the proviso. I consequently consider that there is sufficient evidence of a lack of intention to dedicate the public right of way during the relevant period."

17. Accordingly, the inspector concluded, as she had done in the Godmanchester inquiry, that the way had not been dedicated pursuant to section 31(1) , including its proviso, and that it had not become a highway at common law. Accordingly, she declined to confirm the modification order.

Issue 1— sufficiency of evidence to satisfy the proviso

18. For the sake of convenience of marshalling the various arguments, I deal first with this major issue of appeal-sufficiency of evidence-on its own. However, as Mr George Laurence, for Godmanchester and Dr Drain, and Mr Tim Mould, for the Secretary of State, agreed, it and the second issue-whether "during" means "throughout"-bear upon the construction of each other, particularly when considered in the context of section 31 as a whole. Their meanings are also partly informed by looking at some of the difficulties of prescription of public ways at common law, giving rise to this statutory addition to the public's armoury of prescriptive rights. I use the word "addition" because the statutory scheme does not replace the common law; it is an alternative to it where the period of prescriptive use relied upon is one of 20 years; common law prescription is expressly preserved in section 31(9) of the 1980 Act.

The purpose of the legislative change in 1932 and its treatment by the authorities

19. At common law, the creation of a highway depended upon proof that the owner of the land over which the way ran had intended to dedicate it as such. In practice that intention generally fell to be inferred from long public user of the way since 1189, subject to similar criteria as that required for private rights of way. The problem at common law lay in the uncertainty, not only of establishing a sufficient duration and quality of use as of right and without interruption, but also of proving actual dedication, or of establishing from the long user an inference of it, as distinct from it being a product of the landowner's toleration of trespassers.

20. This uncertainty led to the statutory predecessor of the 1980 Act, the 1932 Act, section 1(1) of which eased proof of dedication, without altering ***737** the common law as to the manner in which public rights of way were deemed to have arisen. It retained the common law requirements of user as of right and without interruption, but it removed the requirement of proof of dedication or of long enough user to infer it, creating as an alternative a statutory presumption of dedication on proof of 20 years of such user: see *Fairey v Southampton County Council [1956] 2 QB 439, 460, per Birkett LJ* . Like the statutory presumption continued in the 1980 Act, that of the 1932 Act, in section 1(6) was rebuttable by "sufficient" evidence from the landowner that he had no intention during that period to dedicate: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335, 351–353, per Lord Hoffmann* .

21. Section 31 of the 1980 Act replaced section 1 of the 1932 Act, including its preservation of the ability to establish dedication of a way as a highway at common law, including, where appropriate, proof of use for a shorter period than 20 years. It also replaced in substance a number of provisions in section 1 of the 1932 Act identifying two means-overt acts-by which a landowner could show sufficient evidence for the purpose of the proviso of his intention not to dedicate, namely the erection of notices on the land and the serving of a notice or deposit of a map and statement, coupled with a confirmatory statutory declaration, with the relevant local authority. It is plain, as Dyson J observed in *Ex p Dorset County Council [2000] JPL 396* , 407, that those provisions do not provide an exhaustive list of what may constitute sufficient evidence of an intention not to dedicate. They are examples of what, as a matter of law, will, in the absence of proof to the contrary, amount to sufficient evidence for the proviso or, in certain instances (see e g section 31(2) and (3)), to bring the right of the public to use the way into question, thus identifying and bringing to an end the relevant 20 years' period. I set out here those provisions, and, for convenience, repeat section 31(1) and (2) :

> "(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… 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 1 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.

"(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in ***738** subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

"(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 that six inches to one mile, and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways; and, in any 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 six years from the date of the deposit, or

(ii) within six 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 lodgment 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."

As can be seen, the only guidance in the proviso to section 31(1) as to what evidence is necessary to show an intention not to dedicate is that it should be "sufficient". For example, it does not specify or indicate whether and, if so, to whom or what class of persons, a landowner has to direct or make known that intention.

22. It would be wrong not to start the jurisprudential story of these provisions or those of their predecessors in the 1932 Act without a reference to an obiter dictum of Denning LJ, in *Fairey v Southampton County Council [1956] 2 QB 439* , 458, on the effect of the identically worded 1932 Act proviso. He said that, for there to be sufficient evidence of no intention to dedicate, it had to be "evidence of some overt acts on the part of the landowner such as to show the public at large-the public who used the path… -that he had no intention to dedicate":

"He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right: see *Mann v Brodie (1855) 10 App Cas 378* , 386. Such evidence may consist, as in the leading case of *Poole v Huskinson (1843) 11 M & W 827* , of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate."

23. The case concerned the computation of the 20 years' period by reference to when the public's right to use the way was "brought into question" pursuant to section 1(6) of the 1932 Act (now section 31(2) of the **739* 1980 Act), not the operation of the proviso in section 1(1) of that Act, albeit that there is some overlap between the two. Hence, as I have said, Denning LJ's observation as to the meaning and effect of the proviso was obiter, and neither Birkett LJ nor Parker LJ, with whom he was sitting, expressed assent to it. Moreover, in the light of the meaning of use as of right, as it is now clearly understood (see *Ex p Sunningwell Parish Council* , at para 29 below) Denning LJ's contemplation that evidence to be sufficient needed to be such as would disabuse users of their belief in their right to use the way has caused some confusion between what is necessary to create a rebuttable presumption of dedication and what the proviso requires a landowner to do to rebut it.

24. *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , is strong persuasive authority for the view that the question of sufficiency of evidence for the purpose of the proviso is a question of fact for the tribunal to determine in each case. I say persuasive, because, although that was the clear view of Rose LJ, who gave the leading judgment, the meaning of the proviso did not directly arise for consideration. The two counter-balancing aspects of section 31(1) as to use as of right and as to the application of the proviso had become intermingled in the inquiry conducted by the inspector. However, there clearly was more than sufficient evidence to satisfy the latter in the landowner's yearly charge of a toll to users at one end of the way and the erection of a locked gate at another entrance to it. Rose LJ, with whom Staughton and Balcombe LJJ agreed, rejected a broad submission from Mr Laurence, on behalf of the appellant in that case, that the 1980 Act and its predecessor had fundamentally altered the common law by introducing much more stringent requirements on a landowner than hitherto if he sought to rely on evidence of no intention to dedicate. Rose LJ expressed the view, obiter, at p 855, that the proviso did not limit "sufficient evidence" of no such intention to, or by, the matters referred to in section 31(3)–(6) , although proof of such matters would provide sufficient evidence in a particular case. He said, at pp 855 and 856, that the sufficiency of evidence in other cases would necessarily vary from case to case and whether there was sufficient evidence of a lack of intention to dedicate was a matter of fact to be determined by the tribunal of fact in accordance with the evidence in the particular case. Staughton LJ, also obiter, while agreeing that it was a matter of fact for determination in each case, indicated, at p 857, tentative agreement with Denning LJ's approach in *Fairey v Southampton County Council [1956] 2 QB 439* , saying that, in the light of section 31(3)–(6) "perhaps it was right to say that evidence of intention had always to be in the form of overt acts".

25. In *Jaques v Secretary of State for the Environment [1995] JPL 1031* , Laws J upheld the landowner's appeal concerning the section 31(1) proviso, in which the inspector had found that he had, by overt acts directed at users of the way in question, including the erection of locked gates and of fencing and of notices, disproved any intention on his part to dedicate. In the course of his judgment, he took the opportunity to reflect on the conjunction in the statutory scheme of use as of right, in the sense of use in the belief of such right, and the sufficiency of evidence on behalf of a landowner of an intention not to dedicate. His conclusion was a slight, but significant, modification of Denning LJ's approach in *Fairey's* case, which had clearly contemplated the need to communicate such **740* intention to the users of the way. Laws J's approach was that the landowner had to prove the intention by overt acts "directed" to, though not necessarily brought home or communicated to the public. This is how he put it, at pp 1037–1038:

> "Quite plainly, the second part of section 31(1) imported a further requirement. It meant that *even if* use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate. The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to have made it clear to the public that they had *no* right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part. That was not a very satisfactory state of affairs. It was plain that the landowner had to disprove an intention to dedicate by overt acts directed to the members of the public in question, but equally plain that they need not actually bring home to the public that there was no right to use the way. He could only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private would be enough for the landowner's purposes in relation to the second part of the subsection, though they did not in fact bring home to the public his objection to their using his land." (Emphasis in original.)

26. Three years later, in *Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996* , where the issue concerned the application, though not the meaning, of the proviso, Hobhouse LJ, with whom Staughton and Millett LJJ agreed, adopted at least part of Denning LJ's approach in *Fairey's*

case holding that the absence of intention to dedicate had to be "objectively established by overt acts of the landowner". Later he stated that "it was for the objectors to persuade the inspector that the owners of the land had during the material period sufficiently *demonstrated* an intention not to dedicate the footpath" (my italics). In his use of the word "demonstrated", he was, as is apparent, adding to the language of the proviso, which simply requires, as a matter of construction, sufficient evidence of such intention. As to the significance or otherwise of the way in which he expressed its effect, it should be noted that the principal issue in that case was whether the inspector had been entitled to find that evidence of the particular overt acts of negative intention relied upon by the landowners were sufficient for the purpose, not as to whether the landowners had no need to rely on overt acts of their negative intention. So, the issue that Mr Laurence had included in his broad submissions to the court in *Ex p Cowell* and which he puts as the first issue in these appeals, was not before the court in *Beresford's* case, where the issue was not as to the need for publication or communication but as to the unequivocal nature of the acts of communication relied on. It is clearly not a reasoned decision as to the meaning of the proviso so as to bind this court. I add that the case does not appear to have been cited in subsequent cases concerning the proviso, and was not before the Divisional Court in this case.

27. Again, in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , the issue of the meaning of the proviso, in particular, as to ***741** the need for communication by a landowner of his intention not to dedicate, was not before the court. Sullivan J upheld the inspector's decision that the 20-year user of the land relied upon by the applicant for the modification was not "as of right" because a revocable deed by the landowner's predecessor under section 193 of the Law of Property Act 1925 rendered the use as by way of licence; so there was no need to consider the proviso. However, again in response to broadly based submissions from Mr Laurence, Sullivan J, taking note of an observation of Staughton LJ in *Ex p Cowell [1993] JPL 851* , 857, that the two parts of section 31(1) may overlap, went on to consider it, obiter. In the following passage he plainly indicated his view that there was no need for evidence of communication to users of the way of an intention not to dedicate or for evidence of continuity of such intention throughout the 20-year period *[1999] QB 374* , 394–396:

> "The authorities cited by Mr Laurence, *Ex p Blake [1984] JPL 101* , *Ex p Cowell [1993] JPL 851* , *Ward v Durham County Council (1994) 70 P & CR 585* and *O'Keefe v Secretary of State for the Environment [1996] JPL 42* … do no more… than establish the proposition that evidence of the landowner's intention must be overt and contemporaneous. Thus, it will not avail the landowner to assert after the event that he had no intention to dedicate, but he is not required to publicise his intention to users of the way. The only dicta to the contrary are those of Denning LJ in *Fairey* … Mr Laurence accepts that they were obiter. In so far as they equate the evidence necessary to satisfy the proviso with the evidence necessary to bring home to the public that their right to use the way is being called into question, they go too far… Implicit in Mr Laurence's submissions is the existence of a very fine line between acts that are sufficiently 'open and notorious' to be capable of bringing the landowner's intention not to dedicate to the attention of the public, and those which are not so open and notorious that they succeed in bringing the user of the way into question. His approach seems to me to leave little if any scope for the operation of the proviso. The landowner must not keep his intention locked in his own mind, but whether his acts are fairly described as overt or covert must be a question of fact for the inspector… I do not accept Mr Laurence's submission that for the proviso to operate at all there must be evidence that there was no intention to dedicate for the whole of the 20-year period. Whilst 'that period' is a reference back to the 20-year period, 'during that period' is not to be equated with 'throughout that period'. Thus, if there is sufficient evidence that for say five or ten years during the 20-year period a landowner who objected to riders or walkers across his land had no intention to dedicate, that would defeat a claim of dedication under section 31(1). I consider that such an approach is consistent with that adopted by Balcombe LJ in *Ex p Cowell* … in respect of the effect of a section 31(3) notice which is not maintained throughout the whole of the relevant period. It is effective for the period during which it is maintained. If the evidence shows that there was no intention to dedicate for only a very short period during the 20 years questions of de minimis may well arise. They would have to be resolved on the facts by the inspector hearing the evidence."

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28. In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , the question as to the need for communication to users of an intention not to dedicate was squarely before the court. There, the inspector had accepted as sufficient evidence of such intention a letter written on the landowners' behalf during the relevant 20 years' period to the Department of the Environment, objecting to a proposed revision of the map on the basis that there was no evidence of dedication. Dyson J expressly adopted, at p 407, Sullivan J's reasoning in *Ex p Billson* , subject to one important qualification of principle, though not one that should make much difference in practice. In doing so, he was, like Sullivan J, much influenced by the lack of any real scope for operation of the proviso if its meaning was to be equated with the provision in section 31(2) for identifying and bringing the 20 years' period to an end, namely by bringing the right of the public to use the way into question. He held, at pp 406 and 407 that: (1) section 31 and the proviso require no more than "sufficient evidence"

of an intention not to dedicate; (2) Parliament left it to the tribunal of fact to decide as a matter of fact in each case whether there is sufficient evidence of no such intention; (3) he would not gloss the proviso, even to the extent of saying the evidence of no such intention must be "overt and contemporaneous", though as a matter of fact the tribunal of fact would rarely, if ever, be satisfied as to the sufficiency of the evidence if it was not overt and contemporaneous-as also had been stated some five years before by Sir Donald Nicholls V-C, with whom Hirst and Waite LJJ agreed, in *Ward v Durham County Council (1994) 70 P & CR 585* , 590–591:

> "I would … not place any gloss on the proviso at all. But if a gloss is justified, it seems to be common ground that it cannot be that advocated by Denning LJ. As explained by Sullivan J… the intention not to dedicate does not have to be brought home to the users, since otherwise, in view of section 31(2) , there would be no role for the proviso at all. Furthermore… the relationship between the two parts of section 31(1) itself demands that, in disproving an intention to dedicate, the owner need not bring home to the users that there was no right to use the way."

(4) if any gloss could be justified, it would not be one that required such intention to have been communicated to or directed at the users of the way; and (5) thus and necessarily, the absence of such intention did not have to be evidenced throughout the 20-year period, only during some part of it.

29. The final authority to which I need refer in this brief jurisprudential journey is *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , in which the House of Lords considered the expression "as of right" in relation to the registration of a town or village green under section 22(1)(a) of the Commons Registration Act 1965 based on indulgence in lawful sports and pastimes "as of right" for not less than 20 years. Their Lordships held that the common law concept of nec vi, nec clam, nec precario, did not require subjective belief of the users in the existence of the right, and that toleration by the landowner was not fatal to a finding that the user had been as of right. The authority is not directly relevant to the proviso, which concerns the *landowner's* state of mind, though it may have some ***743*** bearing on its meaning when looked at in the context of section 31(1) as a whole: see para 56 below. The case, on its facts, did not concern the meaning or operation of the proviso, but, as I have said, the meaning of the words "as of right" going to the establishment of the rebuttable presumption. Lord Hoffmann, in a valuable exegesis of the object and effect of the statutory change to the common law introduced in 1932, explained its purpose as essentially to remove the fiction and difficulties of the common law in requiring evidence to support an inference of an "actual" dedication from long public use as of right by providing as an alternative a rebuttable presumption of dedication from a finite period of uninterrupted use as of right.

The first issue—"sufficient evidence" of "no intention… to dedicate"

Discussion and the judgment of the Divisional Court

30. The first main issue in both appeals is whether evidence, to be capable of sufficiency for the purpose of the proviso, must be of communication of no intention to dedicate to members of the public using the way or of conduct that was likely to bring such intention to their notice.

31. In the Godmanchester claim, as I have shown in para 11 above, the inspector, in deciding whether the proviso was satisfied, directed herself by reference to Dyson J's reasoning in *Ex p Dorset County Council [2000] JPL 396* , but also implicitly in line with Sullivan J's slightly different approach in *Ex p Billson [1999] QB 374* . She found that the landowners' land agents' letter of 27 July 1990 to the county planning officer was an overt and contemporaneous act sufficient to satisfy the proviso.

32. The Divisional Court held, in para 29 of their judgment, in agreement with the reasoning of Sullivan and Dyson JJ in *Ex p Billson* and the *Dorset* case respectively, that on this issue: (1) the obiter dictum of Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439* , 458 should not be followed; and (2) that section 31(1) , including the proviso, does not require evidence of lack of intention to dedicate to be communicated to, or to be likely to come to the attention of, users of the way. More particularly, in para 29(3) of their judgment, the Divisional Court favoured the "pure", unglossed construction of Dyson J in *Ex p Dorset County Council* :

> "Like Dyson J, we consider that it is misleading to speak of 'the overt acts rule'. In our judgment, there is no such rule of law in relation to the proviso. The words of the statute simply do not require it. Indeed, we question whether it is properly described as a 'rule' of evidence. What can be said is that, in the absence of something overt and contemporaneous, a landowner will generally find it difficult to point to 'sufficient evidence' of a negative-a lack of intention to dedicate.

Ultimately, however, what is 'sufficient evidence' outside the specific circumstances contemplated by section 31(3)–(6) is, as Rose LJ said in the *Cowell case [1993] JPL 851* , 855, something that 'would necessarily vary from case to case'."

33. In Dr Drain's claim, as I have noted, the inspector, in paras 50 and 51 of her decision letter, in which she referred to both *Ex p Billson* and *Ex p Dorset County Council* , held that the continuance for much of the relevant ***744** 20 years' period of the tenancy containing clause 17 enjoining the tenant not to tolerate trespassers satisfied the proviso both as to sufficiency of evidence, and as to duration, of an intention on the part of the landowner not to dedicate.

34. The Divisional Court held that the inspector's approach in law was sound and that its conclusion of sufficiency of evidence of no intention to dedicate had been open to her on the evidence. This is how they expressed those holdings in paras 57–58 of their judgment:

"57. …There remains… the uncontested fact that the succession to the tenancy agreement in 1955 was by a family company formed to manage the affairs of the estate. It is clear that the inspector also heard evidence about the management of the estate by the company during the relevant period. This included Mr Petter's evidence about the continuance in force of the agreement and his evidence, which was challenged but was not the subject of concession, that the company never had the intention of dedicating the track as a public path. In our judgment the inspector's finding in relation to clause 17, when viewed against that background, should be read not as a bare finding on the legal consequences of succession and continued existence of the tenancy agreement, but as a positive finding that the company 'took over' the agreement, including the covenant, with the same intention as Lord Iliffe had in entering into the agreement in the first place, and that the agreement was indeed an overt and contemporaneous expression of the company's wishes in respect of the tenant's management of the property.

"58. On that basis, which we consider to be a fair reading of the decision, the claimant's case on the subsidiary issue falls away: it is plain that there was no error of law and that the finding was reasonably open to the inspector. It is therefore unnecessary for us to decide whether the bare fact of succession by operation of law to a tenancy agreement containing clause 17, and the continued existence of the agreement thereafter, would have been a sufficient basis for a finding that the successor in title did not have the intention to dedicate. It may, however, be helpful for us to indicate that we were very far from persuaded by Mr Laurence's submissions on this issue. There seems to us to be a strong case that, just as the terms of clause 17 of the tenancy agreement could properly be regarded as a continuing expression of the intention of Lord Iliffe so long as he was owner of the freehold, so they could properly be regarded as a continuing expression of the intention of the company following its acquisition of the freehold and its succession to the benefits and burdens of the agreement. It is true that the benefits and burdens of the agreement passed by operation of law; but they passed only because of the deliberate acquisition of the freehold, which must be taken to have been done by the company with full knowledge of the legal consequences; and the agreement remained in force thereafter for over 30 years with no evidence of any attempt by the company to vary or determine it. In those circumstances it is difficult to see any artificiality in attributing to the successor in title the same intention as the original owner of the freehold with regard to clause 17."

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Submissions

35. Mr Laurence prefaced his submissions on behalf of Godmanchester and Dr Drain by suggesting that, to construe sufficiency of evidence in the proviso as capable of amounting to evidence of something less than continuous communication of an intention not to dedicate for the full material period of 20 years, so readily "trumps" a section 31 claim as to make the section a dead letter. He contrasted the provision for private rights of way given by the Prescription Act 1832 (2 & 3 Will 4, c 71) and for town and village greens in the Commons Registration Act 1965 , which contain no such trumping provision.

36. On the first issue as to sufficiency, Mr Laurence submitted that, to satisfy the proviso, there must be evidence of some acts on the part of the landowner of an intention not to dedicate that were overt in the sense that they came, or were likely to come, to the attention of users of the way. That is Denning LJ's meaning of "overt" in the *Fairey* case, not Laws J's meaning in the *Jaques case [1995] JPL 1031* or Sullivan J's meaning in *Ex p Billson* .

37. Mr Laurence was loath to separate his submission on this first issue of sufficiency from the second issue as to whether the word "during" in the proviso means "throughout". As to the latter, he submitted that there must be sufficient evidence of an intention not to dedicate for the whole of the relevant 20 years' period. He said that, if all that is needed for sufficiency of evidence of intention not to dedicate is evidence of some firm indication to that effect, whether or not directed to or communicated to users of the way in question, the more likely it is that "during" does mean "throughout", and vice versa.

38. Mr Laurence recognised that, in pursuing those arguments, he was inviting the court to take a different view of the law from Rose LJ in *Ex p Cowell* , Sullivan J in *Ex p Billson* , Dyson J in *Ex p Dorset County Council* and the Divisional Court in this case. He submitted that only in that way can proper effect be given to the policy behind and objects of section 31 . His argument for that broad proposition stemmed, as it has in some of the earlier cases to which we have referred, from the transition from the common law rules governing dedication of highways to the statutory regime first introduced in the 1932 Act. That is, from the onerous and fictional business of establishing an inference of an "actual" dedication rather than toleration from long user as of right, to a presumption of dedication from long and uninterrupted user as of right for a specific period in the absence of specific rebutting evidence, as explained by Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 358–359.

39. Mr Laurence's argument was that the object of the 1932 Act and its successor, the 1980 Act, was more readily to facilitate the establishment of prescriptive rights to public ways. Put another way, he said that the object was to shift the focus away from what the landowner thought to what the landowner did. Such an approach, he submitted, required this court, as a matter of policy, to draw the line nearer to where Denning LJ drew it in the *Fairey case [1956] 2 QB 439* , that is, not just moving to an "overt and contemporaneous" act as Sullivan J considered appropriate in the *Billson* case, but to a point that would exclude purely private acts or statements that public users of the way in question have no reasonable chance of ***746*** discovering. More precisely, he submitted that "sufficient" evidence to satisfy the proviso is proof of acts that were (1) overt, (2) contemporaneous and (3) came, or were likely to come, to the attention of users of the way in question.

40. On Godmanchester's claim, Mr Laurence submitted, by reference to his meaning of "sufficient evidence" in the proviso, that the inspector's conclusion that it was satisfied on the strength of the 27 July 1990 letter (see para 11 above) was wrong in law, and that the Divisional Court, therefore, erred in law in upholding her decision. He submitted that the letter's insufficiency for the purpose was twofold. First, it was not a document that users of the way in question saw or were likely to see. Second, as it was written over 11 years into the material 20-year period, even if otherwise sufficient for the purpose, it could not satisfy the proviso since the intention not to dedicate had not been present throughout the period.

41. On Dr Drain's claim, Mr Laurence submitted that the inspector had wrongly concluded and that the Divisional Court had wrongly upheld her conclusion that the continuing in effect of clause 17 of the 1950 tenancy agreement enjoining, on behalf of Yattendon, the tenant not to tolerate trespassers on the demised land in question (see para 15 above), constituted sufficient evidence under the proviso of an intention during the material period not to dedicate. He submitted that the evidence was not sufficient since the public had no knowledge or means of knowledge of the terms of the tenancy and that Yattendon had taken no steps to bring those terms into the public domain before the inquiry proceedings giving rise to the inspector's decision. He also drew attention to the evidence before the inspector that the tenant had been in persistent breach of clause 17 and that Yattendon, as his landlord, had done nothing to enforce it. As to the issue of the duration of Yattendon's intention not to dedicate, he submitted that, even if clause 17 was sufficient evidence of no such intention, it did not qualify, because it had not remained in effect throughout the whole of the material period of 20 years, the tenancy having come to an end six years before the end of it.

42. As practical pointers in support of his submissions on the law that the Divisional Court has not kept its eye sufficiently on the object of the legislation, Mr Laurence instanced the potential for abuse, on that court's approach, in the ease with which a landowner can negative a qualifying period of user as of right and without interruption, by reliance on some earlier private declaration of intention followed by an open and direct challenge thereby, presumably, bringing the right of way into question under section 31(2) .

43. Mr Laurence suggested that for this court to adopt his construction would not offend the words of the statute. Whilst he accepted that section 31(1) does not expressly require, as a means of satisfying the proviso, proof of overt acts directed by the landowner at anyone, he maintained that it contained no words that would prevent construction of the proviso in the manner for which he contended. He sought support for his purposive construction in section 31(3)–(6) in their provision that erection of notices or, in the event of their being torn down or defaced, the serving of notices on the local authority, or the deposit of statutory declarations and associated documents with the local authority are, "in the absence of proof of a contrary intention, sufficient" to satisfy the proviso. He maintained that, ***747*** while those provisions are not exhaustive instances of what evidence would

satisfy the proviso, they are more than examples of what could do so; they are illustrative or representative of the kinds of evidence that will suffice-acts of a public nature likely to bring the matter to the attention of users of the way that are necessary as well as sufficient for the purpose.

44. Finally, Mr Laurence sought to deal with the similar problems identified by Laws J in the *Jaques case [1995] JPL 1031* and by Dyson J in *Ex p Dorset County Council* respectively (see paras 27 and 28 above), namely that his construction of the proviso as requiring evidence of acts communicated to or likely to come to the attention of users of the way would leave it with little or no role. He suggested that they had proceeded upon a misapprehension since corrected by Lord Hoffmann in *Ex p Sunningwell Parish Council [2000] 1 AC 335* , that communication by the landowner to users of his intention not to dedicate would itself remove one of the basic preconditions of the presumption of dedication, use as of right.

45. Mr Laurence also challenged Sullivan J's separate point in *Ex p Billson [1999] QB 374* , 395, and that of Dyson J in *Ex p Dorset County Council [2000] JPL 396* , 407, that so to construe the proviso would also leave no role for section 31(2) which fixes the end of the relevant 20 years' period by reference to the date when the right of the public to use the way is "brought into question". However, his arguments on this aspect were somewhat tentative, namely that "by no means all" acts of landowners directed to users of their intention not to dedicate would be sufficient to bring home to the public that they had no right to use the way or that it was being challenged for the purpose of section 31(2) . He ventured an example of how his construction might work, instancing an act that did not come to the attention of users to a degree sufficient to stop time running under section 31(2) , but that nevertheless would meet his test of being a sufficient act to demonstrate an intention at the time not to dedicate. It is, as Sullivan J put it in *Ex p Billson [1999] QB 374* , 395:

> "a very fine line between acts that are sufficiently 'open and notorious' to be capable of bringing the landowner's intention not to dedicate to the attention of the public, and which are not so open and notorious that they succeed in bringing the user of the way into question. His approach seems to me to leave little if any scope for the operation of the proviso."

46. Mr Mould, on behalf of the Secretary of State, challenged Mr Laurence's submission that the words "sufficient evidence" in the proviso mean evidence that the landowner's intention has been brought, or has been likely to come, to the attention of users of the way. He submitted that there is no threshold requirement in the proviso of publication to any third party, but acknowledged that there is a spectrum of evidence that may be considered necessary by an inspector on a case by case basis to evidence a landowner's genuine intention at the material time not to dedicate and/or to guard against abuse.

47. Mr Mould pointed out the obvious, but none the less relevant, absence from the proviso or any other provision in the 1980 Act of any such express requirement. He went on to contrast that lack of specific guidance or prescription in the proviso with the provisions in section 31(3)–(6) as examples of what will amount to sufficient evidence not to dedicate. He invited the court to note that, even on the examples of notice to or deposit of ***748** documents with a local authority, the Act did not provide that they had to be drawn to the attention of users of the way in question or provide any machinery by which they would be likely to come to their attention. In short, he submitted that those additional provisions of section 31 support the Divisional Court's conclusion that the proviso should not be glossed in the way for which Mr Laurence contended.

48. Mr Mould took the court back to the main purpose of section 31(1) , which, he said, was, by the creation of a statutory presumption of dedication, to relieve those asserting the public right of way on the basis of public enjoyment of it of having to prove actual dedication; whereas the more limited function of the proviso was simply to enable the landowner to rebut that presumption by showing by some overt and contemporaneous act that he had not so intended. The fact that he may or may not have communicated that intention to users of the way, if his intention is otherwise sufficiently evidenced, is nothing to the point. Communication of the intent is only relevant where it is part of the evidence relied upon to show the existence of the intention.

49. Mr Mould also took strength from the relationship between section 31(1) and (2) . He observed that the statutory presumption of dedication only arises when a tribunal is satisfied that the public have enjoyed the right of way as of right and without interruption for 20 years, that is, for 20 years before the right was "brought into question". That contemplates, he submitted, not only a challenge-free period of 20 years, but also the ability of a landowner to provide sufficient evidence of an intention not to dedicate by something less than communication of it to users of the way.

50. Finally, Mr Mould turned to *Ex p Sunningwell Parish Council [2000] 1 AC 335* in which, as I have said, the House of Lords held that the expression "as of right" in such claims did not, at common law, require subjective belief by users of the way in question in the existence of the right, and that toleration by the landowner was not fatal to a claim that the use had been as of

right. The relevance of this authority to the argument, submitted Mr Mould, was that, if the state of mind of users of a claimed public right of way during the relevant 20 years' period is immaterial to the question whether the right has come into being by virtue of long public use, so also should be the fact that an overt expression of an intention by the landowner not to dedicate is or is not communicated to them to the application of the proviso. That is, after all, covered by the requirement in section 31 for establishing the presumption of dedication; it must be shown to be "without interruption", that is, without overt acts of some kind challenging their entitlement before the proviso can even be brought into play.

51. Mr Edwin Simpson, on behalf of Yattendon, supported the submissions of Mr Mould on behalf of the Secretary of State and the reasoning of the Divisional Court on the main issues, as well as on the subsidiary issue in Dr Drain's case. On the main issues, he submitted that, if "overt and contemporaneous" is part of the test, an act or statement, to be overt, need not be communicated to users of the way in question; it is capable of being sufficient if it is something done or said that is objectively identifiable.
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Conclusions

52. The main question for the court is whether sufficiency of evidence of an intention not to dedicate necessary to satisfy the proviso requires, as a matter of law, that during the relevant 20-year period the landowner should not only prove that negative intention, but also acts communicating it or likely to bring it to the attention of users of the way. There is also a sub-issue-though in practical terms of little importance-namely whether, if evidence of communication of that negative intention to users of the way is *not* necessary to satisfy the proviso, it is at least necessary to prove it by overt and contemporaneous acts during the relevant period. Whether one takes the view of Sullivan J in *Ex p Billson [1999] QB 374* that proof of such acts is what is required as a matter of construction of the proviso, or adopts the "pure" construction of Dyson J in *Ex p Dorset County Council [2000] JPL 396* , 406–407, that the words of the proviso should remain unglossed, the reality, as he acknowledged, is that the "tribunal of fact will rarely, if ever, find that there is sufficient evidence of no intention to dedicate in the absence of overt and contemporaneous acts on the part of the owner".

53. As I have indicated, inextricably bound up with the main question is the second, namely, whether it is necessary for a landowner, in order to satisfy the proviso, to show that there was an intention not to dedicate at some time "during" the relevant period, or continuously throughout it. If sufficiency of evidence as a matter of law requires proof of acts of communication or likely communication to users of the way, the more difficult and onerous for landowners would be the practical application of a requirement of proof of continuity of such acts *throughout* the relevant 20-year period. Nevertheless, in the interest of simplicity of presentation, I shall set out my reasoning on the first and main issue separately and before going on to consider the second.

54. I shall not attempt to rehearse in any detail the analysis in the authorities of the mischief of the common law for which the 1932 Act and its successor, the 1980 Act, were intended to provide an alternative. It is sufficient to note that the common law rule for the acquisition of public rights of way was that long and unchallenged user as of right by members of the public over an unspecified period of time since 1189 was evidence from which a jury *could* infer dedication, but need not do so, if, for example, it considered the proper inference was one of toleration by the landowner: see *Ex p Sunningwell Parish Council [2000] 1 AC 335* , 351–353, per Lord Hoffmann. As I have said, the statutory regime introduced in 1932 was intended to mitigate this uncertain and artificial fact-finder's task as to sufficiency of long use by the introduction of a statutory deeming or rebuttable presumption of dedication from 20 years' uninterrupted use as of right.

55. On the face of it, the statutory innovation, in what is now section 31(1) of the 1980 Act, should make it a simpler and more certain method than that at common law (which is preserved by section 31(9)) for establishing, by way of rebuttable presumption, long user of a way as a public highway. But, as must be apparent from the most cursory look at section 31 and at the authorities, the legislation has produced complexities of its own and scope for confusion, not least in the potentially overlapping ***750*** notions of "interruption" and sufficiency of evidence of intention not to dedicate in section 31(1) and that of bringing the right into question in section 31(2) . Moreover, as I read section 31 it does not tilt the process of ultimate *resolution* of the matter more in favour of public users and against landowners when there is evidence-to borrow a word most commonly found today in human rights jurisprudence-"engaging" the proviso. The observations of Scott LJ in *Jones v Bates [1938] 2 All ER 237* , 249 about the importance of preserving for the public the "genuine public footpath" in an era of increasing use by ramblers and others of the countryside for recreation should be read with that qualification in mind. There was no evidence in *Jones v Bates* to engage the proviso, and subject to an uncertainty of Scott LJ as to the working of it if there had been an issue as to dedication before either of the statutory periods of prescription provided for by the 1932 Act, it did not figure in the case. The only issue was as to the adequacy of the evidence to establish use sufficient to support a presumption of dedication. Nor, as I have said, was the proviso engaged in *Ex p Sunningwell Parish Council* , in which Lord Hoffmann, citing Scott LJ in *Jones v*

Bates , stated (as a counter-balance to Bowen LJ's expression in *Blount v Layard (Note) [1891] 2 Ch 681* , 691, of concern for landowners whose good nature and indulgence of trespassers on their land might be abused) *[2000] 1 AC 335* , 359:

> "A balance must be struck. In passing the 1932 Act, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use."

56. The statutory scheme, it seems to me, creates a delicate balance between, on the one hand, the interest of the public in having access to what have become highways as a result of their nature and length of use of them as statutorily prescribed and, on the other, the interest of landowners in retaining control over their own land. In order to establish the rebuttable presumption, a claimant must show 20 years of use, not only "as of right" in the sense which, since *Ex p Sunningwell Parish Council* , does not depend upon what the users of the way believe to be the case. He must also show that it has been "without interruption", for example, without interference from the landowner by overt, in the sense of identifiable, acts preventing or significantly deterring passage. As Scott LJ pointed out in *Jones v Bates [1938] 2 All ER 237* , 246, mere absence of continuity in actual user does not amount to interruption. Only if a claimant establishes those matters does the rebuttable presumption of dedication arise and then, a need to consider the proviso. The *Sunningwell* case does not help on the proviso, save, possibly in favour of the landowner, on the balance underlying the presumption and the counter-balance provided by it.

57. In my view, the proviso in favour of the landowner has been carefully drawn and in the sparest of terms-"sufficient evidence" of "no intention… to dedicate"-to provide, as near as can be provided, an equilibrium between the interest of landowners and that of the public in respect of claimed rights of way. It was not intended, as I believe, to make it easier for the public to establish a way as a highway when confronted with a landowner's contrary intention. Otherwise, the statutory introduction would tilt the balance too far in favour of the public and against that of the ***751** landowner who has no intention of giving up his land to become a public highway, but who may not be officious about it. If the draftsman had wanted to tilt the balance that way, he would perhaps have provided that evidence from the landowner, to be sufficient for this purpose, must show that he had communicated to the users of the way, whoever they may be or to the public at large, his intention in the matter. Instead, the draftsman, in the proviso, has referred only to rebuttal by sufficient evidence of the landowner's intention during the material period not to dedicate. As Dyson J put it in *Ex p Dorset County Council [2000] JPL 396* , 406: "On the face of it, the language of the proviso is straightforward. All that is required is that there be sufficient evidence of lack of intention to dedicate."

58. A moment's thought makes plain why, in fairness as well as logic, the draftsman has opted for near equilibrium. In the early decades of the 20th century a more mobile public with increasing access to the countryside began to use and populate its footpaths-ramblers-mostly with little contact on any permanent basis with a particular locality or localities. Such burgeoning use of the countryside was to be contrasted with the pattern of user that had shaped common law principles in earlier days, namely that of locals using footpaths as a regular thoroughfare for work, commerce or daily convenience.

59. This new opening up of the countryside called for much greater certainty than before, both in the interests of the developing wave of public use of the countryside and of landowners who, whether or not they tolerated such use on private ways, had to cope with it. It was plain that they should not be credited with giving their land over to public use if they did not intend it. On some large estates, the landowner might simply be unaware of the existence and extent of use by members of the public of private ways on his land. Unless he was aware of such use, why should he have been required to communicate his intention to keep ways private by posting notices or erecting fences or gates to stave off at an early stage-up to 20 years before the right is brought into question if Mr Laurence were right in his contentions-what might have seemed to him only a theoretical threat to his right to control access to his land? And even when landowners were or should have been aware of public use of ways on their land, to whom, and in what form and with what frequency or degree of continuity should those landowners who wished to retain control of their land communicate their intention to retain such control if communication of that state of mind was to be required of them?

60. Given the non-prescriptive terms of the proviso as to the evidence to which the new legislation enabled landowners to turn to rebut the presumption, it is plain, in my view, that it required simply a sufficiency of evidence of an intention on the part of the landowner that there had been no intention to dedicate it during the material 20-year period. The proviso did not require them to vouch for that intention to the extent of providing assurance to the public that they would not "abuse" the machinery provided by the 1932 Act by tolerating trespass until the last moment of the period of prescription, a hypothesis on which much of Mr Laurence's submissions seemed to rest. Why would they need or want to hold back until the last minute their interest in protecting their right to control their own property? And, on the other hand, why should they be goaded into the expense

of extensive and regular acts demonstrating their assertion of that right in order *752 to stave off trespassers, the extent and volume of whose trespass they may not be aware or whom they do not seek officiously to exclude?

61. In my view, the provisions in section 31(3) -the erection of notices, and-in section 31(5) or (6) -that service of a notice on, or deposit of a statement with, the local authority respectively-are sufficient evidence, in the absence of proof to the contrary, to negative an intention to dedicate, do not colour the proviso so as to make it read as if it required proof of evidence of communication or other overt acts demonstrating such intention. Those provisions merely identify certain acts, which if they meet the stipulated requirements, will, subject to proof of contrary intention, be sufficient evidence to negative an intention to dedicate. On the contrary, those express provisions rendering the stipulated acts sufficient evidence for the purpose, in my view, support the Secretary of State's contention that the proviso is not, as a generality, to be shackled with requiring proof of the same or similar kind. And, as Mr Mould observed, the fact that the acts stipulated by, say, section 31(5) or (6) are not likely to come to the attention of users of the way in question is fatal to Mr Laurence's contention that the landowner's intention must have been communicated to that changing population.

62. In addition, as I have said, the proviso must be considered alongside the means stipulated by section 31(1) for establishing the rebuttable presumption of dedication, one of which is "without interruption". It should also be considered alongside the provision in section 31(2) for identifying the end of the relevant 20 years' period of use in any particular case, namely "when the right of the public to use the way is brought into question". To interrupt the statutory period of user or to bring the claimed right into question clearly demands communication by the landowner to users in some form, typically by way of notices, or gates or fencing, that he objects to the use as an intrusion on his rights of ownership. If that is what is required to identify the 20 years' period of user in respect of which a rebuttable presumption of dedication is to be established, what is left for the element of communication of an intention not to dedicate in the proviso? The narrower the gap between "interruption" for the purpose of considering whether the rebuttable presumption is established or for the purpose of determining what is sufficient to bring the use into question under section 31(2) and what, as a matter of construction, the proviso requires, the less scope there is for the latter to have any practical effect. I should add that, in making this point, I have taken into account that the burden of proof on the issue of the rebuttable presumption and that of satisfaction of the proviso is on the public and the landowner respectively, but I do not consider that that forensic difference invalidates the problems of overlap that Mr Laurence's submissions involve.

63. In my view, the proviso, both on its terms and read in the context of section 31 as a whole, is concerned with intention and its proof, not with communication of intention to users of the way in question. To construe it as requiring the latter or even proof of overt and contemporaneous acts falling short of such communication would be to read words into it which would have been clearly included if that had been intended, and which would run counter to the operation of section 31 read as a whole. As Rose LJ observed in *Ex p Cowell [1993] JPL 851* , what constitutes sufficient evidence of intention will vary from case to case. And, as *753 Sir Donald Nicholls V-C indicated with the agreement of Hirst and Waite LJJ in *Ward v Durham County Council (1994) 70 P & CR 585* , 590, and Dyson J acknowledged in *Ex p Dorset County Council [2000] JPL 396* , 406, it will be rare for evidence to be regarded as sufficient for that purpose without proof of some overt and contemporaneous act or acts. Even with proof of such acts, the sufficiency of it for the purpose will depend on the circumstances. For example, the more the landowner knows the more he may be expected to protest to users of the way, as in the *Ward* case in which Sir Donald Nicholls V-C indicated in the following passage, at pp 590–591:

> "Mr Ward did give some evidence that he wanted to keep the back road private. He recalled an instance shortly after he moved in when a neighbour told him to keep his lorries to his own part of the road. I do not think that, set against a background of uninterrupted user by the public for the relevant period of 20 years, this is sufficient evidence of no intention to dedicate. In assessing intention regard must be had to what the landowner knowingly permits to happen on his land."

Where, on the other hand, there has been little use of the way and/or little knowledge of it by the landowner, it may be that a "private" overt act, namely one not communicated to or likely to come to the attention of users of the way, would suffice, because there would be no or little reason for the landowner to protest to users and/or other third parties.

64. For all those reasons, I am of the view that there is no statutory threshold as to sufficiency of evidence for the purpose of the proviso. It is for the fact-finder to determine sufficiency, usually as a matter of weight, on the facts of the particular case, subject only to *Wednesbury* constraints: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223* . Accordingly, I agree with the rulings of the Divisional Court in their adoption, in particular, as expressed in para 29(3) of their judgment (see para 32 above) of the approach and ruling of Dyson J in *Ex p Dorset County Council* . In most cases, no doubt, the fact-finder will look for overt, in the sense of objectively identifiable contemporaneous acts or declarations, if only to guard against any risk of abuse by landowners who might seek to rely on retrospective acts or declarations after the expiration of the

relevant 20-year period. Those may or may not be acts or declarations communicated to, or likely to be brought to the attention of, users of the way in question. The fact of communication is not relevant for its own sake, but only as an indicator of the presence of a genuine intention not to dedicate during the relevant 20-year period. As to the contribution, if any, of policy or the mischief that the statutory addition to the common law in this respect was intended to cure, I respectfully adopt, for the reasons I have given in paras 55–60 above, the following observation of the Divisional Court at para 29(5) of their judgment:

> "Questions of 'the balance' between the users and the landowners are matters of policy. Section 31(1) and its predecessor assist the users by providing for a deemed dedication upon proof of 20 years' enjoyment as of right and without interruption, provided that the landowner cannot rebut the presumption by proving a lack of intention to dedicate. That is as far as Parliament sees fit to go in addressing the balance and it is neither necessary nor desirable for us to go further."

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Issue 2— "during that period"

The authorities and the ruling of the Divisional Court

65. On this second issue, Denning LJ, in *Fairey v Southampton County Council [1956] 2 QB 439* , indicated his view, obiter, that evidence, to be "sufficient" for the purpose of the proviso, did not need to demonstrate a continuous intention throughout the 20 years' period not to dedicate. In making the point in that case, at p 458, that there must be some overt act on the part of the landowner to show users of the way in question an intention not to dedicate, he considered that closing the way for one day a year would do. However, before passing to what Sullivan J said in *Ex p Billson* , I should note that Birkett LJ, also obiter, described the intention, at p 460, as part of a general proposition as to change wrought by the 1932 Act, as "continuous during the 20 years". In *Ex p Billson [1999] QB 374* Sullivan J, and in *Ex p Dorset County Council [2000] JPL 396* Dyson J, disagreed with Denning LJ's reasoning on the first issue and, in doing so, necessarily confined the meaning of the proviso to its wording, that it is only necessary to show sufficiency of evidence for its purpose to show absence of intention "during" the 20-year period, not continuously throughout it. To that extent, their reasoning on the second issue was clearly at one with the approach of Denning LJ.

66. The Divisional Court took the same view. They held, at para 43:

> "In our view it is more likely that the legislature intended the statutory presumption of dedication to be rebuttable by sufficient evidence to negative the intention to dedicate for part of the 20-year period (subject to the question of de minimis) than that it intended to require the landowner to prove the lack of an intention to dedicate throughout the 20-year period."

67. The court added, at para 44, consistently with that conclusion (and in rejecting part of Mr Mould's argument), that the statutory deeming in section 31(1) of dedication as a result of 20 years' user as of right should not give rise to an unlegislated deeming of a continuing intention on the part of the landowner to dedicate throughout that period:

> "it is wrong to talk in terms of a continuing intention to dedicate. Where at common law a period of user as of right gives rise to an inference of dedication, the inference is of dedication at a point of time before or at the same time as the earliest user… In those circumstances it does not make sense to talk of a continuing intention to dedicate during the period of user. The same must apply in relation to the statute: if 20 years' user gives rise to a deemed dedication, what is deemed to have occurred is a dedication at a point of time rather than a continuing intention to dedicate over the 20-year period."

Submissions

68. Before this court, Mr Laurence suggested that the meaning of "during", as a matter of language, is ambiguous as to whether it means "at some time or times during" or "throughout". He submitted that the use of the word as part of the expression "during that period" in this context is more consistent with the meaning of "throughout", so that evidence is only ***755** sufficient to satisfy the proviso if its effect subsists throughout the whole of the 20-year period. He disclaimed any suggestion that the acts

relied on as evidencing an intention not to dedicate had to be repeated every day to satisfy the proviso. It was enough, he said, to manifest a continuous intention not to dedicate, for example, by the annual charging of a toll, as in *Ex p Cowell [1993] JPL 851* , or turning back users, as instanced by Denning LJ in the *Fairey case [1956] 2 QB 439* . The test, he said was that the acts and/or declarations upon which reliance was placed must be such that, taken together, their effect covers the whole period. He sought to draw support on this issue from the provisions in section 31(3) for the erection and maintenance of notices and in section 31(6) for the deposit of statutory declarations with local authorities, contrasting it with the far less onerous requirements on a landowner for satisfaction of the proviso for which the Secretary of State contends.

69. Secondly, Mr Laurence sought support for his contention that the word "during" in the provision, as it now stands, means "throughout" on what he has called "the second proviso" in section 1(1) of the 1932 Act, subsequently deleted by the National Parks and Access to the Countryside Act 1949 and not reintroduced in the 1980 Act. In the second proviso, the word "during" appeared again, but clearly, in his submission, meaning in that context "throughout". His reasoning was that the word "during" wherever it appeared in that provision before its amendment must have had the same meaning. This is how the two provisos in section 1(1) of the 1932 Act read before deletion of the second:

> "unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way."

70. Mr Laurence's submission was that, despite the removal of the second proviso in 1949, the meaning of the word "during" in the original composite provision cannot thereby have changed and that it has carried through into the 1980 Act with the reproduction of the first proviso in section 31(1) .

71. The Divisional Court's response to this argument was that the different formula in the second proviso, including the words "at any time", indicated a different meaning for each proviso. They, therefore, rejected Mr Laurence's contention, holding, at para 38:

> "In the case of the second proviso, the need to prove that the criterion was met throughout the 20-year period arose out of the use of the additional words 'at any time'. Those words are strikingly absent from the first proviso. Had it been the legislative intention to require sufficient evidence that was no intention to dedicate 'at any time' during the 20-year period, i e to require proof of the lack of such an intention throughout the period, one would expect the same formula to have been used as in the second proviso. In our judgment, therefore, Mr Laurence's reference to section 1(1) of the 1932 Act works against his case rather than in favour of it."

72. Mr Laurence sought to meet that reasoning by suggesting that the Divisional Court had misread the second proviso so as to misstate its effect, ****756*** which was, he submitted, that "throughout such period of 20 years there was no person in possession of the land capable of dedicating such a way". But that recasting of the wording, whether apt or not, does not meet the Divisional Court's point that, if the draftsman had wanted the word "during" in the first proviso to have the same effect as he intended for it in the second proviso he would have so drafted it. It is plain that the two provisos had quite different functions. The difference between them was clearly intended to provide, in the case of the second proviso, for the position of limited owners, such as the tenant for life of settled land, where, apart from an express power in the settlement or under powers in the Settled Land Act 1925 , there could be no valid dedication of any part of the land as a highway unless all parties interested under the settlement were sui juris and concurred, or could be presumed to have concurred: see *Halsbury's Laws of England* , 4th ed, vol 21 (2004 reissue), para 115. If there was sufficient evidence that there was no one "at any time" during the material 20-year period capable of dedicating, there would have been no basis for the operation of the first proviso at all. If and to the extent that such an issue were to have arisen, then it would have been for the landowner to produce sufficient evidence that, during the period when there was a person in possession capable of dedicating the way, such a person did not intend to do so. In the circumstances, Mr Laurence rightly, in my view, concluded his argument on this point by conceding that "it might not be decisive".

73. Mr Mould adopted the reasoning of Sullivan and Dyson JJ, in *Ex p Billson* and *Ex p Dorset County Council* respectively and of the Divisional Court culminating in its conclusion that I have set out in paras 66 and 67 above.

Conclusion

74. This aspect of construction of the proviso cannot, as I have said more than once, be considered in isolation from the first and more general issue as to sufficiency of evidence of an intention not to dedicate. If, as the Divisional Court have held and as I would hold, the issue for the fact-finder is whether there was evidence of an intention not to dedicate during the relevant 20 years' period, as distinct from manifestation to users of such intention, it is difficult logically for Mr Laurence to succeed on this issue. A landowner, as Scott LJ observed in *Jones v Bates [1938] 2 All ER 237* , 247 a , can only dedicate once. Are he and any predecessors in title, in the absence of any evidence of dedication or an intention to dedicate, required, in order to retain control of their land, to undertake the possibly onerous task, on a continuous basis, of evidencing their intention not to dedicate over the whole of the relevant 20 years' period?

75. But, even if this were capable of being a discrete issue, the balance struck by section 31(1) , including the proviso, makes it impossible logically to sustain a balance between two similar and partially overlapping notions, namely interruption sufficient to prevent the 20-year period running and an intention not to dedicate, whether manifested or not, sufficient to rebut the presumption of dedication that could otherwise result from a 20 years' period of uninterrupted user. It cannot be seriously contemplated, in the light of the traditions of this country as to the establishment of prescriptive rights and as to what may prevent them, that a landowner should be ***757** required, in order to overcome this statutory piece of prescription, to "pace" the use required to build up the requisite period necessary to establish the presumption of dedication with a continuous, or at least frequent, denial in one form or another of an intention to dedicate. On that basis, the period of user, to succeed in establishing the presumption, would give rise to an arid and pointless period of waiting by users of the way for effluxion of the 20-year period following the landowner's relaxation of his demonstration, as a matter of construction or of evidence, of his negative intent. Or, so long as the landowner evinced the negative intention by notices, gates or otherwise, the 20 years' period of user without interruption would, in practice, never start.

76. Putting aside the problem created by the legislation's attempt to balance two unlike notions, actual user by the public as of right regardless of its belief in the claim of right and an intention on the part of the landowner not to dedicate his land regardless of the user and its legality or otherwise, there are more mundane difficulties in Mr Laurence's contention. Whilst it is plain from dictionary references that, depending upon its context "during" can mean "throughout", in my view the context here shows, that continuity throughout the relevant 20 years' period of an intention not to dedicate, is not how the proviso is to be read. First, it does not sit well with the law that "use as of right" for 20 years, can be broken by proof on the part of the landowner of conduct by him amounting to interruption for a period of shorter duration than 20 years: see e g *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101, 104, per Walton J* , approved by Balcombe LJ in *Ex p Cowell [1993] JPL 851* , 858. Secondly, on what logical basis should a claim on behalf of the public based on a 20 years' period of uninterrupted use not, be capable of rebuttal by a clear communication or other indication by the landowner on one or more occasions during the period that he did not intend to dedicate? In this respect, there seems to me to be symmetry, as well an overlap between the notion of interruption in section 31(1) and an intention not to dedicate, whether or not manifested to users of the way, under the proviso.

77. It is also notable that the special provisions in section 31(3)–(6) as to what will amount to sufficient evidence of an intention not to dedicate leave open whether their subsistence for less than the full 20-year period of user will rebut the presumption. As the Divisional Court observed in para 40, there is no illogicality in applying strict conditions to the creation of a statutory presumption in a landowner's favour, while leaving it open for decision on the facts whether acts of a character, or in respect of a period of time, insufficient to meet the strict conditions were nevertheless sufficient to negative the intention to dedicate.

78. In my view, for all those reasons, Sullivan J in *Ex p Billson [1999] QB 374* , Dyson J in *Ex p Dorset County Council [2000] JPL 396* and the Divisional Court in this case were correct in their approach to the meaning of "during that period", namely that a landowner can satisfy the proviso if he can show no intention to dedicate during a part-possibly more than de minimis according to the nature of the evidence relied upon-of the 20 years' period of user. This could be by one single act, as for example in the *Dorset* case, where a letter from the landowners to the Department of the Environment objecting to a proposed revision of the map was held to be sufficient for the purpose in the absence of any evidence that the owners had ***758** resiled from the position stated in it over a period of many years. It follows that, in my view, the inspector's decisions, based as they were on *Ex p Billson* and *Ex p Dorset County Council* , were correct in law.

Dr Drain's subsidiary issue

79. Mr Laurence has also sought on this adjourned hearing of Dr Drain's application for permission to appeal, to challenge the inspector's decision in Dr Drain's case, and the Divisional Court's decision upholding it, on an alternative ground. He submitted that, even if the inspector had not erred in applying the reasoning in *Ex p Billson* and *Ex p Dorset County Council* as to the meaning of the proviso, her purported application of it on the evidence before her was irrational or otherwise unlawful. He maintained that, while the insertion of clause 17 in the original lease in 1950 (see para 15 above) might have been evidence of the intention of Lord Iliffe, the original landowner and landlord, not to dedicate the way in question, the mere continued existence of that contractual provision throughout part of the material 20-year period was not evidence of such intention on the part of his successor, Yattendon. He said that automatic succession to the benefit of clause 17 on assignment of the reversion of the tenancy was an incident of the reversion, but not an expression by Yattendon of any intention on its part with regard to the way in question. For the same reason, he added, the fact that Yattendon had not determined the tenancy (even if it could have done so under the Agricultural Holdings Act 1948) or that it had not varied the tenancy agreement so as to exempt the way in question from clause 17, could not be taken as evidence of an intention not to dedicate.

80. Mr Laurence attacked the Divisional Court's interpretation of the inspector's decision in which they suggested, in paras 57 and 58 of their judgment (see para 34 above), that Yattendon had been formed to manage the affairs of the estate; that, on the evidence of Mr Petter, Yattendon's land agent, the estate had never had any intention of dedicating the way as a public path; and that Yattendon had taken over the agreement, including clause 17, with the same intention as that of Lord Iliffe in the first place. He maintained that the Divisional Court, in those observations, wrongly credited the inspector with findings that had enabled her to justify her conclusion on more than the bare effect and terms of the tenancy agreement, in particular clause 17, namely on a subjective intention of Yattendon not to dedicate the way in question.

81. Mr Mould contended that it was primarily a matter for the inspector what to make of the significance of the 1950 tenancy agreement and its subsistence well into the 20 years' period by which time Yattendon had become the landlord. He said that, having heard evidence from Yattendon's land agent, she was entitled to find that the tenancy agreement continued to be an expression of its wishes in relation to the tenant's management of the property until 1986 and to conclude, in para 51 of her decision letter (see para 16 above) that it was capable of and did operate as sufficient evidence of an intention not to dedicate within the meaning of the proviso.

82. Mr Simpson, on behalf of Yattendon, urged the court not to grant permission on this issue. He maintained, as Mr Mould had done, that the inspector had been entitled to conclude in the *Wednesbury* sense that the ***759** continued existence of the lease, in particular clause 17 of it, throughout the bulk of the relevant 20-year period was sufficient evidence of an intention not to dedicate. And he also supported the Divisional Court's reason for upholding the inspector's entitlement to reach that conclusion, having regard to the surrounding circumstances to which they referred in para 57 of their judgment. In the event of the court not upholding the Divisional Court's decision on that basis, he turned to the strongly expressed view of the court in para 58 of their judgment that there could be an attribution to Yattendon as successor in title to Lord Iliffe of the intention indicated in clause 17.

Conclusion

83. In my view, it was a matter for the inspector whether she regarded the contractual position as sufficient evidence of a continuation of an intention not to dedicate extending into the relevant 20-year period. If a single letter to a public authority evincing such an intention may have such a continuing effect where there is no evidence that the body responsible for it ever resiled from the stance taken in it, a continuing legal stand maintained by the landowner as reversioner of the land in question is at least as capable of having a like effect. Standing on its own, it is not, in my view, challengeable on *Wednesbury* grounds, given that the inspector had properly interpreted and applied the law on that ground alone, and that the Divisional Court too would have been inclined to uphold the decision of the inspector.

84. Accordingly, although I would grant permission to appeal on this issue and would treat the hearing of the application as the hearing of the appeal, I would dismiss the appeal on this ground, along with the other grounds in both appeals.

ARDEN LJ

85. Real property law reflects the long legal history of England and Wales, and the rights which the law gives to freehold owners of land reflects the value which the law places on their rights as opposed to the rights enjoyed by other citizens. Over time the balance has changed. In medieval times, the ownership of the freehold interest in land carried with it large social and political privileges. Property law was then the basis of all public law. The balance which property law draws at any time in its

history between the rights of different persons can have large social and economic effects. For instance, to take a very different case from the present, the ease with which property can be mortgaged has facilitated the financing of commerce and business. The court must be alive to the large effect which property rights have on the life of the ordinary citizens of this country.

86. The particular statutory provision with which we are concerned in this case, section 31 of the Highways Act 1980 , can be placed relatively late in the timeline of events in this field of our history. Even so, the historical perspective is important and the surrounding case law, which is voluminous, requires careful analysis. I am particularly indebted to Auld LJ for setting out the case law in detail. I am also in debt to counsel for their industry in researching this field and for their diligent submissions. On the ***760** main issues on this appeal, I agree with Auld LJ that a court or tribunal may find that the proviso to section 31(1) is satisfied even if the evidence from which it infers that the owner had no intention to dedicate is not evidence of overt acts or acts communicated to or directed at users of the way. I also agree with him that, while a finding that there was no such intention must relate to the period of user, it is not necessary for the owner to show that he did not have the intention to dedicate continuously through the 20 year period.

87. From that voluminous case law and section 31 of the 1980 Act, a number of relevant propositions about dedication can in my judgment be distilled.

88. First, long user of a way does not of itself lead to the result in law that a public right of way is acquired. The court must be able to find that the owner has dedicated the right of way to the public: see for example *R (Beresford) v Sunderland City Council [2004] 1 AC 889, 903, per Lord Scott of Foscote* . This is the premise on which section 31 proceeds. The apparent right appearing from user must be attributed to a lawful origin.

89. Secondly, section 31(1) provides a statutory mechanism for establishing the lawful origin of a public right of way. This does not replace the common law when it enables a public right of way to be established in some other circumstance: section 31(9) . (The appellants do not rely on the common law in this case.) Section 31(1) creates a rebuttable presumption of dedication in the event of 20 years' user of the way by the public as of right and without interruption. As Lord Hoffmann explained in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 353, one of the principal reasons for the introduction of the presumption was to avoid the unpredictability resulting from the need to prove dedication of a way. However, that presumption can be rebutted if, in the words of the proviso to section 31(1) , there is “sufficient evidence that there was no intention during that period to dedicate” the way to the public.

90. Thirdly, the question of what evidence is sufficient for the purposes of the proviso to section 31(1) is a question of the statutory interpretation of section 31 , and there are indications in section 31 that communication of intention of non-dedication is not required. Section 31 is set out in para 21 of the judgment of Auld LJ, so I need not repeat it here. To use a metaphor from the use of ways, I have looked for signposts in section 31 itself which might assist in resolving the issues on these appeals.

91. The principal signposts on the first issue are in my judgment subsections (1), (2) , and then subsections (3) to (6) . Subsection (1) makes it clear that user by the public has to be “without interruption”, meaning in this context without physical interruption. If the proviso requires the doing of acts which are likely to come to the attention of users, then acts of interruption are also likely to qualify as acts which constitute sufficient evidence of lack of intention and the scope of operation of the proviso is reduced, if not to vanishing point, then to an extent which makes its difficult to see the purpose. Subsection (2) provides for the end of the 20-year period for the purposes of section 31(1) . It comes to an end when the user is brought into question in one of the ways there mentioned. As Sullivan J observed in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , 395, there is little room for the operation of the proviso to section 31(1) if the proviso requires acts likely to come to the ***761** attention of users since these events will bring the period of user to an end in any event. These therefore are two signposts against the appellants' contentions in this case.

92. Subsections (3) to (6) enable a landowner to create a rebuttable presumption that there was no dedication to the public of the way there specified. Importantly, a landowner can create a rebuttable presumption that there was no dedication of a way to the public by erecting and maintaining a notice which is visible to users of the way which is inconsistent with dedication: see section 31(3) . This is the normal way in which the owner will show that there was no intention to dedicate the way to the public. Subsection (4) deals with the case where the owner has granted a tenancy of the land and gives him the right to enter the tenant's land and erect a notice.

93. The provisions of subsections (3) to (4) might suggest that the true interpretation of section 31(1) is that evidence of lack of intention is not sufficient unless it is both capable of being seen by the public and unless it continues throughout the period

of 20 years' user relied on by the person asserting a public right of way. However, as against that, while subsections (5) and (6) deal respectively with the giving of notice to an appropriate council and the deposit of maps and statutory declarations, these are overt acts and result in documents to which the public generally will have access. However, these subsections do not require the notice to be visible to persons coming on to the property. In addition there is no requirement that the statement should have been accessible by the public throughout the period. So subsections (3) to (6) read as a whole do not require that the relevant acts evidencing non-dedication should in all circumstances be communicated to or directed at the users of the way.

94. My fourth proposition is that there is nothing in section 31(1) itself that restricts the type of evidence that can be taken into account under the proviso. That conclusion is based on a literal reading of the section. Moreover there is no inherent quality attaching to intention, or any logical necessity arising out of the nature of intention, which means that a particular sort of evidence is required for the purpose of evidencing intention of non-dedication.

95. Accordingly my fifth proposition is that under the proviso in section 31(1) the court must be satisfied that on the facts of the case the evidence of non-dedication is sufficient to rebut the presumption to which 20 years' user gives rise. From this it would follow that an intention which the owner had but never communicated to anyone else might be evidence from which the court could infer that that there was no intention to dedicate the way. However, as the judgment of Sir Donald Nicholls V-C in *Ward v Durham County Council (1994) 70 P & CR 585* referred to in para 63 of the judgment of Auld LJ shows, the court would reflect long and hard before accepting such evidence which could well have been manufactured. Such evidence would in any event have to be evaluated with other evidence of the owner's intention. As Lord Blackburn held in *Mann v Brodie (1885) 10 App Cas 378* , 386, the court may infer an intention to dedicate from evidence that the owner must have known of the user but took no steps to disabuse the users of any belief that the way had been dedicated. (The same point is made in *Trustees of the British Museum v Finnis (1833) 5 C & P 460* and *Barraclough v Johnson (1838) 8 A & E 99* , which were also cited to us.)
***762** Other factors to be taken into account include the location and features of the right of way or the extent of the user.

96. Sixthly, on the second issue, while the word "during" is on the face of it ambiguous and might mean "at any time during" or "throughout", it must like any other word appearing in a statute be interpreted in its context and when it is so interpreted, in my judgment, it is clear that it does not mean "throughout". If it means "throughout", the intention must be continuous and if that is right the result would be draconian. The owner would have to have known when the user started and to have formulated his response immediately. If he had acquired the land after user started, he might quite reasonably know nothing about the user before he acquired the land or his predecessor's intentions regarding dedication. I do not consider that it is likely that Parliament would have intended such a draconian result and if it had so intended it would in my judgment have used clearer wording to achieve that result. In some cases, if during means "throughout", it might be almost as difficult for an owner to satisfy the proviso as for a camel to go through the eye of the needle. Again I have looked for signposts in section 31 itself for help in answering this second issue. As I have already said, section 31(6) (deposit of objection) provides that the deposit can take place at any time during the 20-year period of user and it need not have taken place at the start of that period.

97. My seventh proposition is that the length of the period for which intention of non-dedication on the part of the owner is shown is one of the matters which the court has to evaluate when deciding whether sufficient evidence that there was no intention has been shown. Beyond that, what the words "during that period" in section 31(1) achieve is that the acts on which the owner relies for the purpose of the proviso must have occurred in the same period as the user relied on. If this proposition were not correct the owner might be unable to rebut the proviso simply because for some part of the period he had not decided what to do about dedication and he may not have even realised that some decision was necessary.

98. Auld LJ has examined the case law with great care. I gratefully adopt what he has said. It follows from his judgment and the propositions expressed above that it would no longer be right to treat as good law the dictum of Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439* , 458 that

> "for there to be 'sufficient evidence that 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 public who used the path… -that he had no intention to dedicate."

99. I said at the start of this judgment that over time the balance between the rights of owners of property and those of other citizens has changed. No doubt it will continue to do so. In my judgment in *R (Ashbrook) v East Sussex County Council [2003] 1 P & CR 191* , I accepted that the rights conferred by the Countryside and Rights of Way Act 2000 had wrought a sea change in the law's approach to the rights of members of the public to reasonable enjoyment of the countryside even when in private

ownership. It might be asked whether, in line with the principle that a statute is always speaking, the legislative intent in the proviso in section 31(1) is that the courts should apply the test of sufficiency to reflect modern conditions and **763* the social policy adopted by Parliament as respects access to the countryside. In my judgment, while sufficiency is an open-textured word, section 31 demonstrates no such intention and thus the question whether section 31 should be amended in some way to deal with this sort of case must be a matter for Parliament.

100. To conclude that a way has become dedicated to the public may involve the owner of the land in substantial liabilities. No issue under the European Convention for the Protection of Human Rights and Fundamental Freedoms was argued in the course of this appeal. In view of my conclusions, however, no such issue needs to be considered.

101. For the reasons given above and by Auld LJ, I agree with the orders which Auld LJ proposes, including the order on the subsidiary issue arising on Dr Drain's appeal.

BENNETT J

102. I also agree with the dismissal of the appeals and the orders proposed for the reasons given by Arden and Auld LJJ.

Appeals dismissed .

Permission to appeal refused .

14. 14 March 2006. The Appeal Committee of the House of Lords (Lord Hoffmann, Lord Scott of Foscote and Lord Rodger of Earlsferry) allowed petitions by the claimants in both cases for leave to appeal.

Representation

Solicitors: Zermansky & Partners, Leeds ; Treasury Solicitor ; Blandy & Blandy, Reading .

J R S

Footnotes

1 Highways Act 1980, s. 31 , see post, para 21.