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Case No: CO/2284/14

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2014

Before :

MR JUSTICE DOVE

Between :

Ainsley David Powell and Jane Shergar Irani	**Claimant**
- and -	
Secretary of State for Environment, Food and Rural Affairs	**Defendant**
- and -	
Doncaster Borough Council	**Interested Party**

Mr George Laurence QC and Rodney Stewart Smith (instructed by **Freeths LLP**) for the **Claimant**
Tim Buley (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 15th and 16th October 2014

Mr Justice Dove :

Introduction

1. This is a challenge brought by the claimants pursuant to paragraphs 11 & 12 of Schedule 15 of the Wildlife and Countryside Act 1981. The interested party did not take part in the proceedings. The case raises, in particular, issues in respect of the application of the test under S. 31 of the Highways Act 1980 and the tripartite test which is to be considered in the question of whether or not use (in this case, in respect of a right of way) has been 'as of right.'

The Facts

2. By an order, made on 16 May 2012 under S. 53 (2) (b) of the 1981 Act Doncaster Borough Council, the interested party, sought recognition of a footpath ("the path") which had arisen from presumed dedication under S. 31 of the 1980 Act, in the village of Hatfield on land attached to Hatfield Vicarage. The discovery of the path was one which it was said amounted to an event under S. 53 (3) (c) (i) justifying the making of the Order. The path which was the subject of the Order is in the form of the hypotenuse of a right angled triangle which can be described between points A, B and C. The right angled limbs of the triangle from A through point C to B were already recognised as a path as a result of matters which I shall set out below. It was the hypotenuse to that right angled triangle formed by a line between A and B which was the route of the footpath which the Order sought to recognise.

3. The factual background in relation to the making of the order is of some significance. The essential elements of that factual background are as follows:

(a) When the definitive map and statement was published for Doncaster in 1965 (accurate as at September 1952) a footpath was shown on the line of A to B (the hypotenuse) as part of a longer footpath identified as footpath 13.

(b) In 1967 a Diversion Order was made the effect of which was to extinguish the footpath on the definitive map and statement between points A and B and to create the footpath described above passing from A to B through point C with a right angle at point C.

(c) When the 1981 Act came into force it is common ground that the interested party ought to have made an Order modifying the definitive map and statement so as to give effect to the 1967 Order removing the footpath from A to B and noting upon the definitive map and statement the footpath A to C to B. The interested party never did that.

(d) In 2002, following enquiries by the Vicar of Hatfield, caused by motorcyclists travelling across the land in question, the interested party sent to the Vicar a copy of what they called in correspondence the definitive map. In fact what was sent was not the definitive map but was rather an unofficial 'working' map. The map that the Vicar was sent was incorrect in ways that are irrelevant to this case but other materials sent

with that correspondence showed and confirmed the existence of the footpath created by the 1967 Order on the A to C to B alignment.

(e) At some point residential development commenced within the grounds of the Hatfield Vicarage and fencing was erected in 2006 as a result of that development across the route of the path, the subject of these proceedings, passing directly from A to B. It seems that the line of the route had, as a result of the development, found itself incorporated within the back garden of one of the properties which were being developed. The obstruction caused by the fencing led to objections by those who had used the direct route from A to B (along with the hypotenuse) without going through the right angle at point C. As a result of those objections and following their investigation of the evidence, the interested party sought to recognise the path, formally, through the creation of an Order under the 1981 Act.

(f) There was an initial attempt to make an Order in respect of the path which ultimately, as a result of illegality in relation to the procedures employed in making that Order, led to it being quashed. The evidence in relation to that order and the reason for it being quashed played little or no part in the present proceedings. However, after that initial attempt to make the Order failed, the Order which is the subject of these proceedings was made.

4. After the order had been made it was necessary to convene a Public Inquiry in order to examine whether or not it should be confirmed. The claimants appeared at the inquiry as objectors to the order. Evidence was provided in support of the use of the direct route from A to B along the hypotenuse of the right angled triangle by those who had used it over the years. As will become apparent from the extracts from the Inspector's Report that I am about to quote much of the evidence was provided in writing and many of those who provided a written statement also gave evidence orally at the Inquiry. Some of those who gave evidence recalled seeing a sign marking the direct route along the hypotenuse from A to B which had, by the time of the Inquiry, been destroyed or removed. In the course of the evidence the interested party accepted, in particular through the evidence they called from their Footpath Officer, Mr Diprose, that there was a lack of knowledge of the 1967 Order. This observation was borne out by the witnesses themselves, many but not all of whom were unaware of the existence of the 1967 Order which, as set out above, had extinguished the direct route from A to B and replaced it with the right angled route from A to B through C.

5. After the Inquiry had concluded the Inspector provided a decision letter containing his conclusions. He was satisfied that it was appropriate to confirm the order subject to a number of modifications which are immaterial to the questions which arise before me. Having dealt with a variety of legal submissions the Inspector went on to consider the detailed factual evidence which he had received in respect of the use of the path. The relevant parts of his decision are as follows:

> '36. Before a presumption of dedication can be raised under statute, S. 31(1) of the 1980 Act requires that a way must be shown to have been used by the public, as of right and without interruption, and for this use to have continued for a period of twenty years. In this case, I have concluded that the status of the claimed route was brought into question in 2006, therefore it needs to be

demonstrated that there was public use between 1986 and 2006 ('The relevant period') to satisfy the statutory test.

37. I have been provided with twenty three user evidence forms ('UEFs') in support of use of the claimed route. The Council conducted interviews with eighteen of the users and statements have been provided. A further eight statements have been supplied from additional people. Questionnaires were also sent out to users in order to try and determine the width of the claimed route. It will generally be the case that evidence given at an Inquiry and subjected to cross examination will carry greater weight than written statements provided. In this respect, ten people gave evidence at the Inquiry, seven of whom spoke in relation to their personal knowledge of use of the claimed route...

39. The remainder of the user evidence is supportive of the user being as of right, namely without force, secrecy or permission. There is also no evidence to indicate that this use was interrupted prior to 2006. The user evidence points to frequent use to access particular locations within Hatfield and for recreational purposes such as dog-walking. The evidence of use by the public across the site is not disputed and is supported by the evidence of the Reverend Sweed and his wife. However, it is submitted, on behalf of the principal objectors that use did not correspond to the claimed route throughout the relevant period...

43. In most cases, the UEFs contain a clear description and/or a good quality sketch plan of the route used. On the whole, I find that the written user evidence is supportive of the route included in the Order and that this route did not materially alter during the period it was used. The evidence of the users who spoke at the Inquiry was clear that the route they used corresponded with the one shown on the Order map. More particularly, it was described as a straight route from the site of the kissing-gate in the wall of the church yard towards point B. The gate itself was not in position for a number of years but the frame has remained. It is also apparent that a stile existed near to point B for a short period until it was removed, which left a gap at this point. A few of the users referred to a former footpath sign at point A but it cannot be determined whether this sign was in place during the relevant period. Such a sign would clearly have been incorrectly positioned after 1967. Whilst the users who spoke at the Inquiry acknowledged that vegetation was present in the locality of the claimed route, they generally state that it did not impact on the route used...

46. From an examination of the evidence outlined above it is my view on balance that the route used did not vary to any significant extent during the relevant period. I find the user evidence to be supportive of use in a straight route between the former kissing-gate and the bend in footpath 13 which falls within the parameters of the route included in the Order. It may be the case that the width narrowed at times due to an increase in the amount of vegetation but this issue can impact on maintained rights of way. I also note that Mrs Credland mentions that she sometimes used another route leading across the triangular parcel between the school and the claimed route. However, there is no other evidence to support use of such a route. Further, the user evidence is supportive

of use of a particular route rather than by people wandering elsewhere within the site.

47. Overall, I consider on balance that the user evidence is sufficient to demonstrate that there has been use of the claimed route during the relevant period to such a degree to raise a presumption of the dedication of the footpath inaccordance with S. 31 (1) of the 1980 Act...'

6. The Inspector then reached his conclusions in the following terms:

'53. I find on balance that the evidence of use is sufficient to raise a presumption that the claimed route has been dedicated as a footpath. In addition, I consider that the land-owner did not take sufficient action to communicate to the public that there was a lack of intention to dedicate the route during the relevant period. Therefore, I conclude on the balance of probabilities that a public footpath exists. In light of this conclusion, there is no need for me to address the user evidence in the context of common law dedication.'

The Grounds in Brief

7. The skeleton arguments and the way in which they were developed orally by Mr George Laurence QC and Mr Stewart Smith who appeared on behalf of the claimants reordered the argument from the way in which the case had been originally pleaded. I have therefore for the purposes of my judgment taken the liberty of re-numbering and re-ordering them, since I accept that in truth the way in which the case was pleaded did not present the claimants' points in the most logical order. The claimants' grounds were as follows:

Ground 1: This ground raises the question as to whether prior to posing the tripartite test to establish whether use has been as of right (that is to say in Latin nec vi, nec clam, and nec precario or, alternatively, with neither force, nor secrecy, nor licence) it should first be asked separately in special or particular circumstances, whether the quality of the use was such that a reasonable land-owner could be expected to intervene to resist it. Under this ground it is, therefore, argued that

there is a separate and discreet question to the tripartite test which can arise in certain circumstances which needs to be asked in addition to the application of the tripartite test. The way in which that would impinge on the legality of the decision in the present case is that no such separate question was asked by the Inspector and therefore since such an additional question should have been posed it was an error of the Inspector to neither pose it nor answer it.

Ground 2: Whether even if the claimants are wrong about Ground 1, on the facts of this case the use could not have been as of right because it was secret. That contention arises in this sense. On the facts of the case as set out above everyone proceeded on the basis that there was a path on the direct route from A to B along the hypotenuse of the triangle. Such a path existed at all material times on the definitive map and statement since whilst entirely legally valid the 1967 Order extinguishing it had not found expression in modifications to the definitive map and statement. It is therefore contended that the use was secret or clam, and that the secret or concealed element in this case was the fact that there was in truth no right of way along the direct route from A to B since it had been extinguished in 1967 prior to the relevant period identified by the Inspector.

Ground 3: Under this ground it is contended that the 2012 Order must be quashed so as to enable the interested party to discharge its duty to give effect to the 1967 Order pursuant to alteration to the definitive

map and statement affected under provisions of the 1981 Act as set out below.

Ground 4: Whether in the particular circumstance that the definitive map and statement show a footpath on the direct alignment from A to B there was any jurisdiction either under S 53(3)(c) (i) to make and confirm the order or, alternatively, whether there was such jurisdiction under S 53(3)(b).

Setting out the grounds in summary form hopefully provides some context for the relevant statutory provisions and case law which now follow.

The Law

8. Presumed dedication of a highway is created by the provisions of S 31(1) of the Highways Act 1980. That provides as follows:

> '31(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 twenty 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.'

The duties in relation to the recording of Rights of Way and also their ascertainment are contained in the Wildlife and Countryside Act 1981. In particular there are provisions which are important to the decision in this case contained within S 53 of the 1981 act as follows:

> '53(2) As regards every definitive map and statement, the surveying authority shall-
> (a) as soon as reasonably practicable after the commencement date, by order make such modifications as to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows-

(a) the coming into operation of any enactment or instrument, or any other event, whereby-

(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or

(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path ;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description ; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

9. By S53(5) any person may apply to the authority for an order under subsection (2) to make such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling in paragraph (b) or (c) of subsection (3). The

provisions of schedule 14 of the 1981 Act have effect as to the making and the determination of applications under this section.

10. The 1981 Act makes provision in section 57 for the inspection of a definitive map and statement by the public. Section 57 (5) provides as follows:

> "57(5) as regards every definitive map and statement, the surveying authority shall keep-
>
> a. a copy of the map and statement; and
>
> b. copies of all orders under this Part modifying the map and statement,
>
> available for inspection free of charge at all reasonable hours at one or more places in each district comprised in the area to which the map and statement relates and, so far as appears practicable to the surveying authority, a place in each parish so comprised; and the authority shall be deemed to comply with the requirement to keep such copies available for inspection in a district or parish if they keep available for inspection there a copy of so much of the map and statement and copies of so many of the orders as relate to the district or parish."

11. It is important to interpolate that the 1967 Order was not an order made under this Part of the 1981 Act and therefore would not have been kept for inspection in accordance with section 57(5) although, of course, it formed part and parcel of the interested party's records in relation to footpaths in the area and as noted above its effect was notified to the vicar of Hatfield in the correspondence in 2002.

12. Paragraph 12 of schedule 15 of the 1981 Act provides for an exclusive statutory remedy in relation any person aggrieved by an order. The remedy is an application to the High Court of the kind made in this case.

13. As set out above in relation to Ground 1 there is a contention on behalf of the claimants that there is a separate preliminary or additional question which needs to be asked over and above the tripartite question as to whether or not a reasonable

landowner would have resisted the use which forms the claim. In support of this submission whilst some reliance was placed on the case of Field Common Limited v Elmbridge Borough Council [2005] EWHC 2933 in my view the real starting point for this argument is the seminal decision of the House of Lords in R v Oxfordshire County Council Ex parte Sunningwell Parish Council [2000] 1 AC 335. This landmark decision addressed the question of the correct approach to the test of "as of right" as it appeared in the legislation concerning town and village greens and, as is clear from the materials set out above, a similar test arises under section 31 of the 1980 Act. Having set out in some detail the history of the law of prescription and the correct formulation of the test for the purposes of understanding the expression "as of right" Lord Hoffmann provided as follows at p355H:

> "My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in Hue v Whiteley [1929] 1 Ch 440 has led the courts into imposing on the time-honoured expression "as of right" a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription. There is in my view an unbroken line of descent from the common law concept of nec vi nec clam, nec precario to the term "as of right" in the Acts of 1832, 1932 and 1965. It is perhaps worth observing that when the Act of 1832 was passed, the parties to an action were not even competent witnesses and I think that Parke B would have been startled by the proposition that a plaintiff asserting a private right of way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be

ignored. Still less can it be ignored in a case like R v Suffolk County Council ex parte Steed, when the users believe in the existence of a right but do not know its precise metes and bounds..."

14. Against this background the case which formed the centre piece of the arguments of both parties before me was the decision of the Supreme Court in R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70. This case concerned land belonging to a local authority which had been used both as a golf course and also for the purposes of informal recreation by local people. Both of those uses were conducted by the participants with mutual respect for each other, with local inhabitants overwhelmingly deferring to the golfers activities in undertaking their informal recreation across the land. The question which arose before the Supreme Court was whether or not the use of the public (who had accommodated the use by the golfers) could properly be described as "as of right" so as to found the claim to a registration as a town or village green by one of the members of the public. In approaching that question and the response of the court to it, it is necessary to set out at a little length the observations and conclusions which were reached by several of the Justices of the Supreme Court starting with the judgment of Lord Walker.

15. The important elements of his conclusions are set out in the following paragraphs:

"18. Both Sunningwell [2000] 1 ACC 335 and Beresford [2004] 1AC 889 were concerned with the meaning of "as of right" in the Commons Registration Act 1965. In Sunningwell Lord Hoffmann discussed the rather unprincipled development of the English law of prescription. He explained, at pp 350 - 351, that by the middle of the 19th century the emphasis shifted from fictions:

"to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario; not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom see Mills v Colchester Corporation [1867] LR 2 CP 476, 486).

The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user but for a limited period;"

"Lord Hoffman pointed out that for the creation of a highway, there was an additional requirement that an intention to dedicate must be evinced or inferred (as to that aspect see R (Godmanchester Town Council) v Secretary of State for Environment Food and Rural Affairs [2008] AC 221)...

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

30. Against that Mr Laurence QC relied on the general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. That was in line with what Lord Hoffmann (in Sunningwell [2000] 1 AC 335, 350-351, quoted at paragraph 18 above) called "the unifying element" in the tripartite test: why it would not have been reasonable to expect the owner to resist the exercise of the right...

36. In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right in Sunningwell [2000] 1 AC 335, to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector's word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would materialise into an established right unless the owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998)."

16. Lord Walker therefore concluded that the use had been "as of right" and that the land should have been registered as a town green. Lord Hope in his judgment set out what had been agreed by the parties as the issues raised by the appeal. In particular at paragraph 53 of the judgment (latterly as we shall see referred to as paragraph 4, the paragraph 53 coming from the creation of internal paragraphs within the report as a whole) that the first question raised and agreed between the parties was in the following terms:

> "(1) where land has been extensively used for lawful sports and pastimes nec vi, nec clam, nec precario for 20 years by the local inhabitants, is it necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging."

17. Whilst there was some dissatisfaction expressed by Lord Hope as to the formulation of these issues he later provides an answer in particular to this question. The full context of that answer is as follows:

> "65. The theory on which these provisions are based is known to the common law as prescription: see Lord Hoffmann's explanation in the Sunningwell case [2000] 1 AC 335, 350-351, of the background to the definition of "town or village green" in section 22(1) of the 1965 Act. As the law developed in relation to private rights, the emphasis was on the quality of the user for the 20-year period which would justify recognition of a prescriptive right:
>
> "it became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not be force, nor stealth, nor the licence of the owner....the unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in Dalton v Henry Angus & Co.[1881] 6 App Cas 740, 773 Fry J

(advising the House of Lords) was able to rationalise the law of prescription as follows:

"the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence".

"Section 2 of the Prescription Act 1832 made it clear that what mattered was the quality of the user during the 20-year period. It had to be by a person "claiming right thereto". It must have been enjoyed openly and in the manner of the person rightfully entitled would have used it, and not by stealth or by licence...

66. Referring then to section 1(1) of the Rights of Way Act 1932, Lord Hoffmann said in the Sunningwell case [2000] 1 AC 335, 353:

"the words 'actually enjoyed by the public as of right and without interruption for a full period of 20 years' are clearly an echo of the words 'actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years' in section 2 of the 1832 Act. Introducing the Bill into the House of Lords (HL debates), 7 June 1932 col 637, Lord Buckmaster said that the purpose was to assimilate the law of public rights of way to that of private rights of way. It therefore seems safe to assume 'as of right' in the 1932 Act was intended to have the same meaning as those words in section 5 of the 1832 Act and the words 'claiming right thereto' in section 2 of that Act..."

67. In the light of that description it is, I think, possible to analysis the structure of section 15 (4) in this way. The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word "lawful" indicates that they must not be such as will be likely to cause injury or damage to the owners property; see Fitch v Fitch (1797) 2 ESP 543. And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6, 77), the owner will be taken to have acquiesced in it – unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way – either because it has not been asked or because it had been answered against the owner – that is an end of the matter. There is no third

question. The answer to the first issue (see para 4 [53], above) is – No.

68. Mr Charles George QC for the claimant said that there was only one simple test: was the use caught by any of the three vitiating circumstances? Mr George Lawrence QC confirmed that it was common ground that the use of the land for recreation in this case was in this case nec vi, nec clam, nec precario, but he said that this did not exhaust the issue. The unifying principle was one of reasonableness. He said that, if it was not reasonable to expect the owner to resist what the users were doing, no harm could come to the owner from his omission to resist or complain. In this case, as the Inspector held, the local inhabitants overwhelmingly deferred to the golfers. As Dyson LJ said in the Court of Appeal [2009] 1 WLR 1461, paras 48- 49, the user of the local inhabitants was extensive and frequent, but so too was the use by the golfers, the greater the degree of deference, the less likely it was that it would appear to the reasonable landowner that the locals were asserting any right to use the land.

69. I agree with Mr George that all the authorities show that there are only three vitiating circumstances.... there is no support there for the proposition that there is an additional requirement. But that does not answer Mr Laurence's point, which was really and quite properly directed to the first question as to the quality of the use that is relied on. That, as has been said, is the critical question in this case".

18. Lord Hope went on to conclude that it was not a bar to the registration of the town green that the two uses, that of the golfers and that of the local inhabitants, coexisted. The legitimacy of recognising coexisting rights, namely the rights of the landowner to use the land at the same time as a recognised right of local inhabitants to use the land as a town or village green was also at the heart of the rationale for Lord Brown also concluding that registration would be permissible.

19. He concluded as follows;

"106 in short, on the facts of this case, had the use of the land as part of a golf course continued, the locals would in my opinion have had to continue "deferring" to the golfers. By this I understand the inspector

to have meant no more than that the locals (with the single exception of Squadron Leader Kime) recognised the golfers' rights to play (in this sense only the locals "overwhelmingly deferred to golfing use"), both locals and golfers sensibly respecting the use being made of the land by the other, neither being seriously inconvenienced by the other, sometimes the locals waiting for the golfers to play before themselves crossing, sometimes the golfers waiting for the walkers to cross before playing. It is not unique for golf courses to embrace at least some common land and there are innumerable courses crossed by public footpaths. Both walkers and golfers are generally sensible and civilised people and common courtesy dictates how to behave. Harmonious coexistence is in practice easily achievable. For my part, and in the light of my own experience both as a golfer and as a walker for over six decades, I do not read the inspectors findings as indicating (to quote Sullivan J) [2008] EWHC 1813 at [40] " that there was overwhelmingly 'give' on the part of the local users and 'take' on the part of the golfers".

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

20. As indicated in paragraph 107 of his judgment Lord Kerr gave a judgment which came to a similar conclusion as the other JSCs. The reasons for his conclusions were as follows;

'114 it is for this reason in particular that I am in emphatic agreement with Lord Hope DPSC in his view that one must focus on the way in which the lands have been used by the inhabitants. Have they used them as if they had the right to use them? The question does not require any examination of whether they believed that they had the right. That is irrelevant. The question is whether they acted in a way that was comparable to the exercise of an existing right? Posed in that way, one can understand why the Court of Appeal considered that the examination of the relevant question partook of an enquiry as to the outward appearance created by the use of the lands by the inhabitants. On that basis also one can recognise the force of Mr Lawrence QC's argument that it was necessary to show not only that the lands had

been used nec vi, nec clam, nec precario but also that it was reasonable to expect the landowner to resist the use of the land by the local inhabitants. The essential underpinning of both these assertions, however, was the view that the registration of the lands as a village or town green had the inexorable effect of enlargement of the inhabitants' rights and the commensurate diminution of the right of the landowner to maintain his pre-registration level of use, if that interfered with the inhabitants extended use of the lands.

115 For the reasons that Lord Hope DPSC and Lord Walker JSC have given, the view that this was the effect of the relevant authorities in this area may now be discounted. For my part, I find it unsurprising that this view formally held sway. Mr Lawrence (without direct demur from Mr George) informed us that it was the universal opinion of all who practised in this field that the inevitable consequence of the decision in Oxfordshire County Council v Oxford City Council [2006] 2 AC 674 was that local inhabitants acquired unrestricted rights of recreation after registration. Passages from the speech of Lord Hoffman in that case – particularly at para 51 – appeared to lend support for the notion that general, unrestricted rights of recreation over the entire extent of the lands followed upon registration. And the speech of Lord Scott of Foscote certainly seemed to imply that he apprehended that this was the outcome of the decision by the majority. Whatever may have been the position previously, however, it is now clear that, where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration.

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

21. During the course of argument my attention was drawn to the recent decision of the Supreme Court in Lawrence & Another v Fenn Tigers Limited & Others [2014] UKSC 13, which albeit a case in relation to an allegation of nuisance, paragraph 30 of Lord Walker's judgment in the case of Lewis was quoted with approval by Lord Neuberger at paragraph 44. Further consideration has been given to the question of the meaning of "as of right" in another recent decision of the Supreme Court in R (Barkas) v North Yorkshire County Council & Another [2014] UKSC 31. This case, whilst concerned with the meaning of the expression "as of right", was in particular focussed upon the "precario" or "licence" element of the tripartite test. It arose in circumstances where the landowner was a local authority which held the land the subject of an application for town and village green registration as a piece of recreation ground under the provisions of the Housing Act 1985. The Supreme Court were clear that the public ownership of land pursuant to a statutory power to provide recreation land was sufficient to amount to the giving of a permission or a licence to the local inhabitants using it so as to defeat the claim to that use being "as of right". In the course of his judgment Lord Neuberger PSC made the following observations in reaching his conclusion as to whether or not the use in that case had been "as of right";

> "16 in the subsequent case of R (Lewis) v Redcar & Cleveland Borough Council (2) [2010] 2 AC 70, which was concerned with the 2006 Act, Lord Walker confirmed at paragraph 20 "as of right" "is sufficiently described by the tripartite test nec vi, nec clam, nec pecario [as] established by high authority" (I would be prepared to accept that it is possible that, as Lord Carnwath suggests, there may be exceptional cases involving claims to village greens where this does not apply, but I am doubtful about that). And at para 30 Lord Walker accepted as a "general proposition" that, if a right is to be obtained by prescription, the persons claiming that right "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him".

17 In relation to the acquisition of easements by prescription, the law is correctly stated in *Gale on easements (19th edition 2012), para 4-115;* "the law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced by the owner is "as of right"; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not "as of right". Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence".

18 the concept of acquiescence in this context was explained in the opinion delivered by Fry J (with which Lord Penzance expressed himself as being "in entire accord" at page 803), in Dalton v Henry Angus & Co (1881) 6 App Cas 740, 774, where he said: "I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner; 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant maybe be made appears to me to be plain...." ...

20 in the present case, the Council's argument is that it acquired and has always held the Field pursuant to section 12 (1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any "inhabitants of the locality" having indulged in "lawful sports and pastimes" "as of right" as they have done so "of right" or "by right". In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully or *precario,* and the 20-year period referred to in section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the Council lawfully cease to hold the Field under section 12 (1) of the 1985 Act.

21 In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In Sunningwell at pp 352H – 353A, Lord Hoffman indicated that when a user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public

on the Field walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.'

22. As a result of the acceptance of the council's argument in that case Lord Neuberger concluded that the land could not be properly registered as a town or village green as the land had not been used "as of right" for the reasons he gave. Lord Carnwath also delivered a judgment concurring in the result with that of Lord Neuberger. The only potential distinction between their positions related to the issue identified in paragraph 16 of Lord Neuberger's judgment as to whether there might be exceptional cases in which the tripartite test was not sufficient of itself. What was said in support of his position by Lord Carnwath was as follows:

> "58 "as of right"/"by right" dichotomy is attractively simple. In many cases no doubt it will be right to equate it with the Sunningwell tripartite test, as indicated by judicial statements cited by Lord Newburger (paras 15-16). However, in my view, it is not always the whole story. Nor is the story necessarily the same story for all forms of prescriptive right...
>
> "61. Lord Scott's analysis shows that the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole. This includes consideration of what Lord Hope has called "the quality of the user", that is whether "the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of the public right" (R (Lewis) v Redcar and Cleveland Borough Council (No. 2 [2010] 2 AC 70, para 67). Where there is room for ambiguity, the user by the inhabitants must in my view by such as to make clear, not only that a public right is being asserted, but the nature of that right.
>
> 62. This is not a live issue in most contexts in which the tripartite test has to be applied, whether under this legislation or otherwise, because there is no room for ambiguity. It was not an issue in Sunningwell itself, where the land was in private ownership, and

there was no question of an alternative public use. Twenty years use for recreation by residents, the majority of whom came from a single locality, was treated as an effective assertion of village green rights...

64. The same cannot necessarily be said of recreational use of land in public ownership. Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right.

65. The point can also be tested by reference to the 'general proposition' (cited by Lord Neuberger, para 16) that, if a right is to be obtained by prescription, the persons claiming that right—

'must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning trespassers off, or eventually finding that they have established the asserted right against him'.

It follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that a 'right' is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights."

23. My attention was drawn to a decision of Mr John Howell QC sitting as a Deputy High Court Judge in relation to a similar but not identical factual context in the case of Naylor v Essex County Council & others [2014] EWHC 2560 (Admin). That case related to an application for registration of a parcel of land as a town or village green where a local authority was not the owner of the land in question, but had managed and maintained it as if it were an area of public open space or parkland and open for all to use. The conclusion which was reached by the Inspector who considered the application on behalf of the registration authority was that the land was most likely to have been managed and controlled either under sections 9 and 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875. Mr Howell concluded in particular in paragraphs 39 to 42 of his judgment that it made no difference to the rights which the public had to use the land that the use arose by virtue of an

arrangement between the landowner and the authority where the authority had itself no legal interest in the land. He concluded that in the circumstances of that case the local inhabitants would have been using land "by right" or "precario" in the sense of having permission to do so from the landowner pursuant to the arrangements between the landowner and the local authority securing the provision of the land and its management as a piece of public open space. Mr Howell QC therefore upheld the decision of the Inspector that the land should not be registered.

24. The final case to which I need to make reference is that of London Tara Hotel Ltd v Kensington Close Hotel Ltd [2011] EWCA Civ 1356. This case concerns whether or not a private easement had been acquired by prescription over a roadway between two hotels. Initially the right to use the way had been created by a personal contractual licence granted by the claimant ("Tara") and a predecessor in title of the defendant. Over the course of time the ownership of the hotel which had initially had the benefit of the licence changed. As the licence was purely contractual, and personal, once the ownership of the hotel with the benefit of the licence changed the legal rights under the licence terminated. Nonetheless the use of the way was continued by successors in title to the hotel to whom Tara had originally granted the licence and the question then arose as to whether or not the use had crystallised by prescription into an easement with a legal entitlement to it. The determination of that issue depended upon an understanding of the expression "as of right" and in the judgment of the Court of Appeal the meaning and effect of the decision in Lewis was discussed and concluded upon. The analysis of the Master of the Rolls appears in the following paragraphs of his judgment:

> "28. In Redcar [2010] 2 AC 70, Lord Walker gave the leading judgment, with which three of the other four justices expressly agreed.

He said that '[t]he proposition that "as of right" is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor by stealth, nor the licence of the owner)' was 'established by high authority' – see at [2010] 2 AC 70 para 20, citing, *inter alia*, observations of Lord Davey and Lord Lindley in Gardner [1903] AC 229, and of Lord Bingham and Lord Rodger in Berrisford [2004] 1 AC 889. Lord Hope reached the same conclusion at [2010] 2 AC 70, para 67, when he said that 'the owner will be taken to have acquiesced in [a use] – unless he can claim that one of the three vitiating circumstances applied in his case'. Lord Brown and Lord Kerr also expressed the same view at [2010] 2 AC 70, paras 107 and 116 respectively. Lord Rodger said at [2010] 2 AC 70, para 87, that, 'the basic meaning of ["as of right"] is ... *nec vi, nec clam, nec precario*'.

29. So, in order to succeed on this appeal, it seems to me clear that Tara would have to show that the use of the roadway from 1980 by KCH and its predecessors was vi, clam, or precario, when judged by the actual use as viewed from the perspective of a reasonable person in the position of Tara. There is no question here of *vis*. However, the argument that, viewed from the perspective of Tara, the use of the roadway from 1980 was precario or clam is not without its attraction. Tara assumed that things had no changed in 1980, and therefore, although as a matter of fact it gave no thought to the Licence, it could be said to have proceeded on the assumption that things were continuing as they had before 1980, and so, implicitly, that the Licence still applied, and the use was with permission, or precario. Another way of putting it is that KCH's predecessors did not inform Tara of the change in the KC Hotel's ownership, which meant that the subsequent use of the roadway was, from the perspective of Tara, secret or clam, in the sense that the identity of the person for whose benefit the use was enjoyed.

30. Although these arguments have their attraction, I cannot accept them...

35. I turn to the other way Mr Gaunt puts the case for Tara, namely that the use of the roadway after 1980 was clam. As the judge said, there was nothing secret about the way in which KCH and its predecessors used the roadway after 1980 at least in the ordinary sense of the word, the use of the roadway was plainly not secret. To succeed on the issue, therefore, Tara needs to establish that, as a matter of principle, a use can be clam simply if the identity of the person enjoying the use is unknown to the owner of the putative servient land. I am prepared to assume that that may be so, but I do not consider the argument can succeed on the facts of this case.

36. It was inherent in the licence that it would determine on a change in the ownership of the KC Hotel, and that should have been (and maybe was) appreciated by Tara when the licence was granted. When the change of ownership of the KC Hotel occurred in 1980, there was no question of any secrecy, or even of a deliberate intention to keep

quiet, on the part of KCL or THF, as is shown by the fact that the change was known to junior employees at the KC Hotel. Accordingly, it appears to me that Tara's case on clam fails for very much the same reasons as Tara's case on precario fails.

37. Of course, whether the case is put on clam or precario, very different considerations would apply if it could have been shown that KCL or THF had deliberately concealed the change of ownership of the KC Hotel from Tara, or, a fortiori, if it could have been shown that KCL or THF had deliberately misled Tara about the change of ownership. But there is no such suggestion in this case."

25. Aikens LJ agreed with the judgment of the Master of the Rolls and also the judgment of Lewison LJ. The reasoning of Lewison LJ appears in the following passages from his judgment:

"59. In the course of his excellent submissions Mr Gaunt QC said that the law of prescription was founded on acquiescence. A landowner could not acquiesce in something of which he was ignorant. Thus the use relied on to support a claim to have acquired an easement by prescription entails assertion, appearance and acquiescence. The assertion in question is an assertion to exercise a right without the landowner's permission. The appearance is how it would appear to a reasonable landowner. The use relied on must be such as to cause the reasonable landowner to appreciate that the assertion is being made by conduct; or at least put him on inquiry that such an assertion is being made. If thereafter he takes no action to prevent the use, he can fairly be said to have acquiesced in it. But unless he knows or ought to know that he can object to the use he cannot be said to have acquiesced to it. Thus the first ground of appeal is that the use relied on did not have the requisite quality to support a claim to have acquired an easement by a prescription.

60. It is clear on high authority that the subjective state of mind of the person exercising the claimed right is irrelevant. The subjective state of mind of the owner is equally irrelevant."

26. Lewison LJ went on to cite passages in Sunningwell and identified in paragraphs 63 and 64 of his judgment that the key question raised by the claimant's submissions was whether the nature of the use had to be such as to make it appear to the reasonable landowner that the use is taking place on the basis that it is carried on in the exercise of a right to use without permission as well as there being no permission in fact. At paragraph 66 of the judgment Lewison LJ concluded that although the law could have

developed in the way that the claimant contended for, as a result of the decision of the Supreme Court in Lewis he was satisfied that it had not, and that Lewis provided clear authority that it had not. Having set out passages from the judgments in Lewis which have been set out by me above, Lewison LJ formed his conclusion on the issue at paragraph 74 as follows:

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

27. Lewison LJ went on to conclude that on the facts of the case it was not possible to conclude that the use of the roadway had been secret in the relevant sense so as to defeat the creation of the easement by prescription.

28. It is against the background of these legal authorities, which it has been necessary in the light of the arguments raised to quote from extensively, that I turn to assess the grounds of the challenge on which the case is brought by the claimant.

GROUND 1

29. The way in which this contention was formulated in the claimant's skeleton argument was set out at paragraph 7.1 of that document as follows

> "the principle underlying in ground D is that a claim of presumed dedication of a Highway under Section 31 of the Act cannot arise, even if use of the way by public as of right is proved for a 20 year period, if the particular circumstances of the use are such that a

> landowner who is reasonably vigilant in protecting his rights cannot have been expected to prevent the use."

30. This submission from the skeleton argument is made in the context of the purported existence on the definitive map and statement of a footpath which would have suggested to the landowner that the user which was being witnessed was one which was simply consistent with that definitive map and statement. This was a case, it was submitted by Mr Laurence, in which the provision of the additional preliminary enquiry which he contended for, would have made a difference to the outcome of the assessment. Furthermore, he submitted that in the light of the existence of the inaccurate definitive map and statement and the particular circumstances of this case which I have set out above, the court was concerned with a case of "ambiguity" of the kind with which Lord Carnwath in the Barkas case was concerned. In the light of that "ambiguity" Mr Laurence submitted in reliance upon Lord Carnwath's observations that the tripartite test in this case might not amount to the whole story as to whether or not a public right had been acquired by means of prescription. As set out above, the failure of the inspector to ask the additional question which Mr Laurence contended as a matter of law he was required to do, rendered the decision which he reached unlawful.

31. In response to these submissions Mr Buley, who appeared on behalf of the defendant, contended that it was simply unarguable (based on the authorities which I have set out at length above) that there might be a separate test in addition to the tripartite test. Furthermore, he submitted that in any event on the facts of this case, the posing of that additional question would have made no difference.

32. Having set out the authorities above and reviewed them, I have no hesitation in concluding that it is absolutely clear from them that there is no additional test over and beyond the tripartite test which the inspector in fact applied. My reasons for reaching that conclusion based on the authorities are as follows.

33. Firstly, para 30 of the case of Lewis in the judgment of Lord Walker, is not authority in my view for any additional test. What Lord Walker is doing in that paragraph is, like Lord Hoffman, equating the tripartite test with the question of whether or not it was reasonable to expect that the owner would resist the use. In other words, posing the tripartite test is the law's way of assessing whether or not it would be reasonable to expect that the use would be resisted by the landowner. Similarly in Lewis at para 67, Lord Hope is not saying, in my view, that there is an additional test to be applied. The proper understanding of that paragraph in his judgment is, that what Lord Hope is doing is to raise the obviously preliminary threshold of whether or not the extent and quality of the use in question could properly be regarded as the assertion of the right which is being claimed. Thus in my view, the case of Lewis is clear authority for the proposition that in fact there is no additional test beyond the tripartite test.

34. Secondly, the case of Tara is in my view clear authority that the law did not develop in the way contended for by Mr Laurence. That proposition is made very obvious in para 74 of the judgment. As Mr Buley rightly pointed out in the course of argument, that case is binding upon me in any event. Even if it were not binding on me, the analysis which is set out by Lewison LJ is a convincing response to the submissions made by Mr Laurence in this case.

35. Thirdly, although it is unclear whether or not the Tara case was cited in Barkas there is, in my view, nothing in Barkas which suggests that the conclusions reached by Lewison LJ in the case of Tara were wrong. Certainly there is nothing in para 16 of Lord Neuberger's judgment which suggests this is the case. Furthermore, I am unable to accept that this is a case where any possible "ambiguity" of the kind contemplated by Lord Carnwath in para 67 arises. The use of the footpath in this case was clear and found by the inspector to be so. The ambiguity which is contended for by the claimant only arises when you look behind that user at questions of what might or might not have been disclosed by legal documentation (in particular in the definitive map and statement) and further what might have been known or discoverable by the landowner or the users. That approach is in my judgment inappropriate. The authorities are clear that the focus of the inquiry should be on the use itself and how it would, assessed objectively, have appeared to the landowner. The case of Barkas at para 21 re-enforces this aspect of the matter.

36. It follows therefore that there was no additional test of whether the reasonable, or reasonably vigilant, landowner would not, even if the use is neither by force, nor stealth, nor permission, have been expected to prevent that use. The structure of the inquiry, as explained by Lord Hope in the Lewis case, is as follows. First there must be an examination of the quality of the use which is relied upon. Was it of sufficient quantity to amount to the assertion of a right? Was it consonant in quality to the nature of the right which is being claimed? For instance, exclusive evidence of usage on foot could not be used to substantiate a claim for the existence of a bridleway. Once the use has passed that threshold of being of sufficient quantity and suitable quality then the

question arises as to whether any of the vitiating elements from the tripartite test apply. The tripartite test is to be applied judging the questions objectively from how the use would have appeared to the owner of the land. The application of that test is all that is required. And in particular an additional, broader, inquiry is not justified by the authorities.

GROUND 2

37. Mr Stewart Smith submitted that applying the tripartite test objectively, from the perspective of the reasonable landowner, the use in this case was clam, or secret. He made that submission contending that a broad approach should be taken to the notion of whether or not the use was open or by stealth. The justification for that broad approach was to be found, he submitted, for instance, in the case of Barkas where an extended meaning had been given to the term "precario". In that case, the question of precario, or licence, was extended in its reach to a use that had been made lawful by statute. That broader or more generous approach to the elements of the tripartite test, he submitted, should be taken in relation to the question as to whether or not the use here was one which was secret.

38. The secrecy upon which Mr Stewart Smith relied in the present case was that because the 1967 Order had not been given effect by being put on the definitive map and statement (or deployed to make modifications to the definitive map and statement), a reasonable land owner (at least from 1986 – 2002) would have had no reason to suppose that the use was not "by right" in accordance with the footpath identified and advertised in the definitive map

and statement. The position as presented to the reasonable land owner, was it seems, reinforced by the positioning of a misleading sign as set out above.

39. In response, Mr Buley contends that this is a very unattractive submission, since the use in this case was in no normal sense of the word secret. In truth, he contends, Mr Stewart Smith's submission is really related to the contention that the land owner would have been misled by the definitive map and statement and that the non existence of the footpath along the hypotenuse from A to B (or its extinguishment) was the real secret here.

40. In my view, the difficulty with Mr Stewart Smith's submission is its factual basis. I am unable to accept that the reasonable land owner, faced with the use described by the inspector in his decision, would have simply relied upon what was disclosed as a result of S57 (7) on the definitive map and statement. It needs to be recalled that the definitive map and statement were accurate as at 1952 and had not been updated. Furthermore, I do not consider that the reasonable land owner would have simply replied upon the presence of an old sign. In his report the inspector addressed points of this nature and in particular, the relatively historic character of the definitive map and statement, and also the question as to whether or not people were misled by the existence of the path on the map on the hypotenuse from A to B upon it. He recorded in his decision as follows:

> "31. Section 53(3)(c)(1) of the 1981 Act provides for the recording of ways found to subsist which are not already recorded in the map and statement. There will be no purpose in an Order being made to record an identical right of way. However, regard needs to be given to the rights recorded only being conclusive as at the relevant date. The fact that the definitive map and statement have not been modified to take

> into account the subsequent legal events could lead to a person being misinformed should they look at the defective map in isolation. Although there is no evidence to suggest that this has happened in this case. Mr Diprose confirmed that people making enquiries regarding the position of rights of way in this area would have been informed that Footpath 13 followed the diverted line. This is supported by the letter outlined in para 50 below [the letter of the 24th October 2002]"

41. It follows therefore, that the Inspector concluded that were any enquiries made as to the rights of way, then on the basis of Mr Diprose's evidence, the person enquiring would have been informed that Footpath 13 followed its diverted line and not that which was apparently shown on the definitive map and statement. On the facts therefore, I am satisfied that, like the case of Tara, there is in truth no evidence here of anybody actually being misled about the position. Any reasonable land owner faced with the use described by the inspector would not have relied simply on a definitive map accurate alone as at the relevant date. Any enquiry of the Interested Party, as the Inspector found, would have brought to light the existence of the 1967 Order and the diversion to which it gave effect.

42. GROUND 3

Like ground 4, ground 3 is procedural rather than substantive in character and is a point raised as to the jurisdiction of the interested party and the defendant to make the order in the first place. The contention made by the claimant is that the 2012 order must be quashed because unless that is done the interested party will not be able to fulfil its duty under Section 53(2)(a) to modify the definitive map and statement so as to give effect to the 1967 order. It will be recalled from the earlier citation in this judgement that the duty under Section 53(2)(a) is to

> "as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appears them to be requisite in consequence of the occurrence, before that date of any of the effects specified in sub-section 8(b)".

43. There can be no doubt that after the commencement of the 1981 Act prior to the 2012 Order the definitive map and statement should have been modified pursuant to this provision so as to give effect to the 1967 Order. There is no evidence in this case that to do so was not reasonably practicable after the 1981 Act commenced. However, in my view the section cannot be read as requiring in circumstances such as this the quashing of orders because they are inconsistent with other orders affecting the definitive map and statement which have yet to be given effect in that documentation. Whilst it might have been reasonably practicable to undertake the task of implementing the 1967 Order earlier, I see nothing in the section to prevent the approach that when the interested party comes to make modifications that they will do so in the light of all the orders which may have been made prior to them undertaking those modifications, including ones which may have extinguished and then recreated paths in the same place. In short it is not inconsistent with the duty under Section 53(2)(a) for the defendant in undertaking the task of modifying the definitive map and statement to now give effect to the 2012 Order notwithstanding that that would be to act as if the extinguishment element of the 1967 Order had not occurred. The point is that the duty requires them to modify the map when they do so in a way which ensures that it reflects the up to date position and I see no warrant in the language of the legislation to

require the 2012 Order to be quashed so as to give effect to an order which the 2012 Order effectively supersedes.

GROUND 4

44. Ground 4 is in 2 elements. Firstly it is said on behalf of the claimant that because the footpath which provides the direct route between points A and B created by the 2012 Order was shown on the definitive map and statement as published, there was not an event under Section 53(3)(c)(i) which could be relied upon in order to make the order . It will be recalled from what has been set out above that that provision relates to the discovery of evidence by the authority which shows that a right of way which is not shown in the definitive map and statement:

> "subsists or is reasonably alleged to subsist over land in the area which the map relates".

It is submitted by the claimant that on the basis that the definitive map already shows a footpath in that location there was no jurisdiction under that element of Section 53 to make the order. The path was already "shown in the map".

45. In the course of his submissions Mr Buley sought to defeat this contention by making a number of factual submissions seeking to distinguish the path created by the 2012 Order and that which might have existed on the definitive map. He contended that the inspector was correct when he observed in paragraph 24 of his decision that the footpath extinguished under the 1967 Order merely "broadly corresponds" to that in the 2012 Order. Furthermore he drew attention to the fact that the path which was extinguished in 1967 was 3 feet wide and that created by the 2012 Order was 1.4 metres wide. He also

drew attention to the different basis by which the 2012 path had been created as compared to that which was extinguished in 1967. I am bound to say that I did not find any of these points of distinction particularly convincing. Having examined both the definitive map and statement, the 1967 Order and the 2012 Order it is difficult to reach anything other than the conclusion that they are essentially the same. Whilst the widths are different that does not appear to me to be a significant or material matter which suggests that the 2012 Order path is not already in substance shown on the definitive map and statement.

46. However, that is not the end of the matter because the linked contention which arises under this ground is that the path could in any event have been confirmed on the facts as found by the Inspector under Section 53(3)(b) which, as set out above, covers the case where "the enjoyment by the public of the way during that period raises the presumption that the way has been dedicated as a public path". It is in effect therefore an alternative basis on which the confirmation of the order could have proceeded bearing in mind the Inspector's conclusions which I have set out above.

47. Although submissions were made as to discretion (on the basis that this subsidiary or alternative means of confirmation of the order would effectively arise as an exercise of judicial discretion) I do not consider that the arguments made in that respect displace Mr Buley principal submission that this is genuinely a case where the same outcome would have been reached by a different route. It is not open to the claimants (nor have the claimants attempted) to displace the conclusions that the inspector reached as to the use of the direct route between points A and B for a twenty year period as of right.

In those circumstances whilst it is submitted that it would send a message out to authorities in the position of the interested party that they ought to comply with the duty to maintain an up to date definitive map and statement, I do not consider that that is a matter which is of any (and certainly not of sufficient) weight to justify the grant of relief in this case. It is clear to me on the findings of the Inspector that the outcome in terms of confirmation of the order would have been the same and that therefore the point that is raised in Ground 4 is ultimately not one which would justify quashing the order.

48. CONCLUSIONS.

For the reasons that I have set out above the claimant's application must be dismissed.