

Neutral Citation Number: [2015] EWHC 893 (Admin)

Case Nos: CO/4444/2014 & CO/4871/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

1 April 2015

B e f o r e :

**RHODRI PRICE LEWIS QC
(Sitting as a Deputy High Court Judge)**

Between:

ASGHAR ALI

Claimant

- and -

**(1) SECRETARY OF STATE FOR
ENVIRONMENT, FOOD AND RURAL
AFFAIRS**

**(2) ESSEX COUNTY COUNCIL
(3) FRINTON AND WALTON TOWN
COUNCIL**

Defendants

**Mr Richard Langham (instructed by Direct Access) for the Claimant
Mr Gwion Lewis (instructed by The Treasury Solicitor) for the First Defendant
The Second and Third Defendants did not appear
Hearing date: 17 March 2015**

The Deputy Judge (Rhodri Price Lewis QC):

Introduction:

1. There are two claims before the court which both seek the quashing of an order made under section 53 of the Wildlife and Countryside Act 1981 modifying the definite map of public rights of way for Essex by adding a new footpath ("the footpath") between numbers 59 and 61 Connaught Avenue, Frinton-on-Sea. The first claim was issued in error 2 days before the time

for challenge began and it is agreed that I should dismiss that earlier claim and deal with the later claim made within the statutory period for challenge.

2. The footpath runs along an alleyway about 1 metre wide between numbers 59 and 61 Connaught Avenue, Frinton-on-Sea. The alleyway forms part of the property at 59 Connaught Avenue. The Claimant Mr Ali owns that property. He had bought the adjoining property number 57 in 2007 and went on to buy number 59 in 2011. Number 57 has the benefit of a private right of way along part of the alleyway. At all material times there has been a door in the alleyway. Mr Ali became concerned at the use being made of the alleyway and erected metal gates at either end in February 2012. That prompted Frinton and Walton Town Council to apply to Essex County Council, the surveying authority under the Wildlife and Countryside Act 1981, for an order under Section 53(2)(b) of that Act modifying the definitive map so as to add the footpath as a public right of way. Mr Ali objected and the County Council decided not to make the order. However, the Town Council appealed successfully to the First Defendant and the County Council were directed by the First Defendant to make the order and did so on the 5th July 2013. The Claimant objected to the order and a public inquiry was therefore held on the 15th July 2014. The County Council adopted a neutral stance at the inquiry and have not appeared before me. The Town Council were represented at the inquiry and called witnesses. They have not appeared before me. Mr Richard Langham of Counsel appeared on behalf of Mr Ali at the inquiry and called Mr Ali and two other witnesses. The Inspector appointed by the First Defendant to hold the inquiry, Sue Arnott, heard the evidence, inspected the route of the footpath and wrote her decision letter dated the 20th August 2014 in which she confirmed the order. The grounds of claim challenge the way the Inspector dealt in that decision letter with the evidence as to the locking of the door which is at the western end of the alleyway about half way between the points A and B shown on the Order plan.

The Law:

3. The law that applies in this case is not controversial. By Section 53(2)(b) of the Wildlife and Countryside Act 1981 the County Council as surveying authority has a duty to keep its definitive map and statement of public rights of way under continuous review and where it discovers evidence which shows that a right of way which is not shown on the map and statement subsists, it should make by order an appropriate modification to the map and statement. There is provision under Schedule 14 to the Act for the Secretary of State to direct the making of an order and that is what happened here. Objections may be made in respect of the Order so made and where any such objection is maintained the authority submit the order to the Secretary of State for confirmation and he in turn causes a local inquiry to be held: Schedule 15 paragraph 7(2).
4. The parties agree that at the inquiry stage evidence is required which shows on the balance of probabilities that a right of way subsists along the Order route if the Order is to be confirmed: see the decision letter at paragraph 5 (hereafter I shall refer to paragraphs of the decision letter as “DL5” and so on).
5. Section 31 of the Highways Act 1980 provides:
 - “(1) Where a way over any land...has actually been 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.”

6. There was no such notice here so I need not set out subsection (3). Nor need I set out any of the other methods in Section 31 in which a landowner can show he had no intention to dedicate the way as a highway because none of those methods was relied on here. As I have said the sole matter relied upon was the locking of the door in the alleyway.
7. How a landowner's intention not to dedicate a way as a highway can be established was considered by the House of Lords in *Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] 1 AC 221 and it will suffice for present purposes if I quote the headnote:

“A landowner's intention not to dedicate a way as a highway had to be established objectively and ‘intention’ meant what users of the way would reasonably have understood his intention to be; that ‘sufficient evidence’ that there has been no intention to dedicate required evidence of some overt acts on the part of the landowner such as to come to the attention of the public who used the way and demonstrate to them that he had no such intention, and it was not sufficient for him simply to give evidence that he had not so intended; that...the landowner's intention did not have to be continuously manifested ‘during’ the whole of the 20 year period but merely at some point during that period...”

8. The court's role in cases such as this is a supervisory one and so is limited to consideration of public law principles as explained in the familiar words of Forbes J in *Seddon Properties v Secretary of State* [1981] 42 P&CR 26:

“(1) The Secretary of State must not act perversely. That is if the court considers that no reasonable person in the position of the Secretary of State properly directing himself on the relevant material, could have reached the conclusion that he did reach, the decision may be overturned... This is really no more than another example of the principle enshrined in a sentence from the judgement of Lord Greene M.R. in *Associated Picture Houses Ltd v Wednesbury Corporation*: ‘It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.’

(2) In reaching his conclusion, the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant...

(3) The Secretary of State must abide by the statutory procedures...

(4) The Secretary of State in exercising his powers ... must not depart from the principles of natural justice.

If there has been conflicting evidence at the inquiry, it seems to me that he may if he wishes prefer one piece of evidence to another though the material must be there to enable him to do so and he must give reasons for doing so. Since the court will only interfere if he acts beyond his powers (which is the foundation of all the above principles), it is clear that his powers include the determination of the weight to be given to any particular contention; he is entitled to attach what weight he pleases to the various arguments and contentions of the parties; the courts will not entertain a submission that he gave undue weight to one argument or failed to give any weight at all to another. Again in doing so he must, at any rate if substantial issues are involved, give clear reasons for his decision.

In approaching this task it is no part of the court's duty to subject the decision letter to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph.”

9. The reasons given for a decision “must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved...A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.” See *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at [36]. The decision letter should be given a “straightforward down-to-earth reading without excessive legalism or exegetical sophistication”: see *Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council* [1993] 66 P.&C.R. 263.

The Landowners:

10. From the decision letter it can be seen that the personalities and dates relevant to the question of the intention not to dedicate or otherwise are as follows:
 - a) A Mr King ran a grocers shop at number 59 from 1994 to 2004. In 2004 he sold the shop to a London-based company from whom the Claimant bought the shop in 2011.
 - b) A Mr Smedley owned number 57 from 1997 to 2007 and ran a stationer’s business from there. In 2007 he sold number 57 to the Claimant.
 - c) Between 2009 and 2011 a Mr Warwick leased number 57 from the Claimant.

Mr King did not give evidence at the inquiry but wrote a letter dated the 18th October 2012 which the Inspector took into account. Mr Smedley, Mr Warwick and the Claimant gave evidence at the inquiry.

The Decision Letter and discussion of the submissions made on it:

11. The decision letter followed a structure in accordance with that of Section 31 of the Highways Act 1980. The Claimant does not criticise that approach.
12. Firstly the Inspector considered **when the right of the public to use the way was brought into question**. The Claimant had erected iron gates across the way in February 2012 and the Inspector recorded that “February 2012 has consistently been accepted by all parties as the point in time when the rights of the public were brought into question” and she decided “there is no evidence before me that causes me to reach any significantly different conclusion”: DL10. But she went on to write:
 - “14. A key issue in this case is the door which has been, since the building was first constructed, located at the western end of the passage, approximately half way between points A and B [the end points of the alleyway on the Order plan]. Evidence has been provided by former owners and occupiers who say that on occasions this door was closed and locked. However, only one of the claimants recalls this happening, this being prior to 1990.
 15. I examine the evidence for, and implications of, the door being locked further below but in relation to the ‘bringing into question’ issue, I have considered the guiding principle as most recently approved in the case decided in the House of Lords.”
13. She then quoted the dictum of Denning LJ in *Fairey v Southampton County Council* quoted with approval in the *Godmanchester* case by Lord Hoffmann and continued:

- “17. The point was also summarised by Dyson J (in *R v SSETR ex parte Dorset County Council* [1999] as follows: ‘Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway
18. Mr Ali (the present owner of 57 and 59 Connaught Avenue) has provided a document signed by 23 local residents, 22 of whom confirmed that they recalled seeing the door closed; all but one said this happened at Christmas time. However, all these people say that they did not ever use ‘the access way next to 59 Connaught Avenue’. Since they were not users of the route, they would have been unlikely to question the closed door. More importantly, unless they used the route, they could not be in a position to say whether or not the door was locked.
19. None of the claimants who gave evidence in person to the inquiry had ever been prevented from using the Order route at any time, although some were aware of the door and had, on a few occasions, found it closed, although never locked. Information was provided by Mr Smedley that during his ownership of No.57 from 1997 to 2007 he would always check that the door was closed when securing his shop and confirmed that Mr King (owner of No. 59 until 2004) would always lock the door at Christmas. Mr Ali had continued the annual practice of locking the door from 2007 onwards, after purchasing No.57 and until he acquired No.59 in 2011. I have no reason to doubt both men took the action they described although evidence to corroborate this is scant.
20. I reach the conclusion that, even if the door had been locked on several occasions, this did not come to the attention of most users of the passageway and therefore did not bring into question the public’s right to walk through.
21. In summary, I conclude that the status of the Order route was brought into question in February 2012 so will examine the claimed use by the public during the preceding twenty year period.”
14. Mr Langham on behalf of the Claimant points out that it was accepted by the Claimant at the inquiry that February 2012 was the date when the public’s right to use the way was brought into question but he submits that the Inspector makes no finding in this part of her decision letter as to whether the gate was in fact locked at any stage and paragraph 15 leaves that conclusion over to later sections of her decision letter. He however lays stress on the Inspector’s observation that she had “no reason to doubt both men took the action they described although evidence to corroborate this is scant.” The men she is referring to are Mr Smedley and Mr Ali. Mr Langham submits that corroboration would only be needed if there was in fact a reason to doubt their evidence. He further submits that in paragraph 20 she is dealing with the locking of the door on a provisional basis by saying that even if it had been locked on several occasions those occasions would not amount to any earlier bringing into question of the public’s rights. I agree with that last submission.
15. The Inspector then in the next, second section of her decision letter went on to consider **the evidence of use by the public from 1992 to 2012**. She recorded that none of the objectors dispute that the use claimed by individuals had actually taken place throughout the relevant twenty year period or that this was ‘as of right’: DL25.
16. She went on to consider the County Council’s earlier conclusion from its analysis of the evidence that “the annual door closures constituted an interruption in the otherwise continuous use of the route, such that no presumption of dedication would be raised.” She continued:
- “26. However, ECC accepted that the timing of the door closure at Christmas or on other public holidays may not have brought about a factual interruption to public use but the

repetition of the action, known to at least some witnesses, contributed to the local reputation of the route as a way that may be used by the public without any permanent rights over it having been acquired.

27. I concur with ECC's conclusion that there was no factual interruption in the otherwise continuous use by the public given the regular pattern of that use."
17. She went on to consider what guidance she was able to obtain from the case of *Lewis v Thomas* [1950] 1 K.B. 438 and quoted Cohen LJ where he observed: "The reference to interruption in the sub-section is to the fact of interruption, and the question of intention is primarily relevant if, and only if, the owner, against whom the right of way is asserted, seeks to prove no intention to dedicate." The Inspector continued:
 - "28. Here of course the owner against whom the claimed footpath is being asserted does seek to demonstrate that there was no intention to dedicate a public right of way, and I shall deal with the issue of 'intention' under that heading. But the necessity to show the owner(s) lack of intention to dedicate the way only arises once continuous use by the public for the required period has been proved.
 29. I shall summarise my key findings as follows: the door was seen to be closed on some public holidays. Some claimants say they occasionally found it closed but the door opened easily so they walked through. That leads me to conclude that, at most, the door should be regarded as a limitation on public use.¹ Statements have been made by owners of No. 57 (Mr Smedley and Mr Ali) confirming to their certain knowledge the door was locked, sometimes overnight but usually at Christmas. Of the owners of No.59, Mr King stated in writing that he did so and Mr Ali confirmed to the inquiry that he did likewise from 2007 onwards. However, there is no evidence from anyone who tried to use the path at any of these times and could not do so because it was locked.
 30. Having heard the evidence of witnesses at the inquiry, and considered all the relevant written submissions, I am satisfied that this clearly demonstrates regular use of the Order route by the public on foot as of right and without interruption, throughout the twenty years between February 1992 and February 2012 (and before that) sufficient to raise a presumption that the route had been dedicated as a public footpath."
18. Mr Langham submits that the Inspector failed to make a finding as to the actual locking of the door despite the evidence of Mr Smedley and Mr Ali and that paragraph 29 ends without a conclusion on that issue. However, in my judgement the Inspector does decide in DL 30 that there was in fact no interruption of the public's use. The evidence in all its forms "clearly demonstrated" to her "regular use...without interruption throughout the twenty year period." It seems to me that she is finding on the totality of the evidence that any locking of the door at Christmas did not in fact interrupt the public's use of the alleyway.
19. The Inspector then went on in the third section of her decision letter to look at the "**intentions of the landowner(s): 1992-2012**" and "whether there is sufficient evidence to show that during the period 1992-2012, the owner(s) of the land over which the Order route passes (No. 59 Connaught Avenue) demonstrated a lack of intention to dedicate a public right of way over the claimed route": DL31.
20. She explained: "Indeed, it is not disputed that the only actions to be considered as being capable of demonstrating the intentions of the respective owners are those concerning the door. In examining those intentions, it is important to make a distinction between closing and locking the door, it being accepted that for the majority of the time (at least during normal shop opening hours) it was either propped open or secured by a hook such that many people walked past without ever noticing its presence": DL 36

21. Mr Langham accepted that the distinction between closing and locking the door was a correct one for the Inspector to make in the context of deciding whether there was sufficient evidence of an intention not to dedicate.
22. The Inspector went on to record that Mr Langham (whom she wrongly names as “Mr Langley” from this passage onwards in her decision letter) submitted that “there are three main items of evidence of relevance here, any one of which would be sufficient to rebut the presumption of dedication”: DL38. The first of those three items of evidence was Mr King’s letter in which he wrote: “ I always made sure the door was closed and locked once a year usually at Christmas but there were times I would close it on some other public holiday.” Mr King did this “because he did not want to lose the freehold of the alleyway”: DL40.
23. The “second item of evidence” was the evidence given by Mr Smedley at the inquiry which the Inspector records as including him saying that “between 1997 and 2007 (and thus overlapping with Mr King’s tenure at No.59) he operated his stationery business from the premises [at No.57] and was witness to the closing and locking of the door by Mr King” and that “this continued to happen even after Mr King sold to the company from London”: DL41. He understood that “Mr King closed (and locked) the door at Christmas because he understood that to be a means to avoid losing the freehold title to the land”: DL42.
24. The “third item of evidence” was that given by Mr. Ali. After he purchased No. 57 in August 2007, “Mr Smedley had passed on the same information that had been given to him: that it was best to keep the door closed to prevent trespass and vandalism and that the owner of No.59 closed the door over Christmas in order to retain the freehold. Thereafter, Mr Ali had taken responsibility for closing the door at Christmas at the request of Mr Thomas [the agent for the company from London] and had been issued with a set of keys to the door in the passageway. He had continued to lock the door every Christmas until he purchased No.59 in February 2011. Finding the door vandalised in January 2012 after the Christmas closure had led him to install the iron gates”: DL 44.
25. Mr Warwick’s evidence does not seem to have dealt with any locking of the door: DL45.
26. The Inspector addressed this evidence in the following paragraphs of her decision letter:
 - “46. Between August 2007 and February 2011 Mr Ali explained that he was acting on the instructions of Mr Thomas as agent for the company, when he locked the door. I would be content that this represented the intention of the owner of No.59 to rebut any public rights were it not for the fact that there is evidence to suggest otherwise.
 47. A plan dated June 2004 entitled ‘Redevelopment of 57 & 59 Connaught Avenue, Frinton on Sea, Essex, (Revision B)’ was submitted in relation to a planning application in 2006 and date-stamped 20 February 2007. On this plan the ground floor layout identified the Order route clearly as ‘public right of way’. (The door was not shown.)
 48. All this was before Mr Ali’s association with either property but he argues that the reference to a public right of way was simply a mistake: it was a note added by the architects and did not represent the intention of the company.
 49. In deciding what weight to attach to this plan I must take into account the fact that it was plainly publicised through the planning process, whereas Mr Ali’s actions during subsequent Christmas periods – locking as opposed to closing the door – was not corroborated by any independent witnesses. No-one says they found the door locked until the end of 2011.

50. If I were to take Mr King's letter on its own, and account for the fact that he himself was not available to give evidence to the inquiry to elaborate upon his written statement (which remains untested) I would not consider it of sufficient weight to rebut the presumption of dedication.
 51. Mr Smedley's evidence, though sound and reliable, corroborates Mr King's actions in locking the door at Christmas time but added little more in terms of revealing Mr King's intentions than he himself had written. I would not regard this as sufficient, either on its own or combined with Mr King's letter.
 52. Although I have no reason to doubt Mr Ali's evidence – that he was asked to lock the door at Christmas by the Company's agent and that he did so each Christmas from 2007 to 2010 – but the weight of the plan placed in the public domain acknowledging a public right of way (it being a plan that had reached its second revision and thus had two opportunities to correct what was said to be a mistake over the status of the passageway) inevitably weakens the link between his actions and the landowner's intentions.
 53. In terms of facts, and on a balance of probability, I conclude that the door was most likely closed overnight quite often, especially during the ten years of Mr Smedley's ownership of No.57. I find it entirely plausible that by morning it had usually been pushed open, whether by vandals misusing the route in the night or by other more responsible early users. Since there is no evidence of any user having found the passageway blocked by a locked door, it is difficult for me to conclude that the way was in fact impassable at any time, although it may simply have been that the specific Christmas periods in which claimants such as Mr McLain, Mrs Davies and Mrs Blythe used the public route to go to the shop in the festive period (and found it open) did not coincide with the particular Christmas holidays in which the path was actually closed. In short, I find it entirely possible the door was locked at Christmas but not proven."
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27. Mr Langham complains that even though the Inspector found Mr Smedley's evidence "sound and reliable" (DL51) and had "no reason to doubt" Mr Smedley (DL19) and Mr Smedley had given evidence that he had seen Mr King lock the door between 1997 and 2004 (DL19 and DL41) and that the locking continued after 2004 until 2007 when he ceased to operate his stationery business (ibid.) the Inspector found on the balance of probabilities that the door was not locked at Christmas (DL53). Mr Langham submits in support of ground one of the claim that this conclusion in the circumstances is irrational and at the very least adequate reasons should have been given for then reaching a conclusion contrary to Mr Smedley's evidence. Similarly he complains that the Inspector had found she "had no reason to doubt Mr Ali's evidence" (DL52 and see DL19) and Mr Ali had given evidence that he had locked the door every Christmas from 2007 to 2011 (DL44 and 52) and yet the Inspector had concluded that it had not been proven that the door was locked at Christmas. Again he submits that that conclusion is irrational or at least adequate reasons had to be given for reaching such a surprising conclusion in the circumstances. He points out that the factual question of whether the door was locked is separate from and precedent to the question of what the landowner's intention was if the door had been locked.
 28. Mr Lewis on behalf of the Secretary of State accepts that there are "infelicities" in the language used here but submits that the resolution of factual issues is for the Inspector and reading the decision letter as a whole and in a straight-forward way without excessive legalism or exegetical sophistication, her conclusions are rational and adequately explained.
 29. In my judgement a reasonable reading of these paragraphs of the decision letter is that whilst the Inspector had no reason to doubt the evidence of Mr Smedley or of Mr Ali in itself that evidence was not sufficient when looked at together with all the rest of the evidence before her including extensive evidence from users of the path to satisfy her on the balance of probabilities

that the door was in fact locked. So far as any locking of the door by Mr Ali at the request of the agent was concerned in 2007 to 2010 she is explaining that the plan identifying the footway as a public right of way means that any locking would not indicate that the landowner was not intending to dedicate the way because the landowner had issued publicly a plan which showed the footpath as a public right of way. Her wording might have been clearer and I agree that there are “infelicities” in her language but in this letter addressed to the parties to the inquiry in my judgement her conclusion is clear, it is one she as the judge of fact was entitled rationally to come to on the evidence and her reasons explain to the parties what her conclusions are and why she came to them. Ground one of the claim is not therefore made out.

30. The Inspector in her decision letter then went on to address the evidence of the locking of the door at Christmas 2011. She wrote:
 - “54. However, I do find the evidence points towards the path being closed over the Christmas period in 2011 after Mr Ali took ownership of No.59 and that the public’s reaction to this in breaking through the locked door began the chain of events which brought the status of the way into question and thus defined the end of the twenty year period to be examined.
 55. I fully acknowledge the accepted principle (and she referred to *Poole v Huskinson* [1843] 11 M&W 827) that “a single act of interruption by the owner is of much more weight upon the question of intention than many years of acts of enjoyment” by the public. I agree with Mr Langley (*sic*) that it is not necessary for the interruption to last a long time or to continue throughout the whole term; it would be sufficient for a landowner to make known his or her lack of intention to dedicate a way at any stage during the twenty years, and it is not necessary that it be demonstrated continuously throughout that time.
 56. I also accept the point drawn to my attention by Mr Langley that annual closure is normally regarded as evidence of lack of intention to dedicate a way.”
31. The Inspector then quoted the passage from the *Godmanchester* case at [20] where “the common method of closing the way one day a year” is recognised as providing evidence showing the persons who use the path that the landowner has no intention to dedicate. But the Inspector chose to stress the following words used in the context of turning off strangers from a path “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” describing those words as “key and the reasoning on which the *Godmanchester* case was ultimately decided.” She went on:
 - “57 ...At paragraph 33 of that judgement Lord Hoffmann stated his view that requiring ‘sufficient evidence’ that there was no intention to dedicate involves ‘objective acts (that) must be perceptible by the relevant audience’.
 58. In the case before me, the majority of path users walked the Order route in the daytime since their purpose was related to the shops and businesses located in Connaught Avenue. The respective landowners during the twenty years could have made known to these users that there was no intention to dedicate the way for public use in a variety of ways without physically preventing daytime use but that did not happen. The fact that the door was closed at times most were not there did little to convey to users that the owner was taking actions to challenge their right to use the passage; locking it would have done so had this taken place at times when people were generally using it.
 59. As Evershed MR acknowledged in *Lewis v Thomas*, ‘I agree that a barring, and particularly a deliberate barring of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period.’

Yet here, use of this passageway would have been quite unlikely over Christmas when the shops and banks were shut.

60. Mr Langley argued that Mr King's intention in closing and locking the door, believing he might lose the freehold of the passageway rather than purposely rebutting any future claim that a right of way might have been established over it, must be judged objectively from the point of view of what the user would have understood by his actions. Whilst I agree with that proposition in principle, in practice I find Mr King's Christmas interventions to have been ineffective. An annual locking regime may indeed be sufficient to negative any intention to dedicate but only if it made known to at least some of then users who may choose to respond by asserting what they believe to be a public right of way.
61. Although ECC accepted that there was sufficient evidence of a local reputation of closure, I make an important distinction between statements from non-users who observed that the door was closed and those people who were able to confirm that the door was actually locked. Amongst the 54 claimants, only one person knew there to be Christmas time closures but this was associated with a previous owner before the relevant 20 year period began.
62. In conclusion I find insufficient evidence that during the period 1992 – 2012 the relevant landowners made clear to the public in any overt way a lack of intention to dedicate a public right of way on foot between Connaught Avenue and Old Way along the line A-B."
32. The Inspector agreed that at common law proof of an intention to dedicate would have fallen short but she found that dedication had been established under the statutory scheme: DL62.
33. Mr Langham submits in support of the second and third grounds of claim that having found that the door was locked in 2011 (DL54) and accepted that it would be sufficient for a landowner to make known his or her lack of intention to dedicate a way at any during the twenty years (DL55) and Christmas 2011 was during the relevant 20 year period, the Inspector failed then to come to a conclusion as to the significance of those findings.
34. I do not agree. On a fair reading of this section of the decision letter the Inspector is saying that the locking did take place at Christmas 2011 but it was not sufficiently overt in that the members of the public were using the way to get to the shops and businesses and so would not have been using the alleyway when the door was locked. It was not made clear to users from a locking of the door at Christmas that the landowner was asserting that the public had no right to use it. The Inspector begins addressing this point in the context of her finding that the door was locked at Christmas 2011 but in response to Mr Langham's submissions made at a time when he did not know what the Inspector's findings of fact would be, she widened her consideration to include the earlier period. She found that locking the door would have conveyed to users that the owner was taking steps to challenge their right to use the passage had it in fact taken place at times when people were generally using the way but here use of this passageway quite obviously would have been unlikely over Christmas when the shops and banks were shut: DL 58-59. She went on respond to Mr Langham's submission about Mr King's locking of the door and made the same response that an "annual locking regime may indeed be sufficient to negative any intention to dedicate but only if it is made known to at least some of the users who may choose to respond by asserting what they believe to be a public right of way": DL60. It is perhaps an "infelicity" that she chose to write that she found "Mr King's Christmas interventions to have been ineffective" when she had earlier found it not proven that the door had been locked at Christmas but in my judgement a reasonable reader would understand that what she was addressing there is the lack of communication to users of the significance of a

Christmas locking when any such locking would occur at a time when people were not using the path.

35. In *Godmanchester* [89] Lord Neuberger of Abbotsbury in discussing “manifesting the intention” accepted as clear that “an interruption of the user at some point during the relevant 20-year period, such as the landowner locking a gate and preventing access will defeat an argument based on user ‘as of right’ under section 31(1) during that period.” But he went on:
- “89. ...Traditionally one day a year is the norm, see for instance *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77, 85. However, **it may depend on the facts of the particular case whether this is enough to amount to a sufficient interruption**; that was the view taken by the Court of Appeal in *Lewis v Thomas* [1950] 1 KB 438. Whatever the position, it is clear that to be effective the interruption need not last long in the context of 20 years in order to defeat user as of right...” (My emphasis)
36. In my judgement here the Inspector was deciding on the facts of this particular case that the use of the path was for the purpose of getting to the local shops and businesses and so a locking of the door at Christmas when those shops and business were closed was not effective to provide “sufficient evidence” that there was no intention to dedicate because such acts on the part of the landowner would not be sufficiently overt to bring to the attention of the public who used the way that the landowner had no such intention. That was a perfectly rational conclusion for the Inspector on the facts here and she adequately explained herself to the parties reading the decision letter to satisfy the requirements explained in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953. Her reasoning enables a reader to understand why she reached her conclusions on the question of the locking of the door. Grounds two and three therefore also fail.
37. I therefore dismiss the claim and invite the parties to draft an appropriate order.

¹ The door is noted as a limitation in the Order Schedule