

A NOTE ON NOTICES

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Introduction

The notice in the *Trap Grounds* case¹ was in these terms:

Oxford City Council, Trap Grounds and reed beds, private property, access prohibited except with the express consent of Oxford City Council.

The Court of Appeal assumed that this was effective to render use after the erection of the notice *vi* and thus not *as of right*.

It would be remarkable if a Court were ever to hold that *vi* in all cases has to mean actual force – overbearing the landowner or (at least) breaking down his fence; and that an owner has to fence off his land if he is ever otherwise to stop unauthorised use of it from being *as of right*².

Nonetheless, if people take free access in the face of a notice, they are in fact behaving just as if they have the right to go on to the land – *as of right*, one might say. Is it potentially **not** *vi*?³

Such an argument is iconoclastic, but what about a variant of it: that putting up the notice and then taking no action demonstrates acquiescence. Evidently this is true in respect of a period measured from a reasonable time after the erection of the notice; but there is an argument that, seen in historical context⁴, the notices have no effect at all?

It is thoughts of this kind which lie behind the remarks of Lord Walker of Gestingthorpe in *Beresford*⁵ *It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Limited 1992 SLT 1035, 1043, approving*

¹ Ie *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674. For the terms of the notice see the judgment of Lightman J at first instance (paragraph 29): [2004] Ch 253.

² A particularly severe requirement if his land is crossed by a public footpath.

³ Likewise if they snip through the barbed wire, but it is a bit difficult to view this as not being *vi*.

⁴ There is potentially a difference between the situation where the notices go up a short time before the application, and where they were erected (say) mid way through the 20 year period, and no action was taken on them.

⁵ Ie *R (Beresford) v Sunderland City Council* [2004] 1 AC 889.

counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."⁶

This reservation was expressed even more strongly by Lord Hoffmann in the *Godmanchester* case⁷

*...there may be a notice which says "No right of way. Trespassers will be prosecuted". Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. **Their user will satisfy [section 31\(1\)](#)** but the landowner, even on the most objective test, will have satisfied the proviso (emphasis supplied).*

This was a highway case, concerning the meaning of section 31 (1) of the Highways Act 1980.⁸ What Lord Hoffmann was saying is that the notice may negative an intention to dedicate (the proviso) but they do not stop the use being *as of right*. It is a shame he did not articulate why he took this view.

⁶ See paragraph 72 (my emphasis).

⁷ *Ie R (Godmanchester Town Council) v Secretary of State for the Environment and Rural Affairs* [2008] 1 AC 221.

⁸ Section 31 (1) provides as follows:

*Where a way over any land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway **unless there is sufficient evidence that there was no intention during that period to dedicate it.***

The emphasised words are the proviso.

By contrast, there is an extended passage in *Redcar* in the Supreme Court to the opposite effect. This is the nub of it:

88 ...*But it would be wrong to suppose that user is “vi” only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi. See, for instance, D.43.24.1.5–9, Ulpian 70 ad edictum, commenting on the word as used in the interdict quod vi aut clam...*

90 *In short, as Gale on Easements, 18th ed (2008), para 4–84, suggests, user is only peaceable (nec vi) if it is neither violent nor contentious (emphasis supplied).*

Permissive notices

These need to be in the form set out by Lord Walker above:

The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time.

Beresford tells us that a notice will not work that does not say

...this permission may be withdrawn at any time.

This is a virus, if you like, that has entered the definition of as of right from the law of rights of way, but *Beresford* of course is authority at the highest level.⁹

Redcar

The notices said

Cleveland Golf Club

Warning

*It is dangerous to trespass on the golf course*¹⁰.

The notices caused something of a stir, as people thought that their use was being contested. The Inspector held that it was.¹¹ Literally, however, the notices were a warning as to a identified danger drafted on the basis that users were trespassers. It did not say *Trespassers keep out*.¹²

Sullivan J held that they were not sufficiently clear to operate to render use not as of right, although his reasoning may itself be said not to be clear:

⁹ For a public highway to be established over land there is a presumption of dedication, so just saying *You are welcome to use this path*, could not be allowed to defeat a claim. Arguably the *ratio* of *Beresford* is simply that a licence could not properly be implied from the admittedly slender facts and the stuff about the need for a licence to be revocable is just an “add on”. You would not have thought this if you had heard the argument; and see the speech of Lord Scott at paragraph 48. (Lord Scott does appear to be on his own in his speech, although Lord Bingham – see paragraph 10 – did express agreement with it.)

¹⁰ Set out at paragraph 11 of Sullivan J’s judgment in [2008] EWHC 1813.

¹¹ His focus was on the idea that the golf club were asserting that local people were trespassers. So what, the local users could have rhetorically responded; but, one can see the argument that the use was being made contentious. The Golf Club were hardly saying *You may be trespassers, but you are otherwise welcome*.

¹² The reason for putting up the notices may have been, on the face of it, a concern that the golf club should not be liable for injuries caused to local people using it for their own recreational purpose. The evidence did not make it clear what the purpose was. (It would not have been relevant anyway – see the *Warneford* case, *infra*).



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...given the ambiguity and the wording of the notices (to put their meaning at its highest from the point of view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting these notices in 1998 it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users.¹³

Warneford

The notices in the *Warneford* case¹⁴ said

No public right of way.

Unhelpfully for the hospital, it was entirely clear that these notices had been put up because there was concern about the establishment of a right of way over the land. (The notice stood where people got on to the land via an authorised footpath, and made the statement *No public right of way* in respect of two other tracks).¹⁵

¹³ See paragraph 23 of his judgment. But what is the ambiguity to which Sullivan J refers? If they **are** ambiguous, that ambiguity surely is as to whether or not they were impliedly saying *Keep off the land* or something similar. And if you do then put the possible meaning of the signs put at their highest, you **do** hold that they are saying *Keep off the land* or something to that effect. But this is to treat Sullivan J's judgment as a statute and not as an explanation for the clear view which he had formed.

¹⁴ *Ie R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) and Oxfordshire County Council* [2010] EWHC 530 (Admin). The land which local people were seeking to register was meadow land adjoining the Warneford Hospital in Oxford. This had been established by Revd Samuel Warneford (1763 – 1855). The accounts of the hospital in the period when it was a very large residential institution with extensive grounds and a home farm present in some ways an attractive picture; but not, of course, in all ways. At any rate after “care in the community” programmes greatly reduced the number of in patients, the use of the meadow also reduced.

¹⁵ As happens, there was evidence of other signs which had been less equivocal in their terms. But an employee who could potentially have spoken to such signs could not, frustratingly for the hospital, remember any detail.

The inspector on this occasion¹⁶ held that use was not rendered contentious and HH Judge Waksman QC (sitting as a judge of the High Court) agreed.

He held that looking at the matter in context and objectively, the notice did not render use of the land contentious.¹⁷

Well, you see the point. But the notice was effectively saying *Keep to the path*; and if it was saying that, it was also saying *Don't go on the land*.

HH Judge Waksman also identified the following eight principles:

- The fundamental question is what the notice conveyed to the user
- Evidence of the actual response to the notice by the actual user is thus relevant¹⁸
- The notice must be considered in context
- The notice must be read in a common sense and not legalistic way
- Proportionality may be relevant: has the landowner done enough?
- The question of what the reasonable landowner would have understood the reasonable user to have understood by the notice is another way of asking what the reasonable user would have understood it to mean

¹⁶ The inspector was the same inspector who had reported in *Redcar* – Vivian Chapman QC. Sullivan J's judgment in *Redcar* came out when Mr Chapman was still writing his report in *Warneford*.

¹⁷ See paragraph 49.

¹⁸ Surely this is dubious?



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- **Evidence of what the landowner subjectively intended is generally irrelevant**
- However such evidence might be relevant eg when the intention has been communicated to users.¹⁹

Bullet 7 is perhaps the important point of law to derive from the Warneford case, but the fact that the Inspector in that case did apparently rely on the subjective intention of the landowner in construing the notices was of no assistance to the landowner – the Court held that he would have reached the same decision anyway.

¹⁹ See paragraph 22.