
Order Decision

Inquiry opened on 4 October 2016

by Alan Beckett BA MSc MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 01 December 2016

Order Ref: FPS/P2745/7/47M

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as Footpath No.35.64/28 Eastern End of Tadcaster Viaduct to Wighill Lane, Tadcaster Modification Order 2013.
- North Yorkshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 25 September 2013. The Order was the subject of an interim decision dated 4 June 2015 in which I proposed to confirm the Order subject to modifications which required advertisement.
- There was 1 objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry into the proposed modifications at the Riley-Smith Hall, Tadcaster. The inquiry opened on Tuesday 4 October 2016 and concluded on Thursday 6 October. This was the second inquiry held into the proposed modifications and was held pursuant to the provisions of paragraph 7 and 8 of Schedule 15 to the 1981 Act.
2. An earlier inquiry had opened and closed on 9 February 2016 which had been held pursuant only to the provisions of paragraph 8 of Schedule 15. At that inquiry, it was argued on behalf of Wharfebank (the objector) that as the route of the footpath had been modified and as the existence of the modified footpath relied upon inferred dedication at common law and not dedication under the statutory provisions, the inquiry should have been convened under both paragraph 7 and paragraph 8 of Schedule 15. It was agreed that the paragraph 7 inquiry held in February 2015 should have been re-opened to run concurrently with the paragraph 8 inquiry; this combined inquiry was held as described in paragraph 1 above.
3. At the inquiry, Wharfebank was represented by Mr Strachan QC and Mr Sahonte of Counsel and the Council was represented by Mr Parkinson of Counsel. I am grateful to all three gentlemen for the courteous manner in which they assisted me during the course of the inquiry.

The Main Issues

4. In my interim decision dated 4 June 2015 I concluded that an inference of dedication at common law could be drawn against CDP, the owner of the relevant land between March 2004 and December 2011 and that there was no
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evidence that CDP lacked the capacity to dedicate a public right of way over its land.

5. New evidence relating to the question of the capacity of CDP to dedicate was adduced by the objector; this took the form of an overage agreement between CDP and Barnardo's and a debenture charge between CDP and its Bank. New evidence was also adduced with regard to the condition of the fence at the Wighill Lane end of the Order route along with other new evidence regarding the Council's dealings with CDP over the creation of a footway / cycleway on CDPs land. It was argued by Wharfebank that applying the principles of dedication at common law to the new and existing evidence regarding the landowner's intention, the conclusion reached in the interim decision that CDP intended to dedicate a public footpath was unsustainable.
6. The main issues are therefore whether CDP had the capacity to dedicate a public footpath over its land between March 2004 and December 2011 and, if it did have the capacity to dedicate, whether the evidence adduced for the second inquiry when considered with the evidence previously available is such that an inference of dedication could not be drawn.

Reasons

Capacity to dedicate

7. It is recognised as a general principle that if land is mortgaged, no dedication can arise if the mortgagee does not expressly consent to the dedication. This principle is set out in Halsbury's Laws (Volume 21 paragraph 73) which states: *"Where a mortgagor (borrower) is still in possession of the mortgaged land it would seem that the mortgagee's (lender's) assent to a dedication is necessary, and that a dedication cannot be inferred from user unless the mortgagee can be shown or presumed to have had knowledge of it."* Paragraph 5.51 of the Consistency Guidelines published by the Planning Inspectorate states *"For leaseholds and copyholds the consent of both landlord and lessee, or copyholder, would usually be required for dedication. However, the detailed wording and provisions of the trust or mortgage document should always be checked, in case there are specific requirements for enabling powers."*
8. The existence of a mortgage to the question of capacity to dedicate is only of relevance in relation to dedication at common law. Wharfebank submits that the general principle set out in Halsbury's Laws was supported by the Privy Council in the case of *Man O'War Station v Auckland City Council* [2002] UKPC 32 where Lord Scott of Foscote stated *"Their Lordships accept the principle that a person with an interest in land inconsistent with the public right of way must consent to the dedication if the dedication is to be effective. So if the land is subject to a mortgage, the mortgagee must consent, and if it is subject to a lease, the lessee cannot dedicate without the consent of the lessor."*
9. Wharfebank submits that on the application of this basic principle there is no requirement for there to be any express contractual obligation within a mortgage or other instrument which provides for a third party interest in land which specifically prevents the dedication of a public right of way. Wharfebank says that such a clause or condition is not necessary as the existence of the mortgage is sufficient to demonstrate the mortgagee's continuing interest in the land. The mortgagee's consent for the dedication of a right of way would be required as the dedication of a permanent right of way over the land would

- amount to the grant of an adverse right to the detriment of the land and the mortgagee.
10. Furthermore, Wharfebank submits that the Overage Agreement made between CDP and Barnardo's as part of CDPs purchase of the land in 2004 whilst not being a mortgage created a third party interest in the land which was sufficient to limit the ability of CDP to dedicate a public right of way without the consent of Barnardo's. The Overage Agreement provided Barnardo's with a continuing interest in the land as a third party which would benefit from any uplift in the value of the property arising out of any subsequent redevelopment of the land.
 11. It was common ground between the parties that the decision by the Privy Council in the *Man O'War* case that "*a person with an interest in the land inconsistent with the public right of way must consent to the dedication if the dedication is to be effective*" was an accurate reflection of the law. However, the issue between the parties was the determination of whether an interest in the land was "*inconsistent*" with the dedication of a public right of way.
 12. The Council's position is that an investigation of the interest a party had in the land was necessary to determine whether dedication of a public right of way would be contrary to that interest. The Council argues that a consideration of the negotiated terms between two parties was essential to determine whether dedication was contrary to the interests of the parties and whether consent by one party would be required before dedication by the other party could be effective.
 13. Both parties referred me to the case of *Applegarth v Secretary of State for the Environment* [2002] 1 P&CR 9 as a case where the terms negotiated between parties had been considered in depth before determining whether the dedication of a right of way was inconsistent with the terms of the agreement. In *Applegarth*, the claimant held a private vehicular right of way over a road leading to his property with the ownership of the road being unclear. The claimant held his rights of access under the terms of a conveyance which did not remove from the owner of the soil the ability to grant further or other rights to other parties. In that case, the third party's private property interests were not inconsistent with the dedication of a public right of way.
 14. It is the Council's case that only by determining what the third party interest in the land is can an assessment be made as to whether that interest in the land is such that consent to the dedication of a public right of way would be required. Whilst not disputing that point, Wharfebank's position is that the interest that Barnardo's held in the land via the Overage Agreement was more substantive than that of the claimant in the *Applegarth* case as the Overage Agreement made provision for Barnardo's to benefit from the future development value of the land. In Wharfebank's view, the interest created by the Overage Agreement was sufficient for consent to dedication to be required from Barnardo's before CDP could make an effective dedication.

Overage Agreement

15. Clause 5.1 of the Overage Agreement reads: "*No disposition of the Overage Property by the proprietor of the registered estate is to be registered without the written consent of Barnardo's of Barnardo House, Tanners Lane, Barkingside, Ilford, Essex, IG6 1QG*"

16. Clause 5.2 to the overage agreement reads *"The Buyer shall not transfer the whole or any part of the Overage Property or grant any lease of the whole or any part of the Overage Property without procuring in favour of the Seller a deed in a form approved by the Seller (such approval not to be unreasonably withheld or delayed) executed by the disponee/lessee in which the disponee/lessee covenants with the Seller from the date of acquiring an interest in the Overage Property to observe and perform the obligations of the Buyer in this schedule (in the case of any dealing of part of them only insofar as they relate to that part of the Overage Property)."*
17. The Council says that dedication of a public footpath by CDP was not contrary to the provisions of the Overage Agreement as dedication was not a *"transfer"* of *"the whole or any part of the Overage Property"*; at all times during the operation of the Overage Agreement, CDP retained the freehold of the property. Whilst the Overage Agreement permitted a transfer if the new owner entered into a deed of covenant with Barnardo's to perform the obligations in the Overage Agreement (as Wharfebank did when acquiring the land from CDP), dedication of a public right of way was not a *"transfer"* of the kind envisaged as the public (to whom the path would be dedicated) could not enter into such a deed. The Council's case is that as the public could not enter into such a deed, dedication of a public right of way was not prohibited by clause 5.2. The Council is also of the view that dedication was not a *"disposition"* of the property under clause 5.1 of the Overage Agreement.
18. Wharfebank submits that the dedication of a public right of way would necessarily involve a permanent surrender by the landowner of part of his land to a third party (the public) and once that dedication had taken place the land could not be unencumbered other than by action being taken to extinguish the public's rights. As the landowner would no longer be in total control of his landholding, it was difficult to conceive of a more extreme transfer of part of the property away from the landowner. Furthermore, Wharfebank's view is that the Overage Agreement imposed a restriction upon the ability of the owner of the land to dispose of the land without the consent of Barnardo's with any disposition required to be registered against the title of the land at Land Registry. Failure to register the disposition would render such a disposition void; disposition of part of the land by the dedication of a highway could only be capable of registration if the consent of Barnardo's had been obtained.
19. Wharfebank also drew attention to clause 10 of the Overage Agreement which prohibited CDP from engaging in any *"Act of Circumvention"* which would reduce the size of or avoid the payment of the Overage following development. It is argued that dedication of a public right of way would have reduced the development value of the land and the potential size of any Overage payment due.
20. The Council says that the dedication of a public right of way did not fall within the terms of the clause 10 of the Overage Agreement; dedication was not a transaction or transactions, nor is there any evidence to suggest that the principle purpose of dedicating a public right of way was to avoid or reduce in size any Overage payment.
21. As far as can be ascertained, the Overage Agreement was entered into by CDP on 19 March 2004 and was time limited for a period of 10 years which would have expired on 18 March 2014. The Overage Agreement was therefore in

- force throughout the period during which I concluded that dedication of a public footpath along the modified Order route could be inferred. If the Overage Agreement has the effect which Wharfebank contends it has then even if an inference of dedication could be drawn against CDP during its ownership of the land, that dedication would be ineffective due to CDPs lack of capacity to dedicate.
22. The purpose of the Overage Agreement was to secure for Barnardo's a continuing interest in the land in order for the charity to benefit from any uplift in the value of the land arising from subsequent development. Furthermore the Overage Agreement was designed to prevent CDP or its successors from acting or behaving in such a way that would reduce or compromise the value of the land for development purposes. In many respects, the Overage Agreement is akin to a mortgage in that Barnardo's, as a third party, retained a legal interest in the land and sought to protect its interests by way of a formal and binding agreement.
23. Clause 5.3 of the Overage Agreement prevents the transfer of the whole or part of the property without the procurement of a deed in favour of Barnardo's which obliges the disponent/lessee to observe the obligations of CDP. The dedication of a public right of way does not involve the transfer of the freehold of the land and where the public right of way so dedicated does not become a highway maintainable at public expense, that dedication would not involve the theoretical vesting in the highway authority of the ownership of the top soil and sufficient of the sub soil as is required to maintain the highway. In this respect, dedication of a public right of way does not amount to a transfer of the whole or part of the land of the type envisaged by clause 5.3 of the Overage Agreement as the freehold ownership of the land is not disturbed.
24. Dedication of a public right of way would however, create a further third party interest in the land and the mechanism by which the creation of third party interests is regulated by clause 5.3 of the agreement. That clause limits the creation of third party interests to those which are approved of by Barnardo's in order to protect its continuing interest in the land. As the public are not a body which could enter into a deed and which could not covenant to perform the obligations of CDP such a third party interest could not be created under the terms of the Overage Agreement. Without the agreement of Barnardo's, the creation of a third party right in favour of the public would have compromised the continuing interest Barnardo's had in the overage property.
25. Furthermore, the dedication of a public right of way would reduce the value of the land and would have been contrary to Barnardo's continuing interests in maximising the potential of the Overage payment which would fall due on the development of the land. Land encumbered by a public right of way is likely to be of lower value than land not so encumbered; any diminution of the value of the land (and thereby any Overage payment that may be due) would be contrary to Barnardo's interests. In such circumstances, I conclude that the consent of Barnardo's to the inferred dedication would have been required to make the dedication effective.
26. This conclusion accords with the general principle set out in Halsbury's Laws in relation to mortgaged land and the principle set out by the Privy Council in the *Man O'War* case. It is clear from the Overage Agreement that Barnardo's had a continuing interest in the land which was inconsistent with the dedication of a

public right of way. Accordingly, for the inferred dedication by CDP to have been effective, the consent of Barnardo's to that dedication would have been required. There is no evidence that such consent was sought or given; in the light of the evidence considered at the first inquiry regarding the erection by Barnardo's of prohibitory notices inconsistent with the dedication of a public right of way, I consider it unlikely that Barnardo's would have given consent to the dedication of a right of way over the land even if the question had been asked of them.

27. I consider that the creation of third party rights over the land by way of the dedication of a public right of way would have been contrary to the continuing interests of Barnardo's and contrary to clause 5.3 of the overage agreement which seeks to regulate the creation of third party interests. Consequently dedication would not have been possible as CDP lacked the capacity to dedicate without the consent of Barnardo's.

Debenture charge

28. It is common ground that CDP created fixed and floating charges over its landholdings on 8 September 2008 by way of a debenture with NatWest Bank. Clause 3.7 of the debenture reads that CDP would not without the consent of the Bank "*part with or share possession or occupation of any of its land*".
29. It is Wharfebank's case that the debenture would have further restricted the capacity of CDP to dedicate a public right of way on the application of the principle set out in *Halsbury's Laws* and the *Man O'War* case without further reference to the specific terms and conditions of the mortgage. However, Wharfebank also submits that the dedication of a public right of way would have been contrary to the restrictions in clause 3.7 of the debenture.
30. Wharfebank submits that the creation of a public right of way which entitles the public to enter the property and pass and re-pass over the full length of the way self evidently involves sharing the possession of the land as the public cannot be prevented from entering the land without action under the relevant legislation; the grant of a public right of way would entail the landowner sharing the occupation or possession of that part of the land which forms the highway.
31. The Council submits that with regard to sharing possession the test was whether the public had a right to exclude others which it plainly did not. With regard to sharing occupation, that was a question of fact in each case and as the public only had a right to pass and re-pass over the land, the public could not be said to '*occupy*' that land.
32. Although a public right of way is an incorporeal right, it is a burden on the land crossed by the right of way. The public enjoy a right to pass and re-pass and that enjoyment cannot be lawfully prevented without recourse to statutory authority. The owner of land crossed by a public right of way is therefore restricted in what he or she can do with the land. Although the public may not be continually present on the path and may only physically occupy the land when they are walking over it, the right of the public to do so subsists over the land irrespective of whether there is any user present and limits an owner's ability to use the land as he or she thinks fit.

33. Consequently, I am not persuaded by the Council's argument that the public cannot be said to occupy the land. The dedication of a public footpath by a landowner would result in the shared occupation of that part of the property over which the right of way is dedicated. As the public right of way is dedicated for all time this would be a permanent occupation of part of the land by the public right. In my view, dedication of a public right of way by CDP would therefore be contrary to clause 3.7 of the debenture which requires the mortgagor not to share occupation of the mortgaged land.
34. Nor am I persuaded by the Council's argument that the question of whether possession is shared should be considered in relation to whether the public could exclude others from the land. To my mind, this question has to be viewed from the standpoint of the mortgagor; the public not being a party to the mortgage. If shared possession is to be determined from whether one party has the ability to exclude others from the land, then the granting of a public right of way would contravene clause 3.7 as dedication would prevent the landowner from excluding the public from his land. I concur with the objector that the dedication of a public right of way would self-evidently involve the sharing of possession of that part of the land over which the way would be dedicated.
35. No evidence has been submitted from which it could be concluded that NatWest Bank was approached for consent to the dedication of a footpath over the Order route. In the absence of any such consent, the inferred dedication would not be valid as the consent of the mortgagee would have been required. As dedication of a public right of way without the consent of NatWest Bank would be contrary to the terms of the debenture charge, the dedication inferred in my interim decision would not have been effective as CDP lacked the capacity to dedicate without the consent of NatWest Bank.
36. The Council's supplementary case with regard to the debenture is that dedication of the public right of way took place in March 2004 at the commencement of the period of use during CDPs ownership of the land; as dedication would have pre-dated the creation of the debenture charge the consent of NatWest Bank was not required as the debenture would have been entered into with the public right of way already in existence.
37. In support of dedication having taken place at the beginning of CDPs ownership in March 2004, the Council relied upon the findings of the Court in *Turner v Walsh* [1881] and upon the judgement of Hoffman LJ in *R (oao) Godmanchester Town Council v Secretary of State for Environment* [2007] UKHL 28. In *Turner v Walsh* consideration was given to when a right of way is dedicated, whether at the beginning of the period of use or at the end. In that case, the Privy Council held "*it is not correct to say that the earlier use establishes an inchoate right capable of being subsequently matured...The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than a series of trespasses*". It is the Council's case that dedication does not occur at the end of a period of use, but occurs at the same time as the earliest use. In *Godmanchester*, the Council say that Hoffman LJ made it clear that evidence of use was evidence demonstrating a past dedication in the period before use

commenced "*in the case of a public right of way, a lawful origin can be found in dedication by the landowner at some unknown date in the past*".

38. Notwithstanding the submissions as to the effect of the Overage Agreement on the capacity of CDP to dedicate a public right of way, Wharfebank submits that the Council's reliance upon dedication having taken place in March 2004 was misconceived. The judgement in *Turner v Walsh* had been considered in the later cases of *Folkstone Corporation v Brockman* [1914] and in *Stoney v Eastbourne RDC* [1927]. In *Stoney v Eastbourne RDC*, Romer J held "*But I do not think that the expression "coeval with the early user" was intended to suggest that a dedication ought to be presumed to have been made at the date at which the earliest acts of use took place. It was not necessary to ascertain in that case the precise date of dedication, but merely whether the dedication took place before the year 1861, and I think the board merely intended to indicate that a dedication ought to be presumed to have been made at least as early as the first act of user*".
39. Wharfebank submits that in the current case it would be a factual impossibility for dedication to have occurred with the commencement of user; use of the modified order route had occurred prior to March 2004 and dedication could not be inferred at the commencement of that use due to the prohibitive notices erected by Barnardo's and due to the fences and buildings which had stood on the site prior to that date. Wharfebank also contends that the suggestion that dedication could have taken place at a time when CDP lacked the capacity to dedicate was simply wrong; this proposition was not supported by any of the authorities relied on by the Council.
40. In my interim decision I had taken the approach that dedication could have taken place in March 2004 when CDP acquired the land as that would be at the point of the earliest recorded use of the path during CDP's period of ownership. If that were the case, then the effect of the debenture charge in limiting CDP's capacity to dedicate (both under the general *Man O'War* principle and the provisions of clause 3.7) would be nullified as dedication would have taken place prior to the debenture taking effect.
41. However, at the point of purchase of the land CDP was a limited owner as a result of the Overage Agreement and was not in a position to dedicate a public right of way without the consent of Barnardo's. Consequently CDP lacked the capacity to dedicate a public footpath over its land at any point during its tenure of the land, and the effect of the debenture was to further incapacitate CDP's ability to dedicate a public right of way.
42. It follows that I conclude that during CDP's period of ownership of the land crossed by the modified Order route, CDP lacked the capacity to dedicate a public right of way. Although I concluded in my interim decision that an inference of dedication could be drawn against CDP on the basis of the use of the path and the inaction of CDP towards that use, the inference drawn in my interim conclusions is nullified by CDP's lack of capacity to dedicate.

Intention to dedicate

43. Notwithstanding the conclusions I have reached on the issue of the capacity of CDP to dedicate a public footpath, I have given consideration to the new evidence adduced in association with the evidence adduced at the first inquiry

in relation to the question of whether an inference of dedication could be drawn against CDP.

Signs

44. The photograph taken on 25 April 2003 as part of a survey of Brickyard Farm prior to renovation works commencing shows the fence erected by Barnardo's together with a notice located between the top two bars of the post and rail fence. The wording on the notice cannot be read but from the background colours visible, it is unlikely to be anything other than the notice shown to the first inquiry by Mr Shaw. This is likely to have been the sign seen by Mr Brough which prompted his letter to Mr Shaw of 27 May 2003.
45. In his letter of 27 May 2003 Mr Brough wrote "*I note that you have recently put up signs at the end of a route from the viaduct to Wighill Lane advising that you could well prosecute for trespassing*". The new photographic evidence shows that the Barnardo's sign had been erected almost a month prior to Mr Brough's correspondence with Mr Shaw.
46. Whilst there is no way of knowing whether the Barnardo's notice remained in place between 25 April and 27 May, it may well be that the notice was present for a sufficient period for some of those who used the path to have encountered it. None of the witnesses at the first inquiry (other than Mr Brough in his contemporaneous written evidence) recalled its existence and Mr Cattle did not recall seeing it when he crossed the site as part of his training runs in the summer of 2003¹. As at the first inquiry, there was no evidence that Barnardo's made any attempt to replace the signs prior to selling the site.
47. In the interim decision, I concluded that an inference of dedication could be drawn against CDP on the basis of the evidence of use of the path during CDPs ownership, the fact that the fence did not prevent use, that CDP was aware of the use and did nothing to prevent it. The interim decision was reached on an analysis of the dialogue² between the users of the path and CDP during CDPs ownership and considered the period of CDPs ownership separate from the actions taken by Barnardo's during its ownership of the land. The Council submitted that this was the correct course of action and that the actions of Barnardo's had no part to play in the dialogue between users and CDP.
48. Wharfebank contends that to treat Barnardo's actions as irrelevant to the question of intention to dedicate is wrong. The reference in *Godmanchester* to "landowner" found in paragraph 57 of Hoffman's judgement did not mean that only the acts of a particular landowner at a particular point in time were relevant to an assessment of the dialogue between the landowner and the public; the term landowner is concerned with the holder of the title to the land and does not isolate individual owners from the actions of their predecessors in title. Wharfebank says that if this were not the case, then a successor landowner would have to remove and re-erect fences or signs erected by his predecessor if he were to demonstrate agreement with an act of objection to a public right of way made by his predecessor. Wharfebank says that users of the path in 2003 who saw and walked past the Barnardo's notice would have realised that their use had been made contentious and that all subsequent use

¹ In cross examination Mr Cattle said his training runs may have started in May 2003

² As per Hoffman LJ in *Godmanchester*

- would be by force as it was conducted contrary to the notice which had been erected.
49. Wharfebank drew support from the case of *Wild v Secretary of State for the Environment* [2009] EWCA Civ 1406 as binding authority for the proposition that the actions of Barnardo's were relevant to the question of whether dedication could be inferred against CDP. In *Wild*, deemed statutory dedication had been rejected because of an objection to the existence of a public right of way by what might have been the then landowner had been made at a public inquiry in 1978; however, dedication at common law had been inferred from subsequent use of the path for a period of 19 years and 4 months before a fence had been erected.
50. The Court of Appeal held that the Inspector in *Wild* had erred in failing to take into account the 1978 objection; the objection, made by someone who might have been the owner rendered subsequent use contentious and not as of right. Scott Baker LJ held "*from the moment of the 1978 inquiry there was public knowledge that it was challenged that the Order route was a public footpath. It must be inferred that users knew they were using the path against that challenge, but the inspector did not deal with this. The state of mind of the users seems to me to be relevant to the status of the track. It was common knowledge that an objection had been made to the public use of the track by someone who might be the owner*".
51. In *Wild*, the Court of Appeal held that the objection expressed at a public inquiry made subsequent use of the claimed contentious and this was relevant as to whether there was a subsequent intention to dedicate at common law notwithstanding changes in individual landownership. The Court of Appeal also concluded that subsequent use over almost 20 years had not "*neutralised*" the effect of the intention not to dedicate. Scott Baker LJ concluded "*Objection followed by inactivity hardly seems to me to give rise to acquiescence from which dedication is to be inferred*".
52. There are clear similarities between the facts of the case in *Wild* and the current case. There is no doubt as to the identity of the owners of the land in the current case nor is there any doubt in the light of the new photographic evidence that in 2003 Barnardo's had erected a suitably worded notice which was contrary to an intention to dedicate a public right of way. On the evidence now available, this notice may have been present for around a month prior to Mr Brough's correspondence with Mr Shaw in May of that year. However, use of the path continued despite the existence of the notice and the fence to which it was attached.
53. Although in my interim decision I considered use of the path during CDPs tenure of the land in isolation from the actions of Barnardo's, I consider that in the light of the findings of the court in *Wild* that the actions of Barnardo's are relevant matters to take into account when considering whether an inference of dedication at common law can be drawn.
54. The notice erected by Barnardo's was not recalled by any of the user witnesses who gave evidence at the first inquiry but was seen by Mr Brough and the photograph taken in April 2003 demonstrates that the sign had been erected as stated by Mr Shaw. In my interim decision, I concluded that although only Mr Brough reported the existence of the sign, as he had seen it, it was likely that others had seen it as well. I consider it highly likely that the notice had

remained on site during the whole of the period between 30 April and 27 May, and that it is also highly likely a number of people would have been aware of its existence given the extent of the claimed use of the path. In my interim decision, I concluded that the notice had been sufficient to make use contentious and therefore not as of right. In terms of an inference of dedication at common law, the sign is evidence of a contrary intention on the part of Barnardo's.

55. The action of erecting a sign and fence was a clear public statement by Barnardo's which was contrary to the dedication of a public footpath. This was also communicated to CDP in the reply to inquiries made during the conveyance of the land. Barnardo's position was therefore made clear to the public and privately to CDP. I place some weight upon the fact that having stated its position to both the public and to its successor in title, Barnardo's retained a continuing interest in the land it sold to CDP by way of the Overage Agreement. In my view, in addition to the guidance given by *Wild*, the existence of the Overage Agreement provides further grounds for the actions of Barnardo's to be taken into account with regard to the question of the intention of the landowner.
56. Barnardo's had erected a suitably worded notice in April 2003 together with a four rail fence; the evidence is clear that CDP were inactive in terms of maintenance of the fence it had acquired as part of the property. CDP's evidence to the first inquiry was that it had been aware of public use of the path and took no action to prevent it. In the interim decision, I concluded that from this inactivity, an inference of dedication could be drawn. It was submitted by Wharfebank that none of the authorities on dedication at common law³ had given rise to an inference of dedication over a short period of time (between 18 months and 8 years) without some positive action being taken by the landowner to throw open his or her land or lay out a route on the land which had the appearance of a public highway.
57. Whilst CDP did not maintain its fence, neither did it take the fence down and throw the route open to the public. The inactivity of CDP is in contrast to the actions taken by the parties in the leading cases on dedication at common law where streets, roads or bridges have been laid out with subsequent short periods of use by the public giving rise to dedication being inferred.
58. The inactivity of CDP, whilst viewed in the interim decision as evidence of acquiescence in the public's use of the path can equally be described as neutral with regard to the question of an intention to dedicate as there is no evidence that CDP actively encouraged use or access to its land. There may even have been a toleration of the use and an unwillingness to adopt a more confrontational approach to that use as CDP had been made aware that prohibitory notices had been erected by Barnardo's prior to selling the land. Whereas in *Smith v Brudenell-Bruce* [2002] 2 P&CR 51 it was held that to contest use, the owner had to do everything in his power and consistent with his means, the recent case of *Winterburn v Bennett* [2016] EWCA Civ 462 suggests that once a suitably worded notice has been erected contrary to dedication, further steps are not necessary.

³ *Rugby Charity Trustees v Merryweather* [1790]; *Jarvis v Dean* [1826]; *R v Petrie* [1855]; *Rowley v Tottenham UDC* [1914]; *North London Railway Company* [1872]; *Young v Merthyr Tydfil CBC* [2009].

59. The evidence before the first inquiry from CDP was that it had not taken any steps to repair the fence which it acquired from Barnardo's. Equally, there is no evidence that CDP took any active steps to throw open its land for public access, nor did it take the fence down or engage in activity which conveyed a message which was different from that conveyed by Barnardo's via its sign and fence. The findings of the Court in *Wild* appear to be pertinent; that is, "*objection followed by inactivity hardly seems to me to give rise to acquiescence from which dedication is to be inferred*".
60. Given the findings of the Court of Appeal in *Wild*, and the similar circumstances in this case, the conclusion I reached in my interim decision as to it being possible to draw an inference of dedication against CDP whilst excluding a consideration of what had happened during Barnardo's tenure is unsustainable and requires revision. I now conclude that those actions incompatible with dedication undertaken by Barnardo's are of relevance.
61. The erection of appropriately worded signs is an overt action directed towards the public which made the landowners intention clear with regard to the dedication of a public right of way. As use was made contentious by the erection of the sign by Barnardo's in 2003 and in the absence of evidence of any positive action to demonstrate a contrary intention, subsequent use of the path during CDPs tenure remained contentious. Notwithstanding the conclusions reached above on the question of capacity to dedicate, it follows that I now conclude that an inference of dedication at common law cannot be drawn against CDP during the period of its ownership of the land.

Fence at Wighill Lane

62. At the second inquiry I heard evidence from five new witnesses called by Wharfebank. One further new witness was indisposed during the inquiry and could not attend in person, but provided written responses to questions which Mr Parkinson put to him in writing via Mr Jacobi. I also heard from Mr Tobin and Mr Jacobi who had given evidence at the first inquiry.
63. These witnesses gave evidence of their recollections of the condition of the fence at the Wighill Lane end of the path and of the use made of the path by the public which they had observed. In addition, new photographic evidence of the Wighill Lane entrance in April 2003 was also submitted.
64. Mr Cattle recalled that in the summer of 2003 the fence was intact with all four rails but no sign. Mr Cattle was subsequently employed on the renovation of Brickyard Farm from December 2005; his recollection of the fence at that time was that the middle bar was missing and that people with or without dogs climbed between the bars. Mr Cattle's evidence regarding the condition of the fence in 2005 when renovation works began at Brickyard Farm was replicated by other witnesses who had been engaged on that project; Mr Harris recalled the fence being intact in January 2004, but by April 2006 the middle bar was missing; Mr Memery recalled that the middle bar had been missing between September 2005 and November 2007.
65. As at the first inquiry, Mr Tobin recalled having to climb over the fence to reach the viaduct to watch the sunset; between November 2006 and January 2007 the middle rail had been missing.

66. Mr Taylor had been the tenant of Brickyard Farm between February 2009 and November 2011. During that time he had observed many people using the path mainly dog walkers during the week but up to 30 people at weekends. On taking up residence there were only two rails on the fence and Mr Taylor initially thought it was a public path due to the frequency of use. Mr Taylor's evidence was that he had been told by an employee of Wharfebank that it wasn't a public right of way and repaired the fence to prevent people walking through as they stood outside his house waiting to cross the road. Mr Taylor undertook such repairs 3 or 4 times but gave up after the fence became completely broken down by summer 2010; he confirmed he had not been given instruction by the landowner to undertake such repairs.
67. The photographic evidence regarding the fence shows it intact in April 2003 with the Barnardo's sign present; intact in July 2004 but without any sign; second⁴ rail missing in January 2006, no sign present but third and fourth rails to hold a sign were present; second rail missing in March 2006 but third and fourth rails holding the sign board present; second rail missing in November 2006 but third and fourth rails holding the sign board present; only the first rail present in October 2008 and in April 2009; gap in fence in April 2011.
68. The deterioration of the fence was known at the first inquiry and it was also known that Mr Bell had undertaken the repair of the fence in 2005 when he had discovered that materials stolen from the renovations at Brickyard Farm had been secreted on CDPs land. The evidence given to the first inquiry by Mr Bell was that only the bottom rail was present in July 2005. It is now known that Mr Taylor also undertook repairs to the fence between November 2009 and the summer of 2010. That the fence had been periodically repaired during CDPs ownership was acknowledged by the user witnesses who appeared at the first inquiry. It is also known that any repairs to the fence were not undertaken by CDP or authorised by CDP.
69. It is the Council's case that the fence may have fallen into disrepair between April 2003 and July 2004 as per the evidence of the user witnesses at the first inquiry. The Council says that although the fence was intact in July 2004 as shown in the photograph it does not follow that any repair undertaken was done either by or at the direction of CDP. It was Wharfebank's case at the first inquiry that the fence made use of the path contentious and that submission was renewed at the second inquiry. Wharfebank says the fact the fence was repaired by people other than CDP is irrelevant; the message conveyed to users by the presence of a complete fence from time to time would have made users aware that their right to do so was being repeatedly questioned.
70. The photograph taken in July 2004 shows the fence to have been in the same condition (minus the notice) as when Barnardo's had erected it. It is not known if or when the fence was broken down and repaired between April 2003 and July 2004 or if it had remained untouched for a period of 15 months. The user evidence considered at the first inquiry suggested that the fence had deteriorated quickly following its erection; however the July 2004 photograph casts doubt upon the accuracy of the recollections of the user witnesses.
71. In my interim decision, I concluded that the fence erected by Barnardo's had not made use of the path contentious as it had been ineffective in keeping people off the land. Despite the fence having been erected by Barnardo's to

⁴ Counting the rails from the ground up; the second rail is the middle rail referred to by the witnesses

- keep people out of the land prior to its sale, use of the route continued. Clearly those members of the public who used the route did not consider the fence to be a restriction on their use; a number of the user witnesses at the first inquiry spoke of being able to step over or climb under it and that it didn't appear to be a serious attempt to block access.
72. The evidence now before the inquiry is of a fence that was in a more robust condition and for far longer than claimed by the user witnesses. The users painted a picture of a fence which was short lived as a barrier and which had rapidly fallen into disrepair. The sum of the evidence relating to the fence is now that it was intact in April 2003 and remained in that condition in July 2004. Whether it remained intact between those dates is not known, but it was intact during the early part of CDPs ownership. Thereafter the fence appears to have been missing most of its bars at some point in 2005 prior to being repaired by Mr Bell. Between 2006 and 2008 the fence appears to have had one bar missing but was missing two bars in October 2008 and April 2009. It appears that the fence only fell into total disrepair after Mr Taylor ceased repairing it in late 2009 or early 2010.
73. The picture that has now emerged is of a fence that remained, by and large intact until around late 2009 or early 2010 and that anyone attempting to walk the modified order route would have been faced with a fence which was reasonably intact although subject to the rails having been removed and replaced from time to time. This is in contrast to the evidence given at the first inquiry of a fence which *'disintegrated quickly over time'* and which *'can't have lasted for long'*.
74. The initial message conveyed to users by the replacement by Barnardo's of the 'driveway style' gates by a four bar fence and a notice would have been that use of the land to reach the viaduct was not welcomed. That is the message which Mr Brough clearly understood. The question is what message would have been conveyed to the reasonable person being faced by the intact fence in July 2004 or at any other time when the fence had been intact as a result of repairs? The only reasonable answer would be the same message conveyed by the fence initially erected by Barnardo's; that is, that the public were not welcome.
75. Wharfebank submits that many users would have been unaware that ownership of the land had changed hands and that consequently, any impact the fenced had would have continued into CDPs ownership of the site. However, given that Mr Tunney, Mr Horsfall and Ms Bould had personally spoken to Mr Marshall regarding their use of the site and as the closure of the children's home had been debated at the Town Council meetings it is likely that it was general knowledge that the land had changed hands. Nonetheless, whether the public were or were not aware of the change in ownership would not impact upon the message being conveyed by a fence which had been intact in July 2004 and until around 2010 had been periodically repaired.
76. What may not have been common knowledge at the time was who had undertaken repairs to the fence. Although as a result of the evidence put before the inquiry, it is known that CDP didn't repair the fence and that repairs were undertaken by others, it is unlikely that any of the users during CDPs ownership would have been aware of that fact; when faced by a complete fence at any time between 2003 and 2010 all the user would have been aware

of was that the fence was complete. In such circumstances a reasonable user is likely to have understood that use of the land to access the viaduct was not welcome; exactly the same message given by the fence when Barnardo's had erected it and the message understood by Mr Brough.

77. At common law the circumstances have to be viewed from what the message being conveyed to the user was, not what a user may have subjectively believed himself. In my interim decision, I had placed greater weight upon the inactivity of CDP towards the fence and the users' view of it in determining what inference could have been drawn as opposed to considering what message had been objectively conveyed by the fence when first erected and when subsequently repaired. I now consider that the reasonable user faced by a complete fence at any time between 2003 and 2010 would have understood the message being conveyed in the same way that Mr Brough had done. The periodic repair of the fence would have conveyed to the user that use was contested, and use as a result of the fence being subsequently vandalised would have been use by force.
78. The objective message being conveyed by a fence which was intact, then broken, and subsequently repaired was that access to the land was not welcome. I note that although CDP did not repair the fence itself, it took no action to prevent or reverse any repairs made to the fence by others. Although in my interim decision, I was of the view that the fence erected by Barnardo's did not make use contentious, I am no longer of that view given the additional evidence relating to the fence.

Other new evidence

79. It was Wharfebank's case at the first inquiry that dedication of a public right of way on the modified order route would have been incompatible with CDPs development proposals for the former Barnardo's site and that remained the objector's case at the second inquiry. Wharfebank contends that throughout the fitful negotiations with the Council for the creation of a cycle track, the Council would have been aware as to why CDP wanted the cycle track to be contained within the spinney; as the spinney was subject to a TPO, the possibility for development was limited. There were no such restrictions on the parkland surrounding the former Barnardo's home.
80. Wharfebank also submitted that new evidence discovered from the Council's own files regarding the negotiations between the Council and CDP over the prospective cycle track and footpath through the site casts doubt on the validity of the conclusions reached in the interim decision regarding CDPs intentions towards access over its land.
81. In an email between a Mr Donaldson of the Highways Department and a Mr Philpott of the Planning Department in July 2011 it was explained why the proposed cycle track was to run in the woods and not over the route being used by the public at that time " *The reason for placing the new footpath at this location is due to the owners of the land want to develop the site and have submitted a planning application to Selby District Council to alter and extend the former Barnardo's home.....The route being used at present would go through the amenity space needed for the aforementioned planning application and if used by the cycle/ped route, would cut off the land on the south side of the site*".

82. Wharfebank submits that in July 2011 the Council was aware of CDPs intention to incorporate the land crossed by the modified order route as part of the re-development of the site; consequently, it was not possible for the Council to now contend that CDP intended to dedicate a public footpath over land which it wished to develop when the Council had understood in 2011 that the contrary was the case.
83. The Council responded that negotiations regarding the cycleway footpath were undertaken by the planning and highways departments and that the Public Rights of Way department had only become involved with the site around November 2011. The thoughts or views of the Council's planning or highways staff on whether there was or was not a public right of way in existence or developing were not relevant.
84. In support the Council directed me to passages in the judgements given in *Nicholson v Secretary of State for the Environment* [1990] and in *Godmanchester*. In *Nicholson* it was held that "*Whether a landowner has the intention to dedicate must be determined on the basis of his overt acts, and not his private thought and feelings*" a view echoed by Lord Neuberger in *Godmanchester* "*the landowner must communicate his intention to the public in some way....that was the position prior to the 1932 Act*". It is the Council's contention that the correspondence between the Planning and Highways departments and CDP regarding the footpath and cycleway did not amount to an overt act on the part of CDP which had been communicated to the public.
85. In response Wharfebank submits that the Council as the relevant highway authority is representative of the public and that the negotiations it entered into for a cycleway / footpath were negotiations on behalf of the public. As such, the responses it received from CDP on this project were overt and had been communicated to those who were representative of the public.
86. The email of July 2011 demonstrates that the officers who were dealing with the cycle track project were aware of CDPs intentions toward the land and that the cycle track could not follow the line which was in use at that time. Although the Council says that the officers dealing with that project would not have been in a position to determine whether a public right of way existed over the used route based on what knowledge they had gained from the site visits they had undertaken, the July 2011 email appears to suggest that those officers were well aware that public access along the used route was incompatible with CDPs development aspirations for the site.
87. Although the correspondence between CDP and one department of the Council may not have been brought to the attention of those using the path, it would appear that those dealing with the cycle track project had no difficulty in recognising that CDP did not want the proposed route within the open parkland of the site. Whilst the correspondence was not with the public who were using the route, it was with a public body whose functions include the protection and assertion of public rights of way. In this respect that communication was with the public, or at least with a body representative of the public in such matters.
88. The further correspondence provided to the second inquiry on this subject provides some support for the objector's contention that it would be highly unlikely that CDP would be content to dedicate a public footpath over the land which would interfere or compromise the development of the property having

made it clear to one part of the Council the reasons why a cycleway / footpath on part of that alignment was being opposed.

89. Although the Council says that the officers dealing with the proposed cycleway / footpath were in a different department from those who deal with public rights of way, CDP may have been wholly unaware of such a distinction; it was negotiating with the Council as a corporate body and the separation of responsibilities within the Council may have been of little or no concern to CDP.
90. In my interim decision, I considered that CDP in 2006 had queried the line proposed on the basis that the infrastructure of the path would have encroached upon the open area of the site, and not that there had been a specific objection to public access in that area because of its development aspirations for the land. The new evidence on this matter causes me to revisit that conclusion. It would appear that the highways and planning officers understood that CDP did not want a public route over the open land because it would interfere with its proposed redevelopment of the site as a nursing home. Whilst not communicated directly to the public using the route, CDPs position was readily understood by those in a position to represent the interests of the public.
91. In such circumstances, it is unlikely that CDP would have intended to dedicate a public footpath over a route which would have had a greater impact upon the land it wished to develop.

Conclusions

92. The debenture charge and overage agreement removed from CDP the capacity to dedicate a public right of way without the consent of the third parties and there is no evidence to suggest that consent was ever sought or given. Consequently, it would not have been possible for CDP to dedicate a public right of way and the conclusion reached in my interim decision that an inference of dedication could be drawn is unsustainable on these grounds alone.
93. Notwithstanding the conclusion reached on the capacity issue, I also conclude that the prohibitory notices erected by Barnardo's had a continuing effect and that they rendered subsequent use of the path during CDP's ownership contentious. Although use continued, it did so following an overt and public act which objected to such use; although CDP did not take any action to prevent that use, neither did it throw its land open or prevent others from rebuilding the fence at the Wighill Lane entrance.
94. As use throughout CDPs tenure was contentious, it was not use as of right and cannot give rise to an inference of dedication.

Formal Decision

95. I do not confirm the Order.

Alan Beckett

Inspector

APPEARANCES

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Mr C Duffield

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Mr M Cattle

Mr W Memery

Mr N Jacobi Peter Lynn and Partners

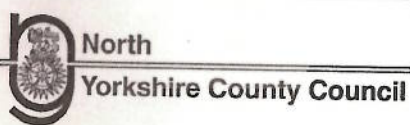
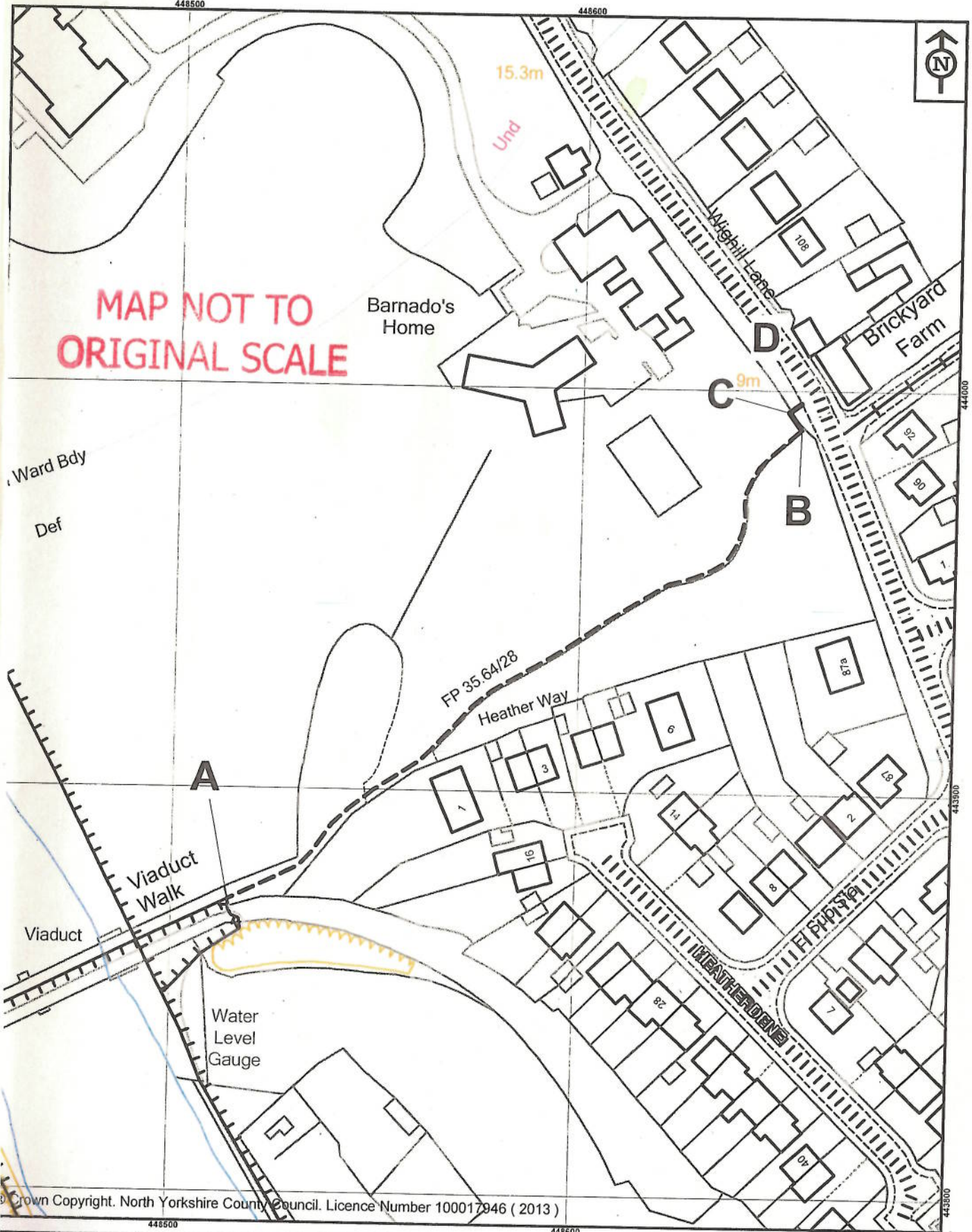
Mr V Ryan

For North Yorkshire County Council:

Mr A Parkinson of Counsel, instructed by Mr S Evans, Solicitor, North
Yorkshire County Council

Inquiry documents:

- (i) Bundle of photographs of the site taken at various locations and various dated between 13 February 2003 and March 2010.
- (ii) Bundle of documents released from North Yorkshire County Council's internal files.
- (iii) Supplementary statement from Mr Jacobi regarding written answers received from Mr Taylor to written questions put to him by Mr Parkinson and the Inspector.



Public Rights of Way
Waste and Countryside Services
County Hall
Northallerton
DL7 8AH

Key:
Footpath to be recorded A-B-C-D
Unaffected footpath
Maintainable Highways

Map drawn on 27 June 2013

Drawn by RJV

Scale 1:1250

North Yorkshire County Council

Wildlife and Countryside Act 1981
Section 53

FOOTPATH No. 35.64/28
EASTERN END OF TADCASTER
VIADUCT TO WIGHILL LANE,
TADCASTER
MODIFICATION ORDER 2013

File Ref No. SEL/2012/04/DMMO