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| **Appeal Decision** |
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| **by A Behn Dip MS MIPROW**  |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 30 November 2022** |

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| **Appeal Ref: ROW/3303775** |
| * This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Shropshire Council not to make an order under Section 53(2) of that Act.
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| * By application dated 28 March 2017, Mr G Price claimed that a route from Snailbeach Lead Mine to Crows Nest Dingle should be added to the definitive map and statement for the area as a public footpath.
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| * The application was refused by Shropshire Council and the appellant was formally notified of the decision on 27 June 2022.
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| **Summary of Decision: The appeal is allowed.** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted. In this case, I have not visited the site, but I am satisfied I can make my decision without the need to do so.
2. The appellant, Mr G Price, requests that the Secretary of State directs Shropshire Council (SC) to make a definitive map modification order to record the route, from A-B in the attached map as a public footpath.
3. In their report dated 23 June 2022, after assessing the evidence, SC concluded that *‘there is insufficient evidence to prove, on the balance of probabilities that footpath rights were reasonably alleged to subsist along the claimed route’.*
4. In addition to the submissions from the appellant and SC, which contain correspondence from various parties as a result of consultations, representations were made by Mr and Mrs Knill, Natural England, and Snailbeach Line Ltd. I have considered all of these documents in forming my conclusions.
5. The papers before me indicate that there are four landowners whose properties are crossed by the claimed path. The owners of that part of the route just south of the mid-point of the path objected to the application. Owners of the remainder of the land crossed by the claimed route do not appear to have objected in principle to the application, with Natural England stating support for the claimed path being established as a public right of way.

**Legal Framework**

1. The original application was made under Section 53(2) of the 1981 Act which requires the surveying authority, (in this case SC) to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Where no public right of way is presently recorded, Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that *“a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist…”.*
3. As made clear in the High Court in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994], and later clarified in the case *R v Secretary of State for Wales ex parte Emery* [1998]this involves two tests:
* **Test A:** Does a right of way subsist on the balance of probabilities?
* **Test B:** Is it reasonable to allege that a right of way subsists? For this possibility to be demonstrated it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.
1. At this stage, I need only be satisfied that the evidence meets Test B, which is the lesser test. Both of these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order requested by the appellant.
2. In relation to Test B, the Court of Appeal recognised in *R v Secretary of State for Wales ex parte Emery* [1998] that there may be instances where conflicting evidence was presented at the schedule 14 stage. Roche LJ held that *"…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard, and those issues determined following a public inquiry."*
3. For documentary evidence, section 32 of the Highways Act 1980 (the 1980 Act) requires consideration of any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
4. For user evidence, section 31 of the 1980 Act is relevant. This requires consideration as to whether a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is 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 period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.
5. Alternatively, if the case is not made out under statute, the evidence may be considered under the common law. In this case the issues to be addressed would be whether, during any relevant period, the owners of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owners, and whether there is evidence of acceptance of the claimed right by the public.

**Main issues**

1. Use of the claimed route by the public does not appear to be in dispute, but more so whether use by the public at large gave rise to a presumption of statutory dedication under the provisions of the 1980 Act or an inference of dedication at common law. The focus in this case appears to be on whether use was with or without permission and whether an intention not to dedicate was sufficiently demonstrated.

Reasoning

***Statutory Dedication***

*When the status of the claimed route was brought into question*

1. Many of the user evidence forms recollect trees being felled and placed across the appeal route in late 2016, followed by fencing shortly after. As acknowledged by SC, it is reasonable to place this event as the calling into question of the right, and thus the relevant period for this appeal is 1996-2016.

*User evidence*

1. Twenty-three user evidence forms were provided by the appellant over the course of the original application and the appeal, with earliest use dating back some 70 years, although some users had a private right or had walked the path with permission. Further supporting statements were also submitted by three of the users.
2. A petition containing 50 signatures claiming use of the route ‘without hindrance, obstruction or interruption, believing it to be a public footpath’ during the relevant period was also submitted.
3. Use appears frequent, many quoting weekly use, mostly on foot, with users often seeing other people whilst on the claimed route, including tourists in some instances. Several users indicated use over a lengthy period and some stated that previous generations of their family had also walked the route.

*Landowner evidence*

1. Landowner consultation on the application was undertaken by SC in early 2022 with the result that SC did not have strong views on the matter, Natural England supported the application for a public footpath, and Snailbeach Line Ltd (SLL) preferred permissive use to continue but would consider a right of way if such access extended across the whole route. In later correspondence SLL stated they would resist an order if it restricted vehicular use across the route.
2. Mr and Mrs Knill objected to the application, as, having purchased some of the land over which the claimed path runs, in November 2016, they were developing part of the land into a private residence. It was the placing of felled trees and branches across the claimed route, further reinforced by the subsequent erection of fencing on their land that served to bring the right into question. Mr and Mrs Knill submitted various documents and statements in support of their case that public rights had not been gained across the claimed route.
3. Statements were submitted from the family of the late Mr and Mrs D Challinor, who were the previous owners, advising that Mr and Mrs Challinor had been happy for friends and neighbours to walk along the part of the route through their land ownership, in the knowledge that it was with their permission, and that strangers were challenged by them.
4. This was supported by 11 statements from local residents, all of whom stated the land was private property, with 8 of the 11 confirming their use was by permission. There was also a petition submitted with 52 signatures stating long associations with Snailbeach and of knowing the land was private property, with a number of these signatories also stating their use was with permission.

*Signage*

1. Mr and Mrs Knill submitted photographs of signs, one dating back to the 1960’s believed to have been erected by The Snailbeach District Railways Company (SDRC), showing ‘No Public Right of Way’ and another more recent sign dating back to 2010, possibly earlier, stating ‘Private Property Please Keep Clear at all times No Horses’ and initialled with ‘DC’.
2. A letter was submitted from the late Mr D Challinor, written in 1988 to SC, wherein Mr Challinor stated how in the previous 30 years he had helped erect “ the no public right of way” signs for SDRC.
3. Statements were also made by other members of the Challinor family who recall Mr and Mrs Challinor, having subsequently purchased some of the land, erecting their own signs indicating their land was private property.
4. Some users acknowledged seeing private property signs of some description, one user specifically recalled the sign saying ‘Private Property, Please Keep Clear, No Horses’, which accords with the photograph mentioned above. This sign, however, does not suggest there is no passage for pedestrians, nor that use by walkers is with permission, it specifically refers to ‘No Horses’.

*Conclusions on Statutory dedication*

1. It does appear that while under the ownership of SDRC, there was clear signage stating ‘no public right of way’ over the claimed route, as supported by old photographic evidence and the letter from the late Mr Challinor who remembered helping erect the signs. However, this is outside of the relevant period of 1996-2016.
2. Moving forward to the mid 1980’s, some of the land that is crossed by the claimed route was sold to Mr Challinor and his letter to SC evidenced that in 1988, he considered any use of his land by walkers at that time was trespass. This is clear evidence of his intent at that time, although the letter was communicated to SC, not the public at large, and again falls outside of the relevant period.
3. Statements from members of his family, the petition, and several local residents state that Mr Challinor was happy for friends and neighbours to use the part of the route through his land, and that he went to some length to keep the route clear and even provide a bench for people to sit on. Evidence presented also submits that challenges were made by the Challinors’ to some users of this section of the claimed route.
4. Conversely the user evidence submitted by the claimant indicates that the majority of those who completed user evidence forms and signed the petition used the route without permission, or a given private right, and were not challenged.
5. Consequently, there is clear conflict between the claimants’ evidence and the evidence supplied by Mr and Mrs Knill. This dispute of evidence cannot be readily resolved from the examination of the written submissions.
6. There is a large body of evidence that suggests many local people knew the land was private property. However, the knowledge that an area of land is privately owned is not necessarily mutually exclusive to a public right of way being claimed, bearing in mind that most public rights of way run across private land.
7. The sign shown in submitted photographs, said to have been present during the relevant period of 1996-2016, does not explicitly state that there was no public right of way along the claimed path as considered earlier in this decision. The SC statement of response to the appeal showed photos of two more signs that read ‘This is private property; the entry of unauthorised persons is prohibited’. This could possibly be seen to hold a little more weight, although it is unclear from the documents before me as to when these signs were erected, where along the route they were located, and the duration they were in situ. As recognised in the case of *Paterson v Secretary of State for the Environment, Food and Rural Affairs [2010]* many public rights of way are on privately owned land and signs containing such wording as ‘private land’ or ‘private property’ can possibly be perceived by users to refer to the land either side of the route, rather than the path itself, and thus are not necessarily irrefutable evidence of lack of intention to dedicate.

**Documentary Evidence**

1. SC investigated a number of sources of historical documentary evidence, but they did not reveal any support for a public way of any antiquity.
2. SC also quoted excerpts from a publication called *‘The Snailbeach and District Railway’, by Andrew Cookson, 2017, Twelveheads Press*, which writes about the history of the railway line which forms part of the claimed route. The publication mentions public use of the route but clearly states that the land is private property and permission should be obtained. It also mentions the SDRC ‘No Public Right of Way’ signs that were in situ circa 1966. It is noted that this book was published after the relevant period and so although helpful in supporting the actions of SDRC in the 1960’s, it is of limited value in terms of the appeal on the basis of use by the public during the relevant period or under common law.
3. The appellant submitted an excerpt from a commercially sold walking guide for the area, *‘The Stiperstones’*, apparently published in 2000 which shows the claimed route as ‘Crowsnest Dingle Walk No 5’. The guide is apparently for sale in local establishments including a shop, pub, and visitor centre. This is not evidence of the status of the claimed route, albeit it does indicate the path as open and walkable and does not state that permission must be sought to use the route.
4. Some evidence put forward at appeal relates to matters of dispute, privacy, safety, benefits of the claimed route as an alternative to the nearby narrow road, and possible land contamination. I understand these to be genuine and important concerns to those who raised them, but the legislative criteria I must apply when determining this appeal does not allow consideration of such matters.

**Conclusions**

1. As set out in the legal framework above, in order to justify the making of a definitive map modification order to add a public right of way under sub-section 53(3)(c)(i) of the 1981 Act it is necessary only to provide sufficient evidence to ‘reasonably allege’ the existence of a public path.
2. I find no incontrovertible evidence in the representations before me that would inevitably defeat the claim that a right of way has been ‘reasonably alleged’ to have been established.
3. The extensive evidence provided in support and against that claim is all very credible, albeit less weight can be given to the petitions than the statements and user evidence forms. In some areas further testing is necessary to fully illuminate important details that would assist in resolving the conflicts that are apparent.
4. I refer to the guidance at paragraph 8 that is applicable when deciding whether an order should be made. Where, as in this case, there is a conflict of credible evidence but no incontrovertible evidence that a way cannot exist, then the answer is that a public right of way has been reasonably alleged to subsist. Since that is the threshold that must be reached in order to make (though not confirm) an order, I conclude that the evidence is sufficient to justify an order being made. Having reached this finding there is no need to address possible dedication at common law at this stage.

Overall Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Shropshire Council is directed to make an order under Section 53(2) and Schedule 15 of the 1981 Act within 3 months of the date of this decision to modify the definitive map and statement for the area by adding a public footpath as shown between points A and B on the plan attached below. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

A Behn

 **Inspector**

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