The Planning Inspectorate

Appeal Decision

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 24 August 2015

Appeal Ref: FPS/W2275/14A/15

- 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 Kent County Council not to make an Order under section 53(2) of that Act.
- The application dated 29 February 2012 was refused by way of notice from Kent County Council dated 3 February 2015.
- The appellant, Shorne Parish Council, claims that the route should be recorded as a public footpath on the definitive map and statement for the area.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. I am appointed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). I have not visited the site but I am satisfied I can make my decision without the need to do so.

Description of the route

2. The appeal relates to a route running in a generally northerly direction, north of Shorne, from Queens Farm Road ("QFR"), which I understand to be a public road, crossing the North Kent Railway Line via Shorne Mead Level Crossing ("the level crossing") to the junction with the towpath of the former Thames & Medway Canal ("the canal")[1]. The towpath, running generally east – west, is recorded as a public footpath, NS137.

3. I understand the level crossing, owned by Network Rail ("NR"), to provide rights for all purposes for certain authorised users, who are key holders. The claimed route on foot passes through pedestrian gates alongside the vehicle barriers on the level crossing. The pedestrian gates were locked in late 2009, leading to the claim by Shorne Parish Council ("SCP").

4. A section of the claimed route, directly to the north of the level crossing to the junction with NS137, crosses unregistered land. A continuation north of the towpath crosses Shorne Marshes to Shornmead Fort on the River Thames. This is known Fort Road and is recorded as a public bridleway, NS318.

Main issues

5. In considering the evidence, I take account of the relevant part of the 1981 Act and relevant court judgements. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement ("the DMS") for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

[1] As shown on Modification Order Application Plan, Drawing No. SPC-21, Feb 2012

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

6. *R v the Secretary of State for the Environment ex parte Norton and Bagshaw, 1994*[2]*,* sets out that there are two tests in relation to such applications and that an Order should be made where either of the following tests is met:

   (a) *Test A, does a right of way subsist on the balance of probabilities?*

   There must be clear evidence in favour of the appellant and no credible evidence to the contrary.

   (b) *Test B, is it reasonable to allege that a right of way subsists?*

   If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then it must be a reasonable allegation.

7. *Bagshaw & Norton* was considered and approved by the Court of Appeal in *R v Secretary of State for Wales ex parte Emery (1997)*[3] ("*Emery*"), the leading judgment saying, "…*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."*

8. The appellants, SPC, stated that their case was based fairly and squarely on statutory deemed dedication under section 31(1) of the Highways Act 1980 ("the 1980 Act"). Their grounds of appeal related to whether sufficient weight had been given to the historical evidence of a right of way over the route and whether too much weight had been given to the arguments of NR, particularly with regard to capacity to dedicate.

9. In determining the application Kent County Council ("KCC") found the historic mapping evidence insufficient to conclude that a public right of way existed prior to the canal and railway. They felt that the route was "…*a way of such character that use of it by the public could not give rise at common law to any presumption of dedication…*" by reference to section 31(1) of the 1980 Act, on the basis that use of the route would be an offence under the British Transport Commission Act 1949 ("the BTC Act"), which provided no power to authorise the use. The relevant Railway Companies had no capacity to dedicate a public right of way in such circumstances.

10. In relation to the statutory tests under the 1980 Act, where a way has been enjoyed by the public without interruption for a full period of 20 years, the way is presumed to have been dedicated as a highway, unless there is sufficient evidence that there was no intention to dedicate it during that period. The period of 20 years is calculated retrospectively from the date on which the right of the public to use the way is brought into question. Use in the twenty-year period must be without interruption but sometimes an interruption results in an earlier date of challenge and an alternative twenty-year period.

[2] [1994] 68 P & C.R. 402
[3] QBCOF 96/0872/D

11. Dedication can be inferred at common law, with express or implied dedication by the owner and acceptance by the public creating a highway. The question of dedication is one of fact to be determined from the evidence. Use by the public provides evidence, but it is not conclusive evidence from which dedication can be inferred. There is no defined minimum period of use at common law but the legal burden of proving the owner's intentions remains with the claimant.

12. In all cases, the test to be satisfied is on the balance of probabilities.

Reasons

Documentary Evidence

13. I agree with SPC that the Russell Map of Chalk and Denton Levels, amended 1808, shows that a feature following the route of NS318, and the claimed route to the south, has existed through the substantially unchanged ditches and fleets since at least 1808, if not 1694. However, the physical existence of a route does not demonstrate that it is public.

14. The canal was built under the Thames & Medway Canal Act, 1800 and there was reference to other Canal Acts dating from that time relating to various powers. Whilst there was provision to allow continued use of a route over the canal, this does not assist with regard to status.

15. The tithe map, 1842, apparently identifies QFR in the same was as other routes now part of the highway network, numbered 570, described as 'roads'. The claimed route is shown as a pecked line feature, coloured ochre, running north to a field boundary some way short of Shornmead Fort, with no continuation identified. Whilst showing the continued existence of a route south of the canal, the status is not clear from the tithe information; unlike other routes it does not seem to be numbered, although I note the colouration.

16. SPC indicate that from 1840 – 1847 there were a number of plans and reference books of various proposed railway schemes in this area but only certain documents are available to me. The Gravesend and Rochester Railway and Canal Act, 1845 was apparently "*…to enable the Company of Proprietors of the Thames and Medway Canal…to widen, extend and maintain a railway from Gravesend to Rochester…*". I understand that there was already a single track railway in this location. KCC indicate that the claimed route was numbered 5 and described in the book of reference as an 'occupation road' in specific named ownership and occupation. There is disagreement between the parties as to the recording, or not, of other nearby roads as parish roads in the ownership of the Surveyor of Highways, or occupation roads in the various records.

17. I understand the South-eastern Railway Act, 1846 ("the 1846 Act") authorised the purchase of the Gravesend and Rochester Railway and Canal by the South-eastern Railway Company. There seems to have been an accompanying Act enabling construction of the railway itself, with plans apparently deposited in November 1845. I agree with SPC that it seems greater weight should be given to the 1846 Act over the earlier acts, as this was approved by Parliament.

18. The claimed route is numbered 10, which the book of reference describes as "*Road to and across railway to drawbridge".* The owners or reputed owners are members of the Day family, the Gravesend and Rochester Railway and Canal Company and the Surveyors of Highways. By contrast the road to the east is numbered 9 and identified as the "*Public road leading from Shorne to Higham*",

with only the Surveyors of Highways named. All the routes crossing the railway line in the longitudinal section 18, including the claimed route, are shown as "*Public Road to be crossed on the Level. Level unaltered."*

19. The status of a way had an impact on the cost of the railway scheme and it is unlikely that plans would show a route at a higher status than was actually the case. Therefore, an entry in the book of reference that a way was in the ownership of the 'Surveyor of Highways' may be persuasive evidence of a public right of some description. Taking account of the longitudinal section description and the reference to the Surveyors of Highways I agree with SPC that the documents appear to be acknowledging existing public rights in this location. The argument of NR that the Surveyors of Highways could have been included to cover the 'possibility' of a public footpath is unsubstantiated.

20. The South-eastern Railway Act, 1872 ("the 1872 Act") apparently allowed the alteration and extension of the railway, including the power to acquire land. The plan shows "*Shorne Meade Crossing*" and what is said to be the gate keeper's lodge to the north-west of the level crossing. The Railway Clauses Acts 1845 and 1863 made provision for roads crossed on the level for the provision of gates, to be opened and closed by an employee and, subsequently, to erect a lodge at the point of crossing for the safety and convenience of the public. Whilst there was an initial suggestion that the lodge was erected in connection with the canal, SPC point out that the lodge was shown on the 1872 Act plans and so appears to have been in connection with the railway, suggesting the level crossing was recognised as being in public use.

21. The South-eastern Railway Act, 1874 conferred various powers on the South-eastern Railway Company including the diversion of the route to the south of the railway line and the claimed route. The level crossing is identified as the "…*crossing of the Company's railway*…". The western end of the diversion commences at "…*the road leading from the Shorne Mead level crossing…"* and the created route as a result of the diversion is a public highway. I consider this is supportive of the recognition of highway rights over the level crossing.

22. Between 1845 and 1852 the Inclosure Commissioners could authorise the inclosure of certain lands without first obtaining the prior consent of Parliament and this was followed by the passing of an *Act to amend and further extend Acts of Inclosure, Exchange and Improvement of Land* in 1852.

23. The Inclosure Award, 1853, for "…*the Inclosure of Shorne Mead situate in the Parish of Shorne in the County of Kent…"* affects land at the northern end of NS318, adjacent to the Thames. Two maps show this land pre- and post-Inclosure. The route to the south is marked "*From Shorne*" but the post-inclosure map shows the route on the inclosed land as a "*Private Carriage Road*" and the Award refers to "*One Private Carriage and Occupation Road of the width of thirty feet commencing at the road leading into Shorne Mead…".* SPC seek to draw a distinction between this "*Private Carriage Road*" and the references in the Award to two other sections of route, suggesting that the lack of description as a "*Private Right of Way"* must mean it, and the continuation south to Shorne, was a public right of way.

24. There is case law that the words 'private carriage road' were deliberately used in a particular inclosure award as a term of art distinguishing the road according to the extent of the rights over it, to a limited if unspecified class of user, from public carriage roads on which all subjects enjoyed right of vehicular passage.

Whilst use of the term 'private' in a local act does not exclude the possibility that some form of public right existed, the relevant Acts are not before me. The Award states that the "…*said Road is set out for the use of the persons interested for the time being in the allotments…".* On balance, I consider that this indicates that it was a private route, set out only for use by those named individuals with an interest in the relevant land. It seems strange to have a potential cul-de-sac public route leading only to a private route. However, I bear in mind that the Commissioners were not empowered to deal with the land to the south, leading to the claimed route.

25. The Finance (1909 - 1910) Act provided for the levying of tax on land. SPC say that QFR and part of the continuation north, now NS318, are in hereditament 126, from which £250 is deducted for "*Public Rights of Way or User*". SPC suggest this deduction relates to the 'road' identified on the base map, however, without further analysis clarifying the entirety of land in this hereditament, and whether there are other rights of way now recorded, I give no weight to this argument. I note that the claimed route itself is included within the uncoloured area relating to the canal and railway.

26. The 1947 aerial photograph and current 'googlemap' show the claimed route was part of the through-route north from QFR and it is clear that there are vehicular gates on the earlier photograph, although I agree with KCC that it is not possible to tell whether there were also pedestrian gates at this time. Neither photograph is capable of showing whether or not public rights exist over the route.

27. The Ordnance Survey ("OS") maps reflect the changes made to the land in this area due to intensive development in the canal, railway and inclosure. The route has clearly survived throughout these changes, however, this does not, of itself, provide evidence of a highway. The OS mapping series shows that there has been a physical feature on the ground providing access across the marshes throughout the last two centuries. The OS maps cannot show that there were any specific rights over the route but the claimed route has been the link between what are now recognised as two public routes, QFR and NS318.

The Definitive Map and Statement

28. The National Parks and Access to the Countryside Act 1949 ("the 1949 Act") introduced the concept of the DMS and set out the procedure to be followed in their production. The SPC Parish map, and subsequent Draft Map, produced in 1950 and 1952, do not show the claimed route, or the continuation to the north, now recorded as NS318. KCC indicate that the provisional map, also dating from 1952, is missing but the 1st Definitive Map, relevant date 1st December 1952, did not show the claimed route.

29. SPC suggest that the route was not claimed as was thought to be a public road. I note that the Highway Inspectors Map, 1953, prepared to show the routes which fell within the jurisdiction of the Highway Inspectors, shows QFR, up to the level crossing, coloured with a solid blue line, indicating it to be an "*unclassified county road (maintained)".* The section north of the railway, including the claimed route, is uncoloured indicating that it was not the responsibility of the Inspectors and so not recognised as a publicly maintainable route.

30. The production of the DMS was to be subject to periodic review and SPC responded to KCC on this matter in July 1969, saying "*Only one amendment is proposed…the designation of the access road to Shornmead Fort from the Kings*

Farm Railway Crossing as a Bridleway…" . They later claimed two other routes and all three are shown in the Strood Rural District Council list.

31. Notice of the Review Map was given in November 1970, showing the claimed route as BR318, part of the length of QFR and NS318. British Railways Southern ("BRS") objected to the Department for the Environment ("the DoE") on 7 April 1971, apparently in relation to this route and others "…*on the grounds that the ways…are not footpaths, bridleways or byways open to all traffic*" although the 'attached schedule' referred to has been lost. A list of objections compiled by the DoE says in relation to 318 "*Objection to the classification of these routes as bridleways. The public right of way on foot is admitted."* A "*Schedule of objections*" notes "*Objection is to Bridleway. Footpath is admitted."* A hand-written note says "*Not on Def. Map. British rail admit footpath over crossing. Northern section (North of FP317) not disputed. DELETE or add as FP."*

32. Where objections were received the intention was for a local public inquiry to ascertain the true status, however, the review in Kent was abandoned in February 1983, before the status of a number of routes, including this one, was determined. As a result, the objection was not heard.

33. In relation to the Special Review, introduced by the Countryside Act 1968 where objections to the initial DMS had not been resolved and the review under the 1949 Act had been abandoned, a letter was sent by British Rail ("BR") to KCC in April 1984. This included a schedule of their understanding of the situation in relation to a number of objections and for BR318 they indicated "*Claim deleted".* KCC responded that the route would be omitted across the railway, due to the disputed status, but "*…it is noted* [BR] *do at least admit a public right of way on foot over this crossing."* No response was noted. Subsequently, the 1987 DMS shows the northern part of the claimed route as the bridleway NS318, terminating on the towpath, there recorded as NS317 with no public rights shown on the claimed route.

34. I consider that this shows the belief of SPC that public rights have existed over the claimed route since at least 1969. Whilst BRS apparently initially objected to the recording of any public rights of way, they '*admitted*' to a right of way on foot on the claimed route, over the level crossing and KCC referred to this again in the 1980s with regard to the Special Review. I consider this to be demonstrative of the understanding and intention of the landowner in relation to such rights in the early – mid 1970s, although I note the lack of any such admission in the 1980s.

Correspondence

35. From August 1972 to October 1973 there was correspondence regarding notices and gates across Shornmead Fort Road, BR318, as it was shown on the 1970 Review Map. Although initially appearing to be in relation to the Milton Ranges Byelaws 1963[4] ("the Byelaws"), as the correspondence continues it seems that closure was by the owners of Queen's Farm; it may be that these were two separate gates or actions. In September 1973 KCC noted "*…that the bridleroad is in perfect condition and appears to be used by a considerable number of people. The gate at the junction of the bridleroad with F.P. 317 was locked…".*

36. Whilst the Byelaws refer to the display of a red flag "*…on the west side of Shornmead Fort Road 235 yards…*[and] *1000 yards north of the railway level crossing…"* it is not clear where the gate referred to was sited. Lack of action by

[4] SI 1963 No. 1555

KCC, on the basis that the matter related to land affected by the objection to the recording of a bridleway, such that no action would be taken until the objection was dealt with by the DoE, suggests that this relates to the claimed route, to the south of the towpath. However, reference to the Byelaws suggests it was to the north, which may not be directly relevant to the claimed route.

37. In 1991 and 2000 there was correspondence regarding the use of the level crossing by motorcyclists to access the Shornmead Fort Road, the sea wall and the Marshes for scrambling. In 1991 BR discussed removing the pedestrian gates at the level crossing, leaving the vehicular gates. The Ministry of Defence said that if there was a legal requirement for a footpath, as BR had referred to the route, then a stile could be provided. It seems that BR did not think that they could, or should, close the route to pedestrians in the early 1990s; action was taken to retain the pedestrian access via the pedestrian gates, whilst trying to prevent access by motorcyclists, albeit that the vertical rails failed to achieve that aim and I understand they were removed in 1998.

38. In the 2000 correspondence, the Royal Society for the Protection of Birds raised the matter and Railtrack Southern responded that *"…the first action taken by Railtrack, or prior to 1994, was to put in some vertical rail sections so that only pedestrians could get through the pedestrian gates…to…prevent motor cyclists…would involve…palisade fencing around the crossing area…".* It does not appear that anything was done on the level crossing in 2000.

Queen's Farm Road car park, 1990s

39. In April 1993 a planning application[5] was made in relation to land immediately south-west of the level crossing. The application set out that this was for "*…use as a car park for visitors to* [the canal] *& marshes…".* The attached plan showed QFR as a public highway and annotated "*Pedestrian access to level crossing".* SPC supported the development, paying £1,000 towards it in 1994.

40. This development was clearly associated with access over the level crossing. It seems unlikely that it would have taken place without some understanding that access was available over the level crossing to the canal and marshes. Whilst such access could have been permissive no evidence has been provided of any agreement in this respect. I understand that the car park was later closed due to illegal dumping on site.

Signs

41. Information on signs was supplied by NR although the original records were not provided; it is probable that some of the dates given arise from known changes in the owner/operator of the railway but clarification would be helpful. Signs were erected at some point between 1964 and 1969 under the Rights of Way Act 1932 ("the 1932 Act") stating "*The Southern Railway Co. hereby give notice that this way is not dedicated to the public".* A photograph was submitted although the copy is not clear enough to determine the location. SPC raise queries about the effect of this sign, given changes in relation to the relevant railway company.

42. At some point in the period 1969 – 1991 signs were erected advising that the way was "*…not dedicated to the public, save as a footpath…".* Neither of these signs has been referred to in the user evidence submitted.

[5] GR/93/0230

43. Signs under the 1980 Act were then erected reading "*The British Railways Board hereby give notice that this way is not dedicated to the public."* Photographs of these signs from 2007 were provided, so they have been in place since at least that time.

44. Standard 'Stop, Look Listen' signs were noted on the crossing and the photographs also show signs saying "*Warning Do not trespass on the Railway Penalty £1000"*, with an earlier version showing the penalty of £200. Additionally a sign saying "*Access for authorised vehicles only"* is visible on the road leading to the level crossing barriers alongside the pedestrian gates.

45. These signs were referred to by some users, although the 1980 Act sign was suggested by many not to have been erected until about ten years prior to the closure of the route, which would be in the late 1990s not 1993 as suggested by NR, and one person specified it to be in 2004.

The user evidence

46. User evidence was initially provided with the application in the form of 'statement letters', sworn affidavits and records of organised walks. KCC contacted a number of those providing such evidence to clarify the use by way of standard user evidence forms. The evidence shows use from the 1950s onwards with no indication that anyone has been prevented from using the route until it was closed off by NR in 2009.

47. The majority of use was on foot and although a few people referred to taking a bicycle across, that evidence seems insufficient to support a claim for higher rights. The frequency of use varied from annually, to 3 or 4 times a year to monthly or weekly, with one person referring to daily use. A few people indicated that they had used the route with the permission of the landowner, although others commented along the lines that there was no need for permission, as it was a public right of way. Clarification of such permission would assist in determining whether or not use was 'as of right'.

48. I agree with SPC that *R v Oxfordshire County Council ex parte Sunningwell Parish Council, 1999*[6]*, London Tara Hotels Limited v Kensington Close Hotel Limited, 2011*[7] and *Powell & Irani v Secretary of State for Environment Food and Rural Affairs & Doncaster Borough Council, 2014* [8]set out that the important matter is the quality of use by the public, not how the landowner might view such use.

49. I consider that the evidence submitted is sufficient to show use of the claimed route over a period of over 50 years in a manner suggestive of the existence of public rights on foot.

Capacity to dedicate

50. NR says that it is not possible to acquire a right by the undertaking of a criminal offence and, therefore, the rights could not be dedicated at common law after the introduction of the BTC Act, or lead to a presumption of dedication under the 1980 Act. It is clear from the leading author references discussed by SPC that there is some disagreement on the meaning of "…*a way of such character that use of it by the public could not give rise at common law to any presumption of dedication…*". I shall deal with the matters as relied upon by NR, agreed by KCC.

[6] [1999] UKHL 28
[7] [2011] EWCA Civ 1356
[8] [2014] EWHC 4009

51. Section 55 of the BTC Act states "*Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings.*"

52. SPC rely on the requirements of sub-section 55(3) of the BTC Act, to show that there was no criminal offence in using the level crossing as the signage was inadequate. There is some evidence from NR on signs, however, I agree with KCC that the judgement in *R(Newhaven Port and Properties Ltd.) v East Sussex County Council, 2015*[9]*, s*eems relevant. Whilst dealing with a different act under which notices were required, the *Harbours, Docks and Piers Clauses Act 1847*, it was said that "*The fact that it may be necessary to show that the byelaws were appropriately displayed before a prosecution for their infringement could proceed does not justify the contention that they are of no effect generally unless they are displayed… although* [the fact that they were not displayed as required] *may well have meant that breach of the Byelaws could not have led to a prosecution (at least of someone who had infringed them without having seen them).*"

53. SPC refer to *Bakewell Management Limited v Brandwood, 2004*[10], suggesting that the railway company could render the trespass lawful by granting permission to cross. I consider there to be some merit in the argument of SPC that a level crossing is a feature constructed expressly for the purpose of crossing a railway, such that use of it would not seem to be trespass. It does not appear that anyone has been prosecuted for trespassing on this level crossing.

54. I agree with SPC that there must be doubt in relation to the argument that a railway company had no power to authorise use of any railway land not already authorised prior to the introduction of the BTC Act. If this were the case then it would seem that no new platforms could be opened as users would be 'in dangerous proximity' to the railway.

55. Section 31(8) of the 1980 Act states that "*Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes*." In this case there are other public rights of way crossing this railway line on the level in the same manner, which suggests there is not an incompatibility between the two uses of the land.

56. There are competing arguments in relation to capacity to dedicate public rights over the level crossing. However, I do not consider, on the balance of probabilities, that there is incontrovertible evidence to demonstrate that the railway companies had no capacity to dedicate such rights.

Section 31 of the Highways Act 1980

57. The 1980 Act requires that the twenty-year period is calculated retrospectively from a date of 'calling into question' of the public rights. KCC have looked at the period 1989 – 2009, in relation to the closing of the level crossing, which was the action leading to the application and, therefore, clearly calling use into question.

[9] [2015] UKSC 7
[10] [2004] UKHL 14

58. Within that period there is evidence of a sign under the 1980 Act indicating a lack of intention to dedicate by the landowner, in relation to part of the claimed route, over the level crossing. This sign was in place for a substantial part of the twenty-year period, whether from 1993, the late 1990s, 2004 or 2007, as variously suggested in the evidence. I consider that this would lead to failure under statute in relation to that twenty-year period.

59. It is less clear whether the erection of the sign itself should be taken as a calling into question. *R (on the application of Godmanchester and Drain) v SSEFRA, 2007*[11]("*Godmanchester*"), addresses the meaning of s31(2) with regard to what acts constitute 'bringing into question.' By reference to earlier case law: "*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.*"

60. I bear in mind the other reference to such signs in that leading judgement by Denning LJ: "*The landowner can challenge their right, for instance, by…putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may…tear down the notice: the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way. But whatever the public do, whether they oppose the landowner's action or not, their right is 'brought into question' as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way."* It would seem that such a sign may be an effective challenge, even if no action was taken in relation to it at the time, suggesting acquiescence by the public. This would give rise to twenty-year periods of 1973 – 1993, late 1970s – late 1990s, 1984 – 2004 or 1987 - 2007, depending on when that the sign was erected.

61. In relation to evidence from correspondence of potential interruption in the 1970s, I am not clear of the location of that gate, and therefore whether it is relevant to the claimed route, or the period of time it was locked. It seems it was erected, or locked, at least at one point to prevent cattle straying, which is referred to in *Jones v Bates (1938)*[12] as an insufficient interruption, not aimed at preventing the public from using the route. Therefore this may not interrupt any earlier period, or provide an alternative date of calling into question.

62. The other matter requiring clarification, which may indicate a lack of intention to dedicate within the relevant identified twenty-year period, is when, where and for how long the 1932 Act sign, apparently in place in October 1969, was in position.

63. KCC agree with the reliance of NR on section 55 of the BTC Act, that it would not have been possible for public rights to be claimed under the statute. Leaving aside such argument here, which does not appear to be relevant to the entirety of the claimed route in any case, I consider that there is a reasonable allegation in relation to public rights being presumed to have been dedicated under section 31 of the 1980 Act, depending on clarification of a number of matters in relation to gates and signs.

[11] [2007] UKHL 28
[12] [1938] 2 All ER 237

Common Law

64. In relation to the evidence of public user prior to the building of the railway I consider the evidence is conflicting. There is clearly a long-standing physical route in this location, which has survived the changes in development. However, that does not, in itself, demonstrate that it is a public route. However, I agree with SPC that the South-eastern Railway Act, 1846 is supportive of pre-existing public rights over the level crossing, although, possibly as a bridleway or footpath alongside higher occupational rights, for the other named owners.

65. KCC accepted the argument of NR that the evidence arising from the 1970s in relation to the Draft Definitive Map was insufficient to show express dedication on the part of BRS. Dedication of a highway requires actual or implied intention to dedicate. In this case not only is there evidence that BRS admitted to a right of way on foot in 1970/71 to KCC and the DOE but this was supported by the erection of notices at the level crossing indicating that such rights were admitted, at some point in the period 1969 – 1991. Without further information as to why NR believe that these were erected under the 1980 Act, and so would only have been in place for a maximum of 11 years, it seems likely, on the balance of probabilities, that they were erected at around the same time as the objection to bridleway rights, with the admission of footpath rights, in the early 1970s.

66. Following *Godmanchester* it seems that the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be acknowledgement of a public right of way on foot over the level crossing. The evidence of organised walks and the development of the car park suggest that there has been a continued understanding that the route was a public footpath.

67. There is evidence of public use on foot from the 1950s which would support acceptance of such dedication.

The conflict of evidence

68. *Bagshaw & Norton* sets out that to meet Test B, 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. *Bagshaw & Norton* and *Emery*, indicate that where there is conflicting evidence, which could only be tested or evaluated by cross-examination, an order would seem likely to be appropriate.

69. In this case I consider that there is both conflicting evidence and conflicting legal argument in relation to the appropriate interpretation of that evidence. Accepting the evidence and arguments relating to use and dedication in the more recent period and rejecting the evidence and arguments in relation to signage, the potential implications of such signage and the assertions with regard to the capacity to dedicate, I am satisfied that a reasonable allegation, satisfying test B, has been made. In the alternative, the actions in the 1970s may demonstrate recognition of existing historical public rights over the railway line, which had been known about by the landowners from the mid-1840s.

Other Matters

70. I cannot take account of arguments as to the usefulness, or otherwise, of a route in this location; potential safety issues arising for users forced onto alternative routes if the route is not recorded; the potential detrimental effect of recording the route to the railway operators; or, whether they may seek to have the route closed under other legislation if it was to be recorded. Whilst I am aware that

these matters may be of prime importance to the parties I have not considered them in relation to this decision.

71. SPC say that the BTC Act has been found to be unlawful in relation to the Human Rights Act 1998 ("the 1998 Act"), which enshrines in UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights ("ECHR"). It seems to me that the BTC Act must be dealt with as it stands now, and stood during the relevant period; any changes may, or may not, be retrospective but can only be dealt with as and when they arise.

72. SPC argue that closing the level crossing breaches Articles 1, 6 and 8 of the 1998 Act, due to the public or general interest in the case, the need for a fair hearing and the potential interference by a public authority with the right to private and family life.

73. Whilst it is unlawful for a public authority to act in a way which is incompatible with a ECHR right this does not apply if, as the result of one or more provisions of primary legislation, the authority could not have acted differently. Definitive Map Modification Orders are made under the primary legislation of the 1981 Act; it is not considered possible to interpret the legislation in such a way that it is compatible with the ECHR rights. The arguments may be relevant in relation to the legal removal of public rights, should those be found to subsist, however, I am not considering that matter. In relation to Article 6, I am directing an Order to be made, which will almost certainly trigger objections and lead to an Inquiry.

Conclusion

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

Formal Decision

75. The appeal is allowed.

Heidi Cruickshank

Inspector