
Order Decision

Inquiry held on 12 January 2016

Site visit made on 13 January 2016

by Alan Beckett BA MSc MIPROW

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

Decision date: 11 February 2016

Order Ref: FPS/A4710/7/68

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Borough Council of Calderdale (Savile Road to Love Lane, Halifax) Order No. 3, 2014.
- The Order is dated 19 November 2014 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were 7 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public local inquiry into the Order at Halifax Town Hall on Tuesday 12 January 2016. Following the close of the inquiry I made an inspection of the route in question in the company of Mr Champion of Calderdale Council, Mr Anderson (the applicant for the Order), Mr Ure, Mrs Powell, Mr Karuna and other statutory objectors.

The Main Issues

2. Whether the evidence discovered is sufficient to demonstrate, on a balance of probabilities that a public right of way on foot subsists over the Order route.
 3. In a case where there is evidence of claimed use of a way by the public over a prolonged period of time, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.
 4. If the evidence is insufficient to satisfy the statutory tests found in section 31 of the 1980 Act, I am required to consider whether dedication of the claimed footpath has taken place at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.
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Background

5. The claimed footpath commences on Savile Road and runs in a generally south-easterly direction to Love Lane. The claimed path passes to the east of the properties known as 2 – 8 Savile Glen and to the west of the properties known as the Coach House and Savile House.
6. The properties at Savile Glen were built in the 1930s within land owned by Savile House. As part of the construction of the houses on Savile Glen, a path or track was created which provided access to the rear of the houses and a link between Love Lane and Savile Road. In addition to the access to the rear of 2 – 8 Savile Glen a similar access was provided to the rear of 1 – 7 Savile Glen. This latter access was stopped up by the residents around 2005 and the remnant of this path can be seen on the Order plan.
7. The copy of the title deed to 6 Savile Glen demonstrates that the property included the land to the rear of the house crossed by the access path and that the owner of 6 Savile Glen had a private right of way over those parts of the rear access path owned by his or her neighbours. It is not disputed by any party that the Order route is or was subject to a private right of access or that the existence of a private right of way is incompatible with the existence of a public right of way.
8. Ordnance Survey maps published in 1907 and 1933 show that the land crossed by the claimed path formed part of the garden of Savile House, whereas maps published after the 1930s all show the footprint of the properties on Savile Glen and the access path which ran behind the properties between Savile Road and Love Lane. It is not disputed that a route on the alignment of the claimed footpath has been in existence since the mid-1930s.

Reasons

The date on which the right of the public to use the claimed footpath was brought into question

9. The application to add the claimed path to the definitive map was made by Mr Anderson in November 2005 following a discussion he had had with the then occupier of the Coach House, a Mrs Roulson. Mrs Roulson had been told by the then owner of 2 Savile Glen (Mr Loboda) that the rear access path was private and that she should not use it. Mrs Roulson was in the process of collating evidence of use of the path by the public but was also in the process of selling her property and did not have the time to submit an application. Mr Anderson had used the path himself for some time and took it upon himself to make the application.
10. It is common ground that as part of his renovation of 2 Savile Glen, Mr Loboda had erected a gate at the Love Lane end of the path which had a 'private' notice on it. A matter of dispute was the date at which Mr Loboda's gate and sign were erected and the effect that the gate and sign had on public use of the path.
11. Mr Loboda was not present at the inquiry and his written evidence is somewhat contradictory regarding the date at which he erected his gate and notice. In a statement made in December 2012 Mr Loboda stated that he had erected a gate in 1998, but in further correspondence in January 2015 he suggested that the gate had been erected in 2001 around the same time that he had re-built

- the rear garden wall of his property. The photographs taken by Mr Loboda of the new boundary wall however only show two gate pillars with a clear gap between them. On the basis of the available evidence, it is more likely that Mr Loboda only erected a gate after re-building the garden wall.
12. The recollections of other Savile Glen residents of a wooden gate being present prior to 1998 are at odds with Mr Loboda's own evidence that the gate he found within the overgrowth at the end of the path was of wrought iron. Mr Loboda had found this gate in the open position, off its hinges and unusable. There is no reliable evidence that this earlier gate carried any form of prohibitory notice.
 13. On the basis of the available evidence I am not persuaded that there was a functioning gate present at the Love Lane end of the path prior to 1998. It seems more likely than not that Mr Loboda only erected a gate after he had completed the re-building of his garden wall. Although there is no certainty as to the exact date which Mr Loboda erected his gate and notice, it is more likely than not that it was present by 2002 at the latest, although I cannot wholly discount the possibility that it may have been present late in 2001. On a balance of probabilities, I conclude that the gate and notice was present not later than 2002.
 14. Mr Loboda's gate had a latch fitting and the gate was not locked prior to it being wired up in 2005. The presence of a gate which did not prevent passage along the path did not therefore pose a challenge to use of the path by the public. The 'private' notice appears to have had a mixed impact on those who were using the path. Having walked the path for almost 20 years, Mr Anderson ignored the notice; Mrs Slomski also ignored the notice and continued to walk the path until the gate was wired up. On the other hand Councillor Baines had walked the path until 2002 and stated that he would not have walked past a 'private' sign; in written evidence, one respondent stated that she had stopped using the path after the 'private' notice had been erected.
 15. It is acknowledged that most public rights of way cross land which is privately owned. A notice which says 'private' could therefore be describing the ownership of the land or could be meant as an indication that the land was not open to the public. Given that the claimed path is physically constrained on both sides by walls and fences and was gated at the Love Lane end, the notice 'private' is more likely to imply that the land beyond the notice was considered to be 'not public'. The erection of such a notice by Mr Loboda can therefore be considered to bring into question the right of the public to use the path. That some members of the public ignored the challenge by continuing to walk the path demonstrates the continued assertion of a public right of way.
 16. Although the erection of the 'private' notice did not immediately trigger an application to add the path to the definitive map, I consider that the action of erecting that notice was sufficient to bring into question the right of the public to use the path. The relevant 20-year period of use can therefore be calculated backwards from the date on which the notice was erected. Accordingly, for the purposes of section 31 (2) of the 1980 Act I consider the relevant 20-year period of use to be 1982 – 2002.

Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public's right to do so was brought into question

17. For use by the public to be 'as of right' it must be use which was without force, without secrecy and without permission.
18. Seventeen user evidence forms (UEF) were submitted in support of the application; a further UEF was submitted at the inquiry by a witness called by the Council who had not previously provided evidence. Of these eighteen UEFs I have discounted three forms as the respondents either had not used the route personally or had failed to specify their period of use or had only used the path from 2007.
19. Of the remaining 15 UEFs only 2 respondents provided evidence of use throughout the 20-year period under consideration. The use by the remaining respondents was evenly distributed throughout that period. One respondent had used the path from 1960 to 1980 and then again from 1985 to 2005. Although the overall numbers of people claiming use of the path is not great it is sufficient to demonstrate that use of the path occurred throughout the 20-year period under consideration.
20. I heard from six witnesses at the inquiry as to their use of the path. Mrs Slomski had commenced using the path in 1971 as a short cut between the midwifery centre and the homes of her patients and had subsequently used the path for leisure purposes and as a short cut when visiting friends. Mr Anderson had commenced use on 1985 and had used the path several times a week until 1995 as part of route to his tennis club in conjunction with other public footpaths in the area. From 1995 Mr Anderson had used the path on a regular basis again as part of a short-cut to destinations to the south of Love Lane. Councillor Baines had used the path between 1990 and 2002 when delivering leaflets and campaign material to constituents; his use had been around 6 times per year.
21. Mrs Baker had first used the path in 1987 when taking her son to nursery as she had been told about it by other parents attending the nursery. Mrs Baker's evidence was that as her children grew older she would allow them to walk to and from their friend's houses via the claimed path; she could see the end of the path from her house and could monitor their progress whilst allowing them some independence. Once her children had grown, Mrs Baker's use of the path was for utilitarian purposes as opposed to leisure. Mr Wilson had first used the path in 1997 when exploring the area as a newly-arrived resident. He described a path with the appearance of an urban snicket in that a worn path between walls ran from Love Lane with no gate or prohibitory notice present. Mr Wilson's use had been regular between 1997 and 2001 as part of a circular walk in the area for exercise after work.
22. Mrs Dolan had first used the claimed path in 2001 as a short-cut to work and had used the path to take her child to nursery. Although her personal use of the path was limited, her evidence was that her house overlooked the Love Lane end of the path and she had been able to see numerous people using the it; as she knew the residents of Savile Glen by sight, she knew that the people seen walking the path were not the residents. In her experience, the path was regularly used but not in constant use.

23. In objection to the Order Mrs Ure stated that when her children had been young they had played in the back garden and in the path and she had kept an eye on them from the house. During those times she had not seen anyone walking along the path; in her experience the path had not been walked to the extent claimed. Mr Ure said that he generally arrived home from work around 16:30 to care for his children as his wife worked in the evenings. He did not recall seeing people walking by on the path, although he conceded that the garden wall and fence would have restricted his view of the path.
24. I acknowledge that Mr & Mrs Ure may have been unaware of people walking past their garden on the path and that the level of use demonstrated by the UEFs and the user witnesses is not extensive. Mr & Mrs Ure conceded that they would not have been watching the path all hours of the day and it is probable that much of the use which was made of the path went unnoticed. The level of claimed use may not have been great but it is evident that the path has been in use since at least the 1960s by those not resident at Savile Glen.
25. One of the objections put forward in opposition to the Order was that the path did not lead anywhere and there was therefore no reason for it to have been used. It is clear from the evidence of the witnesses at the inquiry that the path did lead somewhere; it provided a traffic-free link between Savile Road and Love Lane which was utilised as part of a longer walk within the immediate area using other public footpaths.
26. The user witnesses described the claimed path as a short-cut between Savile Road and Love Lane; many of them noted that the path had been used in preference to walking along Love Lane as the junction with Savile Road was one-way with a blind corner and no footway at the side of the road. For those witnesses taking their children to nursery or to the schools north of Savile Road the claimed path was viewed as a safer route than Love Lane.
27. None of the witnesses who appeared at the inquiry recalled a gate being present at the Love Lane end of the path prior to the one erected by Mr Loboda. The evidence of some of the occupants of Savile Glen that a wooden gate had been present since the 1980s is in conflict with that of Mr Loboda who found an inoperable wrought iron gate in 1998 and that of Mr Wilson whose evidence was that there was no gate present between 1997 and 2001. There is no evidence of a gate or other barrier being present at the Savile Road end of the path and the preponderance of the evidence is that there was no gate at the Love Lane end before 2002. I conclude that any use of the route during the relevant 20-year period was without force.
28. The use appears to have taken place at all times of the day; some witnesses used the path predominantly in the mornings and afternoons when going to work or taking children to nursery or to school. Mr Anderson recalled using the path in the evenings and at weekend to travel to his tennis club. Use of the path would therefore have been visible to anyone who cared to look; I conclude that use of the path was not conducted in secret. No evidence has been presented from which it could be concluded that permission to use the route was sought or given. I conclude that the use of the path during the relevant 20-year period was use 'as of right'.
29. No evidence has been submitted from which it could be concluded that use of the claimed path had been interrupted during the relevant 20-year period. Evidence was given by all sides that the section of the path leading to Love

Lane was subject to overgrowth and undergrowth during the summer months but it was never so bad as to prevent access along the path. There is some evidence of building waste being temporarily deposited on the line of the path during renovations at the Coach House; however, the temporary deposit of building materials has been held not to represent an interruption in use¹ and as this occurred around 2007 it is in any case outside the relevant 20-year period under consideration.

30. The oral evidence I heard reflects and supports the remaining untested evidence of use found in the UEFs and allows me to place additional weight upon that untested evidence. Although the evidence of use adduced in this case is small in absolute numbers, I nonetheless conclude that it demonstrates use of the claimed path as of right and without interruption throughout the 20-year period which ended in 2002. It follows that I also conclude that the evidence of use is sufficient to raise a presumption of dedication of the way as a public footpath.

Whether there is sufficient evidence that there was during this twenty-year period no intention on the part of the landowners to dedicate the claimed footpath

31. In order for a landowner to take advantage of the proviso to section 31 of the 1980 Act, there must be some evidence of an overt act undertaken within the 20-year period under consideration which demonstrates that there was no intention to dedicate a public right of way. Such actions can include the closing of the path for one day a year in such a way that those wanting to use the path would be made aware of the closure, or by the erection of a suitably worded prohibitive notice. Whatever means is employed, it must be done in such a manner to bring the owner's lack of intention to the attention of at least some of those persons wishing to use the footpath.
32. The only notice recalled by the user witnesses is the 'private' sign erected by Mr Loboda. Although the objectors suggested that there had been a wooden gate with a similar notice present at the Love Lane end of the path during the 1980s and 1990s there is little by way of corroborating evidence of the existence of this gate and its notice. The claim that a wooden gate was present prior to 2002 is undermined by Mr Loboda's own evidence that the dilapidated gate he had found had been made of wrought iron and by Mr Wilson's evidence that there was no gate present in 1997. There is nothing in Mr Loboda's written evidence to suggest that the gate he discovered had carried any form of prohibitory notice.
33. It is common ground between the parties that notices had not been erected at the Savile Road end of the path. If the owners of the land crossed by the path did not intend to dedicate it to public use, a suitably worded notice to that effect could have been erected on site at either end of the path or at any point along its length. However, there is no evidence of the owners of the properties of Savile Glen having taken any such action prior to Mr Loboda doing so in 2002.
34. Mrs Ure stated that she had challenged anyone she saw walking along the path although she could only call to mind one elderly lady who had been in the habit of stopping near Mrs Ure's house to stare at her windows. Mrs Ure had told this

¹ Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360

lady that the path was not a public way but to no avail; this individual had continued using the path.

35. None of the user witnesses recalled being challenged over their use, whether by Mrs Ure or by anyone else. There are references within the UEFs to challenges having been made to use by the owner of 2 Savile Glen, but these challenges appear to have occurred after 2002². Whilst I acknowledge that Mrs Ure challenged at least one person using the path, that challenge or any others she may have made do not appear to have been done in such a manner that word of her actions became known to regular users. In order to bring home to the public that use of a path is not tolerated, action has to be taken in such an open and notorious fashion as to become known to those using the path. On the evidence I heard, the challenges said to have been made were insufficient to convey that message.
36. I note that it may not have been possible for Mrs Ure or others to see people walking the path as it is sunken below the level of the gardens. In such circumstances, it would have been appropriate for a suitably worded notice to have been erected in a prominent position which would be seen by the public; no persuasive evidence has been submitted that notices of any description were erected on the path prior to 2002.
37. I conclude that there is insufficient evidence of a lack of intention to dedicate to rebut the presumption of dedication raised by the user evidence adduced in this case.

Common law

38. Having concluded that the provisions of section 31 of the 1980 Act are satisfied, I do not need to consider whether the documentary and user evidence is sufficient for an inference of dedication to be drawn at common law.

Conclusions

39. I conclude that the evidence is sufficient to show use of the way on foot by the public as of right and without interruption throughout the period between 1982 and 2002 and that there is insufficient evidence of an intention not to dedicate a public footpath. It follows that I am satisfied that, on a balance of probabilities, a public footpath subsists over the Order route.
40. Having had regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

41. I confirm the Order.

Alan Beckett

Inspector

² Mr and Mrs Ashworth's statement, Mrs Hoyle's UEF; Mrs Williams' UEF.

APPEARANCES

For Calderdale Metropolitan Borough Council

Miss J Biott Legal services, Calderdale Council, Northgate House,
Northgate, Halifax, HX1 1UN.

Who called:

Mr P Champion Asset Officer, Highways Assets and Delivery, Calderdale
Council, Awleys Depot, Huddersfield Road, Elland.

Mr R Anderson

Councillor S Baines

Mrs K Baker

Mrs D Dolan

Mrs M Slomski

Mr N Wilson

Objectors:

Mrs D Ure

Mr P Ure

Mr J Karuna

Mr T Carter

Mrs C Powell

Inquiry documents

1. User evidence form of Mrs Baker.
2. Map of the area surrounding the claimed path showing street names and names of prominent buildings.
3. Google Street View photographs of the Love Lane end of the path dated April 2009.
4. Savile Road to Love Lane aerial photograph 2002.
5. Savile Road to Love Lane aerial photograph 2006.