The Planning Inspectorate

Appeal Decision

by Michael R Lowe **BSc (Hons)**

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

Decision date: 9 March 2016

Appeal Ref: FPS/L3055/14A/14

Appeal by Stephen Parkhouse

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Nottinghamshire County Council (the Council) not to make an Order under section 53(2) of that Act.
- The Application by Stephen Parkhouse, dated 08 December 2008, was refused by Nottinghamshire County Council on 22 September 2015.
- The Appellant claims that the appeal route in the Parish of Mansfield Woodhouse, between Clipstone Drive (Bridleway 30) and Spa Ponds (Bridleway 31), should be added to the definitive map and statement for the area as a footpath.

Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Nottinghamshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath as set out in the application dated 8 December 2008. A limitation or condition to be specified that the footpath is subject to the use of vehicles for land management purposes.

2. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Preliminary Matters

3. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.

4. The appeal has been decided on the basis of the papers submitted.

Main issue

5. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act and court judgments.

6. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] 68 P & CR 402, and clarified in the case of R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 1.

Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.

For the purposes of this appeal, I need only be satisfied that the evidence meets test B

7. Section 31 of the Highways 1980 Act (the 1980 Act) provides that a way may be presumed to have been dedicated as a highway if it has actually been enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years calculated retrospectively from the date on which the right of the public to use the way is brought into question. Landowners can, however, take steps to negate the presumed intention to dedicate a right of way by, for example, closing the way or erecting notices which clearly indicate that no public right of way exists. The presumption of dedication does not apply if there is sufficient evidence that there was no intention during the 20 year period to dedicate the way. Further, under section 31(6), a landowner may deposit with the highway authority a map and statement showing those ways, if any, which he or she agrees are dedicated as highways, followed by a statutory declaration to the effect that no additional ways have been dedicated. In the absence of proof of a contrary intention, the declaration will be sufficient evidence to negative any intention to dedicate any additional highways.

8. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. Use by the public of a way 'as of right' for a sufficient period could be evidence of an intention of the landowner to dedicate a public right of way. Whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must be assessed objectively. Unlike presumed dedication under the Highways Act, use by the public does not raise a presumption of an intention to dedicate. The burden of proof is on those asserting the public right to show on the facts that there was an intention to dedicate. The quality and quantity of public user must be sufficient to bring home to a landowner that a right is being asserted, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. User, which is acquiesced in by the owner, is 'as of right'. However, user which is with the licence or permission of the owner, is not 'as of right'. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. Before there can be a dedication or implied dedication of a public right of way there must be an owner of the land legally capable of dedicating the way as public.

Reasons

9. The application was made by Stephen Parkhouse. The basis of the application is that a public footpath has been established between Clipstone Drive (Bridleway 30) and Spa Ponds (Bridleway 31). Some forty seven user evidence

forms were submitted in support of the application indicating substantial public use of the way mainly, but not exclusively, on foot. The County Council investigated the application and consulted with the landowners and the Forestry Commission who, via the Secretary of State, have a lease over most of the land concerned.

10. The earliest public use in evidence from the user evidence forms is 1932, whilst most of the evidence relates to a period after the 1950s when the Forestry Commission constructed an access track and established the woodland plantation. From the photographs submitted by Mr Parkhouse the claimed route is a well defined track or path. The Ordnance Survey maps compiled from surveys undertaken in 1913-14 and revised between 1938 and 1950 do not indicate any path or tracks over the claimed route. It therefore appears to me unlikely that the claimed route was physically in existence until after 1952, when the Forestry Commission started their operations.

11. There is no indication in the user evidence forms or from the correspondence with the owners or the Forestry Commission that public use of the claimed route was ever interrupted or challenged directly or by notices and there is no indication that any express permission was granted. The evidence forms also indicate that the claimed route does not cross any fences, gates, stiles or other structures. There is no evidence that any lack of intention to dedicate was brought to the attention of the users of the claimed route.

12. The Council considered that the 1952 lease between Mr James Shaw-Browne and the Minister of Agriculture and Fisheries prevented the operation of section 31 of the Highways Act 1980. The Council therefore considered that the application could only be considered on the basis of a claim at common law. Section 327 of the 1980 Act indicates that the Act does not apply to land belonging to a government department unless there is an agreement between the highway authority and the government department that the Act shall apply. It appears to me that, whilst the 999 year lease is limited for the purposes of forestry, that may be sufficient for the land to be said to belong to the Minister and, in any event, the Crown is not bound by any statute unless the statute expressly binds the Crown and that, for this purpose, Crown Land includes land owned by a government department.

13. If I am wrong in the above conclusion then I would not see any obstacle to Mr Parkhouse's claim based upon section 31 of the 1980 Act. In my view it is reasonably alleged that the public have enjoyed 20 years use of the claimed way before 8 December 2008, that use has been as of right and without interruption and that there is insufficient evidence that there was no intention to dedicate a public right of way during the 20 years.

Dedication at common law

14. In my view there is satisfactory evidence of user by the public of the claimed route for a period of about 50 years. The user appears to be of such quality and quantity that a reasonable landowner must have been aware of it. There is no evidence that during the 50 or so years before 8 December 2008 any action was taken to challenge the public's use of the claimed way or to indicate to the users that there was any lack of intention to dedicate. There do not appear to have been any fences or gates to impede the public use and there is no evidence of use by force or secrecy. The outward appearance of the landowners' action is therefore one of acquiescence over a long period from which I conclude that dedication of a public right of way should be inferred,

with the provisos that the owners had the capacity to dedicate and could have prevented the user but did not do so, and that the public use was not by permission.

15. Part of the land is the subject of a lease. Generally, land subject to a lease would require the consent of both parties to dedicate a public right of way and dedication might be inferred against both parties. However, the particular lease between Edmund Shaw Browne and the Minister is of a limed nature. It only allows the Minister, in practice the Forestry Commission, to use the land for forestry purposes. In my view that would not allow the Forestry Commission to dedicate a public right of way, grant permission for public access or to deny access unless such access affected the forestry use of the land. The capacity to dedicate a public right of way remains with the lessor. Similarly the power to grant permission for access remains with the lessor, as would the right to take action against trespass. The lessor may not exercise these powers to the detriment of the Minister's interests in the land for the purposes of forestry.

16. I have noted the submission by the Forestry Commission's Area Land Agent that the Forestry Commission has sole occupation of the site under the lease with limited rights reserved to the lessor, some of which were for a limited period. However, I do not construe the lease to indicate that the Commission is in sole occupation of the site, even after the expiry of the reserved rights. In particular the lease does not require or expressly permit the Minister to prevent trespass. It does not exclude the lessor from entry to the site, and clause 5 of Schedule C restricts the use of the land for purposes with statutory authority, the lease being based upon the Minister's powers under the Forestry Act 1945. As submitted, the Commission does not permit public access to leasehold land where this is not permitted under the terms of the lease. I agree that the Commission does not have the power to grant public access under the terms of the lease. However, it does not appear to have the statutory authority to prevent trespass unless such trespass is prohibited under the bylaws, and this indicates to me that the residual right to prevent trespass remains with the lessor. Whatever the respective rights of the lessor and the lessee, the capacity to dedicate and prevent trespass lies with both parties, and whatever rights are not held by the Minister under the terms of the lease will remain with the lessor.

17. I have also noted the submission that the lease established an obligation to lease back the sporting rights for a period of 21 years. However, it is not unusual for sporting rights to be exercised over land crossed by a public right of way and I therefore do not consider that the intent of the lessor to exercise sporting rights gives rise to any significant inference of a lack of intention to dedicate a public right of way. Similarly I do not consider that there would be anything unusual in the use of a public right of way as an extraction route for timber such as to create an incompatibility between the two land uses. However, use of a public right of way by vehicular traffic is a limitation or condition upon the public use of the way. I consider it is self evident that timber will, in due course, need to be extracted and that will inevitably be along the access tracks within the plantation. I therefore consider that such a limitation or condition applies to the claimed route.

18. Section 46 of the Forestry Act 1967 allows the Forestry Commissioners to make byelaws: (a) for the preservation of any trees or timber on the land, or of any property of the Commissioners; and (b) for prohibiting or regulating any act or

thing tending to injury or disfigurement of the land or its amenities; and (c) without prejudice to the generality of the foregoing, for regulating the reasonable use of the land by the public for the purposes of exercise and recreation. Such byelaws were made under SI 1982 No. 648. Byelaw 5 (xiii) prohibits the riding of horses except on bridleways and byelaw 6 prohibits the bringing of any vehicles on to the land. It follows that horse riding and cycling were unlawful on the claimed route, at least since 1982, but there does not appear to be any general impediment to pedestrian access on land managed by the Forestry Commission.

19. It appears to me, from the evidence that I have seen, that there is no reason to conclude that use of the claimed route as a footpath would be significantly detrimental to the use of the land for forestry by the Forestry Commission. However, as cycling and horse riding were unlawful after 1982 such uses cannot give rise to any rights. The quality and quantity of use by horse riders and cyclists before 1982 leads me to conclude that dedication of a bridleway or restricted byway cannot be implied at common law.

20. I have also considered the question of whether the byelaws operate to give an implied permission, whereby the prohibition of horse riding and cycling implies permission for footpath use. However, as the Forestry Commission lack the capacity to grant such permission, no such implication can arise.

21. In my view the claimed route, across the land leased to the Minister / Forestry Commission, was over land over which the lessor had the capacity to dedicate and could have prevented the user, but did not do so. In any event, even if the capacity to dedicate is jointly held by the lessor and the lessee, there is no reason why such a joint dedication should not be implied at common law. There is no evidence to indicate that the other landowner lacked any capacity to dedicate and no evidence to indicate that the use of the claimed route as a footpath was by permission or implied permission. I have noted that part of the claimed route is not over registered land, but that land appears to me to be part of the land covered by the lease to the Forestry Commission.

22. In my view the evidence indicates, on the balance of probability, that a footpath can be implied to have been dedicated at common law along the claimed route in accordance with test B.

Conclusion

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

Michael R Lowe

INSPECTOR