



Order Decision

Site visit made on 18 September 2018

by **Helen Slade MA FIPROW**

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

Decision date: 01 October 2018

Order Ref: ROW/3191893

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Cornwall Council (Addition of a Footpath, Bridleways and a Restricted Byway together with the upgrade of a Footpath to Bridleway at Rosemellyn and Hallow in the Parishes of Roche and Treverbyn) Modification Order 2017.
- The Order is dated 15 February 2015 and proposes to modify the Definitive Map and Statement for the area by adding or upgrading various rights of way as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- The objection related to only one section of the affected routes, and the Order has been severed accordingly, having been partly confirmed on 4 September 2017.
- This decision relates to the unconfirmed section of the Order: a proposed section of Public Bridleway between Points A and B on the Order Plan.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. This matter was originally scheduled to have been determined by way of a public inquiry due to the nature of the objections. However, the sole objector, Mr Alun Kitts, withdrew his objection in a letter dated 21 August 2018, written on his behalf by his solicitor, Mr John Lowry. I have therefore determined the matter by way of the written papers on the file.
2. I nevertheless conducted an unaccompanied site visit to the area on Tuesday 18 September 2018 in order to familiarise myself with the location. As the Order has been submitted to the Secretary of State I must still be satisfied that the unconfirmed part of the Order meets the necessary tests for confirmation.
3. Mr Kitts original objection related only to a short section of one of the paths affected by the Order. In pursuance of the powers conferred by Schedule 15 of the 1981 Act, Cornwall Council ('the Council') severed the uncontested parts of the Order and confirmed the Order in respect of those paths on 4 September 2017. This decision relates only the section to which Mr Kitts originally objected, being the length of bridleway proposed to be added to the Definitive Map and Statement ('DMS') between Points A and B on the Order plan, and equating to part of the route described in Part II of the Schedule to the Order as '*BR from Road East of Carbis Mill to Road junction south of Criggan*'.

The Main Issues

4. This Order has been made in consequence of the occurrence of two events specified in section 53(3)(c)(i) and 53(3)(c)(ii) of the 1981 Act. In respect of the section A-B, with which this decision is concerned, it is the first of these events which is relevant, and which provides that the DMS should be modified where it can be shown that a right of way (in this case – a public bridleway) which is not currently shown in the DMS subsists over the land in the area to which the map relates or is reasonably alleged to subsist. At the confirmation stage I must be satisfied that the right of way subsists.
5. In order to determine whether or not a highway subsists it is most usual to look at the statutory tests set out in Section 31 of the Highways Act 1980. This states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used 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 to so dedicate during that period. 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.
6. The Council has chosen to rely on evidence of a common law dedication. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.
7. The test I must apply is the balance of probabilities.

Reasons

8. The Council considers that the evidence shows that the entire route A-B-C-D-E-F was used by the public on horseback from 1964 to 2013, and that the owners of the land took no action during that period to prevent equestrian users from using the way. Notwithstanding that assertion, the Council accepts that it itself erected a barrier across the route (between Points C and D) in 1997 in an attempt to prevent use by motorcyclists and horse riders. The majority of the route was recorded as a public footpath at that time. Although apparently being successful in preventing use by motorcyclists, equestrians simply bypassed the barrier and continued to use the route.
9. Since the barrier was erected not by the landowner but rather by the Council, the Council took the view that, in the absence of any action on the part of the landowners to prevent the use, the user exercised by the public on horseback during that period demonstrated that dedication of the route had occurred at common law.
10. I do not need to comment on the confirmation of the uncontested part of the Order, but I do need to be satisfied that the Council's assertion that there has been a dedication of the section A-B at common law, based on the evidence of use from 1964 to 2013, can be justified.

User evidence

11. The application in respect of the route I am considering was made in November 2013 and was supported by 25 user evidence forms and letters. The user evidence forms are accompanied by maps on which the witnesses have marked the route they used and various features along it. Most of them make reference to the barriers; many of them refer to gates along the route (not on the section A-B) and all of them show that they used the route marked on the DMS as Roche Footpath 10.
12. As a result of Mr Kitts objections, further enquiries were made of several of the witnesses with respect to the length A-B, because the definitive line of Footpath 10 runs immediately parallel to, and beside, a metalled track. It was clear from the responses of the witnesses that they had used the metalled track and not the line shown as the footpath on the DMS or on the maps attached to their statements. The Order map clearly identifies this distinction.
13. Having visited the site I can see that it would be extremely unlikely, if not impossible, for walkers or equestrians to have used the line of the footpath as shown on the DMS as it is totally overgrown and not obvious on the ground. The track, however, is clearly inviting to use, and I accept that the witnesses are more likely to have used it than attempting to use a route they probably did not know even existed alongside.
14. There was clear evidence on the ground of equestrian use on the section of the route between Points B and D (where the path is over softer, unmade ground) and I am therefore satisfied that any user of the path on horseback would have continued to the unclassified road U6114 (at Point A) by using the track as shown on the Order plan, and not the line of the adjoining footpath.
15. There is nothing to show that the use of the way was other than open, without force and without permission, and I am therefore satisfied that the user was exercised as of right. There is no evidence to gainsay the user evidence, but I need to examine the actions of the relevant landowner: Mr Kitts.

Actions of the landowner

16. The Council, in its statement of case, states at paragraph 23 that there was '*no evidence provided to show that the landowners did not intend to dedicate a public bridleway during the period over which use has been reported 1964 to 2013*', and thus there is no evidence to negate the evidence of use.
17. If one is relying on dedication at common law, I consider that is an incorrect interpretation of the landowner's actions. At common law it is necessary to look at all the circumstances, and any action taken by the landowner which is inconsistent with dedication carries more weight than several acts of user. In this case, when he bought the land in 2008 or thereabouts, Mr Kitts contacted the Council to discuss the location of the Public Footpath sign at Point A. He was concerned that it was misleading in pointing along the track rather than along the definitive line of the footpath. Despite the apparent agreement of the Council to move the sign, it was never done.
18. The Council has dismissed this action as not being relevant to the question of whether or not bridleway rights have been dedicated over the track between Points A and B, but I consider that this action on the part of Mr Kitts is not consistent with dedication of the track, whether as a bridleway or, indeed, a

footpath. His intention was to define the legally recorded location of the footpath on the ground so that the public would use the correct line.

19. His intentions were reinforced by his subsequent erection of a notice at Point A stating 'Private Lane Authorised Personnel Only'. The Council's approach to this is that riders continued to use the lane regardless. However, this was a clear act on the part of Mr Kitts which was inconsistent with dedication of the track itself. Nevertheless, this act took place in 2013 and therefore does not affect the period of user relied upon by the Council.
20. I consider that the action taken by Mr Kitts in 2008 to try to formalise the use of the legally recorded public right of way means that dedication of the section of the Order route over the track that he owns (A-B) cannot be inferred at common law over the period relied upon by the Council, in the face of those documented actions which are inconsistent with dedication.
21. It may be that a common law dedication could have taken place over a lesser period, but I shall firstly look at the evidence in relation to the criteria set out in Section 31 of the 1980 Act.

Section 31 of the 1980 Act:

Date on which the use of the way was brought into question

22. The erection of the sign referred to in paragraph 19 above is clear evidence of an act which challenged the public's use of the track. Regardless of the issues relating to planning permission, the fact that the smaller replacements were torn down suggests that their message was brought to the attention of the users, who rose to the challenge by submitting the application.
23. The earlier attempts in 2008 to formalise the location of the right of way do not appear to have involved any of the users, and there is no evidence to suggest that the public was aware at that stage of any challenge to their use.
24. I therefore consider that 2013 is the date on which the use of the way by the public between Points A and B was brought into question.

Whether there has been use of the way by the public as of right

25. I have already concluded that the use of the way that was made by the public on horseback and for which there is no contradicting evidence (Mr Kitts having withdrawn his objection) has been exercised as of right apart from two users who may have benefitted from some form of permission or private right.
26. I am also satisfied that, the witnesses who have provided evidence of their use comprise a group which is capable of being interpreted as forming 'the public' in the sense that they are representative of the local community.

Whether there has been an uninterrupted period of use for 20 years prior to 2013

27. The user evidence does not indicate that there has been any interruption to use of the Order route between Points A and B prior to 2013. What happened further along the route is immaterial to my decision, particularly as the rest of the Order has now been confirmed.

28. In respect of the unconfirmed section of the Order route I am therefore satisfied that the user evidence is sufficient to show an uninterrupted period of user by the public as of right for 20 years prior to 2013.

Whether there is sufficient evidence of a lack of intention to dedicate during the relevant period of 20 years

29. Prior to the purchase of the land by Mr Kitts, there is no evidence of any actions taken by the landowner, whosoever that may have been, which demonstrate a lack of intention to dedicate a public right of way over the track A-B.

30. Whilst I accept that Mr Kitts actions in 2008 to try to formalise the line of the right of way were inconsistent with dedication of the track at common law, these actions were not brought home to the people using the way, whose use continued unaffected.

31. Until the erection of the signs some five years later, bringing the period of 20 years to an end, I do not find that the actions of Mr Kitts provide sufficient evidence of a lack of intention to dedicate for the purposes of Section 31 of the 1980 Act.

32. I am therefore satisfied that a public bridleway is deemed to have been dedicated over the Order route between Points A and B and that consequently, on the balance of probabilities, a public right of way subsists.

Conclusions

33. Having regard to these and all other matters raised at the in the written representations I conclude that the Order as remaining should be confirmed.

Formal Decision

34. I confirm the Order in respect of the route A-B as shown on the Order Plan.

Helen Slade
Inspector

Wildlife & Countryside Act 1980 Section 53
 Order Map: WCA 475 & WCA 587
 Parish: ROCHE & TREVERBYN CIVIL PARISHES
 Produced by Countryside Access Team: 01 February 2017

MAP NOT TO
 ORIGINAL SCALE

