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# Appeal Decision

by Mrs Helen Slade MA FIPROW

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

Decision date: 24 October 2018

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## Appeal Ref: FPS/E2001/14A/6

- This Appeal, dated 1 May 2018, 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 East Riding of Yorkshire Council not to make an Order under section 53(2) of that Act.
- The Application dated 5 June 2009 was refused by the Council on 12 April 2018.
- The Appellant, Mr Michael Jackson, claims that an Order should be made to add the appeal route to the Definitive Map and Statement for the area as a Restricted Byway.

**Summary of Decision: The appeal is dismissed.**

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## Preliminary Matters

1. I have been directed 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.
2. This appeal has been determined on the basis of the papers submitted. I have received submissions from the appellant, Mr Michael Jackson; from the East Riding of Yorkshire Council ('the Council'); and from one of the landowners, Mr A M Gray. I have not visited the site but I am satisfied I can make my decision without the need to do so.

## Main Issues

3. 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], and clarified in the case of *R v Secretary of State for Wales ex parte Emery* [1997]:

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

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

4. This case relies on the interpretation of documentary evidence; no user evidence has been submitted. Section 32 of the Highways Act 1980 ('1980

Act') requires a court or tribunal to take into consideration 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.

5. In considering the evidence and the submissions, I have taken account of relevant court judgments and guidance.

## **Reasons**

### ***Description of the Appeal Route***

6. The appeal route is known as Ings Lane and commences at the western end of Back Lane, Burstwick (Grid Reference TA 2245 2765) and runs in a generally westerly direction, and then a west-north-westerly direction for a total distance of approximately 1380 metres, terminating at the point where it meets the line of the dismantled Hull to Withernsea Railway (Grid Reference TA 2113 2787).
7. The appeal route has existed as a physical feature on the ground since at least 1777, the date the Burstwick Inclosure Award was enrolled ('the 1777 Award'). It may have existed prior to that date (the associated map is given the date of 1771 in the submission by East Riding of Yorkshire Council ('the Council')) and the appellant has submitted a sketch map dated 1773 on which part of the awarded route appears to be shown.
8. The dispute centres on the interpretation of the various historical documents on which the parties rely, and on the implications of the decision taken by the Council to add the route to the List of Streets following an application under Section 56 of the 1980 Act.

### ***1773 Inclosure Act and 1777 Inclosure Award***

9. The 1777 Award was made in accordance with the provisions of an Act made in 1773 for the dividing and inclosing of the open arable fields, meadow and pasture grounds within the Parish of Skeckling cum Burstwick, in Holderness. The document produced by the Council as the associated map is stated by them to be dated 1771, and appears to have been annotated, possibly at some later stage.
10. Nevertheless, Mr Jackson does not dispute that the 1777 Award set out a lane (then called Enholmes Road) as a private road, because it was only forty feet wide, and not the minimum width of sixty feet required by the 1773 Act for public roads. The 1771 map shows the line of Enholmes Road terminating at a field of the same name. The adjoining field to the east is named as Ings.
11. The Award sets out that Enholmes Road was for the use and benefit of "*the several owners and proprietors of lands and grounds in Burstwick aforesaid their tenants lessees heirs and assigns and their servants horses cattle carts and carriages*" but it also decreed that "*all the highways and roads ... awarded whether directed to be public or private roads shall forever hereafter be maintained and kept in repair by such ways and means and in such manner as the public highways are repaired by the laws and statutes of this realm.*"
12. The Council has pointed out that this latter provision was deemed to be *ultra vires* by a judgement of 1796 in *R v Inhabitants of Cottingham* where it was determined that the Commissioners had exceeded the powers vested in them

by the relevant enabling Act in that case when they had decreed similar provisions. They accept that the local Surveyor of Highways may nevertheless have maintained the appeal route in a mistaken notion of liability, due to the clause in the 1777 Award. Notwithstanding this situation, the Council states that just because the route was maintained at public expense does not in itself indicate that it is for public use.

13. I accept the principle put forward by the Council, and furthermore there is no evidence that any maintenance was actually carried out. However, it does make the evidence of the 1777 Award slightly ambiguous, but I agree with the Council that there is no evidence in the Award of public rights to use the route.

### ***Other historical documentary evidence***

#### *Mapping*

14. It is possible that public rights could have been dedicated at a later stage, either expressly or, more likely, impliedly through usage. However, only anecdotal evidence of use by Mr Jackson himself has been submitted. It is therefore necessary to examine other historical documentary evidence to see whether dedication can be inferred.
15. Looking at the other mapping evidence, the 1824 Ordnance Survey ('OS') map (scale unknown) shows the appeal route as a cul-de-sac, but I accept that there are numerous other routes shown in the same way on this map. Nevertheless, it does not provide positive evidence of any public status.
16. The 1829 Bryant's map shows the route as Ings Lane, but I agree with the Council that the depiction of the route on the map does not provide evidence of public rights, and particularly not rights in vehicles. I accept nevertheless that it is likely to have been capable of carrying such traffic, since the private rights of use granted in the 1777 Award included rights in carts and carriages. The route is shown as a cul-de-sac and, whether correct or not, shows the parish boundary running down the centre of the route and continuing beyond. The scale and nature of the map does not allow any conclusion about its termination point to be drawn, but the Council considers that, at some point, its termination point was altered to end at the field known as Ings, and hence the change of name.
17. Mr Jackson has submitted a copy of a map which was produced in 1851 in connection with a drainage scheme for the area. It shows an ochre coloured line which corresponds to the line of the appeal route, but there is no key other than to the colours of the fields represented in accordance with their agricultural value. This map shows the appeal route terminating at a field boundary in the same location as on the 1771 map, at the field known as Enholmes, but it does not show the entire route to the east. The field adjoining Enholmes to the east is named as Ings. I do not find that this information assists in determining the existence or extent of any public rights.

#### *Railway Plans*

18. The next significant documentation is that connected with the eventual construction of a railway in the area. The plans for the 1845 scheme did not come to fruition, but nevertheless showed the appeal route, and described it as an "*Occupation road called Outgang*". An outgang is a generalised name for

any track which leads to parts of a farm holding further away from the closer, in-bye land.

19. The later 1852 railway scheme did result in the building of a railway between Hull and Withernsea, and the plans for this scheme also deal with the appeal route but in more detail. In each of the relevant parcels (17, 19, 24, 27, and 31) it is described as "*Road called Enholmes Road and Arable Land*" and along with the owners names it is described as being in the ownership of the Surveyor of Highways for the Parish of Skeckling cum Burstwick. This would normally be taken as good evidence of public status; highways being, by their very definition, public.
20. However, this evidence needs to be taken in conjunction with the evidence of the 1777 Award and the *ultra vires* terms regarding the maintenance of the route. It appears to support the Council's view, expressed above, that the Surveyor may indeed have accepted the responsibility on behalf of the Parish without knowing that it was not legally justified. Nevertheless, the evidence does support that the appeal route was considered to be publicly maintainable and therefore is evidence in support of public rights.
21. It does not however assist with defining the extent of those rights. The appeal route is not described in the cross-sectional plans in the same way as other public roads for which the railway company were required to cross on the level. It is merely described as an occupation road, although it does appear to be at the same level as the railway in the relevant cross-section. This might suggest that the public element of its status was less than that of a public road, and also less than vehicular.
22. Furthermore, the road itself was not carried on across the railway, but terminated at Ings, one field short of its original destination. The Council suggests that this was the reason for the change of name although, as I have noted above, the earlier 1829 Bryant map refers to Ings Lane rather than Enholmes Road, so this may be speculation.
23. I note here that the appeal route terminates at a point where it joins the line of the disused railway and not at the entry into Ings field which is significant when drawing inferences of any dedication, and I return to this issue at paragraph 35 below.

#### *Finance Act 1910*

24. Of the numbered hereditaments crossed by the line of the appeal route, only two of them contain any reference to a deduction in relation to the land tax imposed by this legislation. One of them relates to a deduction for a cart road and a footpath (Hereditament 7), and the other simply for a cart road (Hereditament 40). This does not cover the entire length of the route now appealed, and not does it provide clear evidence of vehicular rights over the route. I also note that both hereditaments for which a claim was made have a footpath marked (notated on the OS base map) running through them in addition to the line of the appeal route.
25. I acknowledge that the process was complicated and inconsistently applied across the country as a whole, but in relation to a small area I would have expected some consistency to have applied. The surveyor may simply have not considered it was necessary to distinguish between public rights of way and

private easements since it did not appear to affect the way in which the tax was going to be administered. The evidence is ambiguous but since the evidence suggests that both hereditaments had an annotated footpath running through them which was not on the line of the appeal route it could imply that the deduction in relation to a cart road was claimed for Ings Lane. However, it does not clearly distinguish whether or not it was for a private easement or a public right of way. The absence of similar claims in other affected hereditaments is not supportive of public vehicular rights. If there had been public vehicular rights of any sort I would have expected a claim on all the affected hereditaments. If it was a public right on foot it is more likely in my experience that a claim for a deduction was overlooked or not considered to be worth applying for.

### *1976 Conveyance*

26. This document appears to show that a previous administration (The County Council of Humberside) purchased a piece of land in 1976 which was described thus:

*"All that piece or parcel of land comprising twenty three decimal nine one five acres or thereabouts situate in the Parish of Burstwick in the County of Humberside being bounded on the north by Burstwick Drain on the south in part by Ings Drain and in part by the disused Withernsea Branch railway line on the east by land belonging to the Council and on the west by land belonging to S. E Rogers Esquire and being Field Nos. 140a...141... and 142... together with a right of way leading from Burstwick aforesaid at all times and for all purposes over and along Ings Lane shown coloured green on the said plan..."*

From a comparison of the field numbers on OS maps, and the maps showing the named fields, this would appear to encompass the field known as Ings.

27. Clearly the Council already owned some land to the east of this field, and may already have benefitted from a right of access over Ings Lane to service that land, although no documentation in relation to that purchase has been submitted. Notwithstanding that possibility, the Council were clearly granted a private right over Ings Lane by the 1976 conveyance, which would suggest that neither the vendor of the land nor the Council itself considered that Ings Lane already benefitted from public vehicular rights.
28. It is not possible to know what was contained in the statutory declaration mentioned in the conveyance because it is not available. It may have related to the right of access or it may not. Nevertheless this document suggests that no public right in vehicles was considered to exist over Ings Lane, but it does not preclude the existence of lesser public rights.

### *List of Streets*

29. In 1998 the British Horse Society served the Council with a Section 56 Notice with regard to maintenance of Enholmes Road, citing the 1777 Award as evidence of their liability in this respect. The Council investigated the matter and decided to add the route to the List of Streets. Mr Jackson considers that the associated map submitted by the Council in their evidence does not show the entire awarded route, but I disagree. The description in the 1777 Award makes clear that the awarded route went south from the western end of what is now Pinfold Lane and then west. This route is marked in red on the map

submitted by the Council as comprising their List of Streets. (Back Lane lines up directly with Enholmes Road/Ings Lane and is also shown in red on the map rather more prominently and may have caused confusion.) Mr Jackson is understandably confused because the list he submitted himself, which he had been told by the Council comprised its List of Streets, does not appear to record Ings Lane. Of course, it may list Enholmes Road, but I do not have the relevant extract for that alphabetical section.

30. The Council has sought to explain that if a Section 56 Notice was served today it is unlikely that it would have accepted liability because it would have interpreted the 1777 Award as *ultra vires*. The Council also points out that the List of Streets does not provide conclusive evidence as to public status and, even in connection with maintenance, it can be altered or 'corrected' if mistakes are found, without the legal process which is required to modify the Definitive Map and Statement ('DMS').
31. I agree with the Council's view that the showing of a route on the List of Streets as being publicly maintainable does not equate to it having vehicular rights, as the maps or lists do not generally indicate status. However, on the face of it, this amounts to a third piece of evidence that suggests that the route was subject to maintenance at public expense. Like the other documents (the 1777 Award and the 1852 Railway Plans) the List of Streets does not indicate whether or not public vehicular rights exist, but it would not be unreasonable to infer that some form of public rights subsisted over the route as a consequence of the repeated references to the public maintenance liability in different documents.
32. It is possible that the confusion over the maintenance liability was linked somehow to the Council's ownership of land in the vicinity and the fact that they enjoyed a private right of access. Council's in general only have public money available to them, and so any maintenance would naturally have been paid for out of the public purse.
33. Ings Lane may subsequently have been removed from the printed list, but the Council has only provided speculation on why that may have occurred; there is no clear explanation of why or when the route was removed from the list, and the Council's own submission suggests that it is still shown on the associated map. There is consequently a conflict of credible evidence.
34. Mr Jackson states that, had he known about the depiction on the plan, he would have made an application for a Byway Open to All Traffic ('BOAT') on the basis that vehicular rights had been preserved as a consequence. Nevertheless this requires public vehicular rights to shown to exist in the first place.

#### *Cul-de-sac Route*

35. Mr Jackson's application route, and consequently the appeal route, terminates at the point where it joins the line of the abandoned railway, now recorded on the DMS as a public bridleway. However, he has based his case on the documentary evidence which does not support the termination of the route at that location, and nor does it provide any logical reason for a public right of way of any sort to terminate historically at either of the named fields (Enholmes or Ings).

36. I accept that, even in rural locations, public rights of way may legitimately be cul-de-sacs, but I do not consider that there is any legitimate reason for the appeal route to end on the railway line based on the historical evidence on which Mr Jackson relies.

### **Other Matters**

37. Mr Gray provides no evidence, and nor does he comment on the historical documents submitted, but merely expresses reasons why it would not be desirable to have a public right of way over the appeal route. Whilst I accept that he has concerns, these matters are not relevant to whether or not public rights exist over the route, and I have not taken his views into account in reaching this decision.

38. Mr Jackson refers to the drains on either side of the appeal route and appears to suggest that the route lies on the south side of Ings Drain. He links this to the position of the parish boundary and thus the location of the appeal route and the group of people who might have historically had rights to use it. I am satisfied that the Council is correct in stating that the parish boundary runs to the south of the appeal route, and consequently do not consider that it has any implications on my decision.

### **Conclusion**

39. The appellant has failed to provide evidence that there is a public right of way in vehicles of any sort over the route of Ings Lane sufficient to satisfy either Test A or Test B (set out in paragraph 3 above). Consequently, I conclude that the appeal should be dismissed.

40. There is, however, a conflict of credible evidence in relation to the public liability for maintenance and it is for the Council to determine whether or not that supports a reasonable allegation that a public right of way of any other sort may subsist. This appeal does not relate to any such claim, and it is therefore not open to me to make any direction in that connection.

### **Formal Decision**

41. I dismiss the appeal.

*Helen Slade*

**Inspector**