



Appeal Decision

by **Helen Heward BSc (Hons), MRTPI**

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

Decision date: 30 October 2019

Appeal Ref: FPS/V4250/14A/1

- 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 The Metropolitan Borough of Wigan not to make an Order under Section 53(2) of that Act.
- The application dated 7 March 2016 was refused by way of a decision notice attached to a letter from Wigan Council dated 7 December 2018.
- The appellant, Peak and Northern Footpaths Society, claims that a 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").

The Application

2. The appeal relates to a route from Hall House Lane, Leigh to the northern bank of the Bridgewater Canal and an application to record it was submitted on 6 January 2016. The Council questioned the validity but following submission of other information on 7 March 2016 it was accepted as valid and determined.

Main Issues

3. The Council determined the matter by reference to Section 53(3)(b) of the 1981 Act. Section 53(3)(b) relates to the situation where there has been "*the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path...*".
 4. The required expiration of the period of use can be shown 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.
 5. It may also be shown by statutory deemed dedication under Section 31 (s31) of the Highways Act 1980 ("the 1980 Act"). S31 of the 1980 Act states that 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.
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6. *R (on the application of Godmanchester and Drain) v SSEFRA*, [2007] UKHL 28, (*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.*"
7. Where there is no identified event calling public rights into question s31(7) of the 1980 Act, as inserted by the Natural Environment and Rural Communities Act 2006, allows that the date of the application to be used.
8. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"(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."
9. The tests were described as "A" and "B" in *R v SSE ex parte Norton & Bagshaw* [1994] 68 P&CR 402:

Test A: does a right of way subsist on the balance of probabilities?

Test B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.
10. It was held in *Norton & Bagshaw* that an Order should be made where either of the tests is met. The evidence to establish Test B is less than that necessary to establish Test A. Therefore even if Test A is not satisfied, I might conclude that, on a balance of probabilities, it is reasonable to allege that the right of way subsists, and Test B is met. In which case I would direct the surveying authority to make an order.
11. It was noted by the CoA in the leading judgment of *R v SSW ex parte Emery* (1997) QBCOF 96/0872/D "*...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.*"

Reasons

Section 31 of the Highways Act 1980

Does a right of way subsist on the balance of probabilities?

12. The reasons for the Council questioning the validity of the application included that on the Evidence of Use Forms (UEF's) all users had given exactly the same grid references for the start and finish points with no other written reference or description of the claimed route and all of the plans accompanying the UEFs were identical. In March 2016 the applicant submitted 26 new UEF's from 13 of the original 23 supporters plus 13 new supporters and it is this evidence to which I now turn.

13. Most of the UEFs do not generally refer to obstructions or challenges. Several refer to becoming aware 'recently' and a few state that they were informed that the path was being closed and/or that it was closed on 31 October 2015.
14. One user, residing close to the route, states that up until 4 months ago they had never been approached by or stopped by anyone, then one Saturday morning they were told by a man with his family that they were trespassing and could no longer walk that way and the next day a fence was put up blocking the path.
15. Another user residing close to the route believed it was a public footpath until 10 years ago [2005] when fencing to a new property encroached on to the footpath and the user was told at that time that it was not a public footpath. However, this user's evidence is somewhat ambiguous advising also that they were never stopped challenged or turned back until the end of October 2015 when the landowner informed the user that he was closing the path at both ends and the way was obstructed by fencing erected at both ends on the 31 October 2015 with a sign "*private land keep out trespassers will be prosecuted*".
16. A few other users from a wider area state that the route was not blocked until recently. Another specifically refers to a barrier being erected in October 2015 and another specifies end of October. All UEF's are dated February 2016.
17. *Godmanchester* refers to the need to read s31 of the 1980 Act as a whole. It sets out that "*The primary example of an act which would negate an intention to dedicate is the erection and maintenance of a notice inconsistent with dedication "in such manner as to be visible to persons using the way": section 31(3). If the notice is torn down or defaced, notice to "the appropriate council" will have the same effect: section 31(5).*"
18. In this instance clear action was taken to close the route on the 31 October 2015 by the erection of fencing to obstruct access at either end, the attachment of the signage and subsequently keeping the route closed after the 31 October 2015. The 1980 Act requires that the twenty-year period is calculated retrospectively from a date of 'calling into question' of the public rights. On the balance of probabilities that date appears to have been 31 October 2015, giving a relevant twenty-year period of 1995-2015.
19. The reported frequency of use varies but several users state that they used the route daily or weekly. There are a variety of reasons given for using the route including as a means to get somewhere, including to school, shops, cemetery, work or visiting. There are also several statements indicating use for leisure, recreation, exercise and to walk dogs.
20. I find the evidence regarding frequency and purpose to be what might be expected given the proximity to the Bridgewater Canal and the situation of the route within the wider locality in relation to the location of shops, school, cemetery and areas of housing generally.
21. If there is evidence to show that the landowner did not intend to dedicate a public right of way within the relevant twenty-year period, then the statutory presumption can be overturned. The user who was informed that it was not a public footpath in 2005, had also been advised in writing by the Council three years previously in 2002 that the route was not a recorded public right of way.
22. However, there is little evidence to demonstrate that the landowner took any open action to indicate to the public that they did not intend to dedicate the way as a highway and thus break the 20-year period. There are several other UEF's

covering the entire period aside and little evidence to say that they were advised of this, or that their use was not 'as of right' or not without interruption. Use 'as of right' is without force, without secrecy and without permission¹.

23. Of the 26 UEF's, several do not provide sufficient evidence of use up until October 2015, with a few stating they used it until 2014, some stating that they stopped using the route several years before, and a few stating that they did not start using the route until sometime after 1995. Nonetheless, aside from the local resident referred to above, there is an adequate number of users for whom the period of usage and frequency provide sufficient evidence of use to raise a presumption of dedication within the relevant twenty-year period.

Is there is a conflict of credible evidence?

24. The Council finds the evidence unbelievable for a number of reasons. Emery indicates that "*...where the applicant...produces credible evidence of actual enjoyment of a way as a public right of way over a full period of twenty years...then the allegation that a right of way subsists is reasonable...*".
25. There is a lack of any physical description of the claimed way on the UEF's; such as the surface, fencing, boundary treatment, a bridge or a substantial hanging post for a field gate along the route at the bottom of an incline by a bridge. Section 1 of the UEF template used in this case requires the user to provide a description of the way. Aside from describing the start ('from'), 'via', 'to' and 'width' the form does not prompt the user to elaborate.
26. The descriptions given on most of the UEF's of the start point 'from' are remarkably consistent, with most users appearing to consider the start by approaching from the north. It is referred to by most as a "crossroads" on Hall House Lane. This is somewhat curious as it does not appear as such on a map. That aside, all of the user maps indicate this crossroads to be at the same place. In relation to the end point most users describe this as "canal bank", "canal path" or "towpath".
27. A couple of users refer to the route going between Brook Hall and Coaching House and a few users refer to the route going past or by Bedford Brook and a few refer to an incline. The claimed route is relatively short and direct. It is plausible that a user might consider that 'via' was relating to a more convoluted route or one that went via another place. Given the shortness of the claimed route users might have felt it self-evident and not requiring elaboration. Or, given the requirements of the standard form, many might not have thought it necessary to provide more information.
28. Given the shortness of the route there is little opportunity for great variation in the description of the claimed route. It does not surprise me that in this case most users have left the section 'via' blank in this case.
29. Overall the descriptions of 'from' and 'to' together with the user evidence maps provide a reasonably clear and consistent collective description of a route from a point on Hall House Lane to a point on the north side of the Bridgewater Canal.
30. There are very few references to the width of the claimed route. The Council is also surprised that there is both a lack of evidence on the UEF's about the condition of the bridge and the steep incline up to the Canal, and a lack of reports

¹ *nec vi, nec clam, nec precario*

to the Council during the 20-year period. But I find the Council's own evidence in this regard somewhat equivocal.

31. The Council inspected the "*Hooten Bridge over Bedford Brook*" four times between 1977 and 2002. A 1981 record states that "*this bridge takes the Bridgewater Canal over Bedford Brook and therefore should belong to Manchester Ship canal Co. There is no public footpath over and so should be removed from the inspection list.*" However, a subsequent inspection took place on 23 July 2002, within the relevant period. In it the "Road No" is referred to as "F/P" which, whilst not providing any evidence regarding status, may be an acronym for footpath, and the inspection was undertaken, and it found the bridge to be "*in good condition and there is no danger to general public*".
32. It may well be that there were regularly maintained, wider and more open definitive public footpaths in the locality which users could have followed as suggested by the Council. But this fact does not render the applicant's evidence improbable.
33. Whilst some of the users would have been very young when they first record using the route, the majority would have been adults during the period in question. Of these there are several who would have been of retirement age towards the end of the usage period. One user advises that they could not manage the incline to the canal latterly. It is somewhat surprising that no other users refer to any difficulties but that is not to say that the evidence of older users is incredible.
34. For those approaching from the south, if they had followed the northern bank of the Bridgewater Canal, the claimed route may well have been perceived as shorter or more direct. If at times it was not in good condition then the availability of alternatives for occasional use might actually be a reason for a lack of complaint, and not clear evidence that the claimed route was not used. The Council has worked with the School and is aware of concerns about pupil safety and the routes taken to walk to school. A manager at the School advised the Council that they were not aware of pupils using the claimed route and would not have encouraged any to do so.
35. But the School's policy and a lack of evidence from young people at the time of the application does not render implausible or unlikely the evidence regarding use for school during the relevant period. A diversion of Footpath 139 was made three years ago. There is little to say if, or for how long, pupils would have been able to access the school grounds via the shorter diverted route within the relevant period. Some of those stating that they used the route to reach the School would no longer have been pupils at that time and their use of the claimed route by the time of this diversion could have been for one of their other stated purposes such as dog walking or for leisure.
36. The claim is for a cul-de-sac footpath which would end at the Canal. *Robinson Webster (Holdings) Ltd v Agombar and another* [2001]² says "*It is clear...that public rights may be established over a cul-de-sac by actual use as of right by members of the public*". The appellant considers that it provides access to the Canal bank which is a place of public resort. Aside from one user reporting going to see a kingfisher at the Canal, most evidence provided at sections 4(a) and 4(b) of the UEF's indicates use as part of a wider route to get to or from somewhere. Of those using the route for leisure or recreation I find it rather

² (QBD)[2001] EWHC 510 (Ch)

implausible that they would use a cul-de-sac when the locality offers several rights of way that would create circular routes.

37. The Bridgewater Canal Company would not support the application because it would create a public footpath ending on the north bank of the Canal. The merits of the route are not for consideration in this appeal. The official towpath is on the south side. There is no public footpath along the north side. There may have been several signs along the north side indicating that it was private property and not a right of way and a barrier preventing cycles. But there is nothing to indicate that there were any barriers or signage on the claimed route until 31 October 2015.
38. Most users identify the route on the map in a very similar way, only one or two indicate the route they would have followed on the Canal towpath to reach or leave the claimed route in order to get to where they have claimed to be going. They might have known that the canal towpath was not a public right of way, or they might not. But I do not find any of this renders their evidence for the claimed route improbable.
39. The Council refer to the applicant's initial UEF's to dispute authenticity of the application. Those forms were withdrawn, and I attach no weight to them either way. The 26 UEF's in the resubmission all use the same base map, which is not one provided by the Council. The plan used clearly shows public footpath 137 but it is not referred to by any of the users.
40. A resident of the immediate locality of the claimed route has been involved with the application since the outset. This individual may have used social media to promote awareness, supplied the plan, and assisted with the compiling of the original UEF's. Be that as it may, I must confine my consideration to the 26 UEF's before me now. All of these appear to be individually signed.
41. The owner of the land throughout the relevant period and prior to October 2015 advised the Council that no one was given permission to use the route and that it was very overgrown. But, following *Godmanchester*, I am not persuaded that there are sufficient facts to show that this amounted to a lack of intention to dedicate a public right of way on the part of the landowner.
42. The land was purchased by the current owners in October 2015. They submit that they knew the area previously and that the land and the way were overgrown and not used by the public. On the 22 January 2016 the new owner emailed the Council stating that "*someone has laid stones down and been clearing part of it to look like its been being used as a path*". But active steps to prevent use from 2016 do not assist in showing whether the route was, or was not, in use in the relevant twenty-year period.
43. A Public Rights of Way County Copy map, dated 23 October 1951, for the Borough of Leigh may have formed the basis of the Draft Definitive Map. Under the National Parks and Countryside Act 1949 Statements were annexed to the Draft Rights of Way Map on 1 January 1953. The route was part of footpath Leigh 136 in the Statement which was struck through in red crayon, inferring it was deleted. Subsequently the Manchester Ship Canal Company objected under Part IV Section 29 of the 1949 Act and Lancashire County Council determined to delete Leigh 136 from the Draft Map and Statement.
44. Even the most elderly users would have been children at the time. The relevant period starts four decades later. It is plausible that users had no knowledge of

the earlier challenge. The landowners throughout the relevant period took ownership in 1981 and were not the landowners at the time of the challenge to the Definitive Map and Statement in 1953.

Other Matters

45. There is little evidence regarding a tree falling across the route in 2014, or of the significance of this either way. Use of the route by one local resident may have been with the implicit agreement of relatives if they owned the land, but I have already discounted this user's evidence.
46. I cannot take account of arguments as to the usefulness, or otherwise, of the routes; the potential effect of recording the right of way on the Bridgewater Canal Company, or in relation to a private grievance over the sale of land.

Conclusions

47. I consider that reasonably accepting the evidence of the applicant there is sufficient evidence to raise a presumption of dedication of a public right of way in the period 1995 – 2015 in relation to the claimed route. The Council raised a number of reasonable questions regarding the authenticity of the evidence but on the whole I found it inconclusive of the allegations made. As a result, a reasonable allegation has been made.
48. *Emery* indicates that where there is conflicting evidence, which could only be tested or evaluated by cross-examination, an Order would seem likely to be appropriate. The making of an Order leaves both the applicant and objector with the ability to object under Schedule 15. At that stage the conflicting evidence can be heard and those issues determined.
49. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

50. The appeal is allowed, and Wigan Council is directed to make an Order, to record on the Definitive Map and Statement the route from Hall House Lane, Leigh (grid reference SJ 6752 9964) to the northern bank of the Bridgewater Canal (grid reference SJ 6744 9954).

Helen Heward

Inspector