The Planning Inspectorate

Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 04 December 2019

Appeal Refs: FPS/Y3940/14A/13

- This appeal, dated 28 February 2019, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Wiltshire Council ('the Council') not to make an Order under 53(2) of that Act.
- The application (Council reference 2017/03) was made on 21 July 2017. It was refused by the Council on 9 January 2019 and the applicant was notified by letter dated 31 January 2019.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the appeal routes as a Public Footpath.

Summary of Decision: The appeal is allowed.

Preliminary Matters

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

2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

3. Submissions have been made by the appellant, Mrs Susan Carter, who has been assisted by Mr Trevor McMaster, and by Wiltshire Council, both as landowner and surveying authority. Other submissions have been made by Mr Alan Baines.

4. I understand from the papers on the file that two applications were made which affected two parcels of adjoining land. For clarity this appeal relates to the application for a circular path around the field known locally as the Forty Acre field.

The Main Issues

5. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).

6. Section 53(3)(b) of the 1981 Act provides that one of those events is the expiration of a period of time during which there has been enjoyment of the route by the public sufficient to raise a presumption that the way has been dedicated as a public path.

7. Another applicable event is set out in Section 53(3)(c)(i) of the 1981 Act which provides that an order to modify the DMS 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 upheld in R v. Secretary of State for Wales ex parte Gordon Michael Emery [1997] EWCA Civ 2064:

   - 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 be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

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

8. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') 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.

9. It is also open to me to consider whether dedication of the way as a highway could have taken place at common law. 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 could be shown to have occurred expressly or, alternatively, whether dedication could 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.

10. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances.

11. I must also have regard to advice and guidance issued by the Department for Environment, Food and Rural Affairs ('Defra') and judgements of the courts.

12. The principal issue in this appeal is whether or not the Council was correct to conclude that the submission in 1995 of a deposit under Section 31(6) of the 1980 Act had the effect of bringing the use of the path into question, and

whether it had continuing effect as demonstrating a lack of intention to dedicate.

Reasons

Description of Appeal route

13. The appeal route commences at a junction with Footpath 66 Melksham Without at Ordnance Survey Grid Reference ST911 654, and passes across a small field before running around the edge of a larger field, known locally as the Forty Acre field. It passes through points 2, 3, 4, 5, 6, and 7 returning to point 2, creating a circular walk with a linking spur. Between points 3 and 4 it runs alongside the River Avon (see map at Appendix 1).

14. The land over which the claimed route runs is part of a farm owned by Wiltshire Council called Forest Farm. It was occupied until 2017 by Mr Donald Burnell, and then taken on, in April of that year, by Mr Gareth Powell.

Statutory Dedication: Section 31 of the 1980 Act

15. The Council considers that the right of the public to use the claimed route was brought into question on 28 November 1995 when a deposit was made under Section 31(6) by the landowner, Wiltshire Council. The appellant considers that the right of the public to use the route was brought into question in 2017, when the route was blocked by fencing.

16. The appropriate statutory period during which to examine the evidence is the 20 years dating back from the date on which the right of the public to use the way was brought into question. Consequently, there is a disagreement about the relevant period of 20 years to examine in relation to usage. By taking the earlier period, dating back from 1995, the Council has concluded that there is insufficient evidence of usage at the beginning of that period. If the later period had been relied upon (ending with the erection of fencing in 2017 by the new tenant) the investigating officer's report indicates that they considered that there would have been sufficient use by the public, as of right, to satisfy the relevant usage criteria. However, in the opinion of the Council, the deposit of 1995, and later discussions about potential permissive access over the land, demonstrate a continuing lack of intention to dedicate public rights of way and thus preclude the making of an order.

17. Both the Council and the appellant rely heavily on comments made in the decision in Godmanchester and Drain v SSEFRA [2007] UKHL 28 ('*Godmanchester*') to support their arguments so I need to carefully appraise those comments.

Did the deposit of the map constitute an act which brought the right of the public to use the way into question?

18. Firstly, I need to determine whether or not the deposit made under Section 31(6) by the Farms Department of Wiltshire County Council in November 1995 was an act which brought the use of the claimed route into question. The Council considers that the judgement *Godmanchester* suggests that, even though there was no public register of such depositions at the time, the deposition of the maps was sufficient to bring to the attention of the public that their right to use the way was brought into question. In support of their argument they quote the following passage:

"A well-advised defender of rights of way, such as the Ramblers' Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner's intention can come to their attention or not."

19. I consider that the Council's interpretation of this clause, taken in isolation, is mistaken. This excerpt is preceded by the words:

" A notice to the council under section 31(5) is plainly regarded as second best and is only allowed when the original notice has been torn down or defaced, just as substituted service is allowed only when there is good reason to dispense with personal service. It is true that users of the way are not very likely to call at the County Council offices to ask whether any notices under section 31(5) have been lodged, but…"

20. The quote relied upon therefore does not refer to a deposit under Section 31(6) but to the serving of a notice on the Council after notices posted on site have been torn down or defaced. Section 31(5) provides that:

"Where a notice erected in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway."

21. Section 31(3) provides that:

"Where the owner of the land over which any such way as aforesaid passes-

a) Has erected in such manner as to be visible by persons using eh way a notice inconsistent with the dedication of the way as a highway; and

b) Has maintained the notice after the 1 January 1934, or any later date on which it was erected,

The notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

22. The document to which the Council is referring in its reasoning, and which was actually deposited, was the initial stages of making a deposit and declaration under Section 31(6). Consequently I consider that the Council is relying on a misunderstanding of the judgement, or a misreading of it at the very least.

23. There is no evidence of any notices having been posted on site, nor of the subsequent serving of a notice on the Council under Section 31(5). In any case, I think that Lord Hoffman was saying, in the last sentence of the extract I have quoted above in paragraph 18 above, that merely because a less than transparent method of declaring a lack of intention to dedicate a highway was sufficient in certain specific circumstances, that was <u>not</u> the same as saying that it did not matter, generally speaking, whether the matter was brought to the public's attention or not. Clearly, in my view, he was saying that, in general, such an intention <u>ought</u> to be drawn to the public's attention for it to be an effective rebuttal; thereby being consistent with the overall thrust of

the *Godmanchester* decision which concluded that an act which was effective in demonstrating a negative intention to dedicate would normally also be an act which brought the right of the public into question.

24. In paragraph 33 of the judgement Lord Hoffman is clear that the acts in question must be objective and must be perceptible by the relevant audience (i.e. the public). He goes on to support his arguments by stating in paragraph 35 (following on from the excerpt relied upon by the Council)

". The same point may be made about the elaborate provision for maps, statements and statutory declarations in section 31(6). What would be the point of all this if Parliament was using the word "intention" in a subjective sense which could be proved by any relevant evidence? And why did Parliament, by Schedule 6, paragraph 4 of the Countryside and Rights of Way Act 2000, insert a new section 31A (not yet in force in England) into the 1980 Act to establish a register of the maps and statements deposited under section 31(6) and require that it should be available for inspection free of charge? Surely to make such alternative methods of rebutting the presumption available to the public, so as to approximate as far as possible to the primary method of rebuttal.[1]

25. Furthermore, Section 31(6) of the 1980 Act states:

"An owner of land may at any time deposit with the appropriate council—

(a)a map of the land on a scale not less than 6 inches to 1 mile; and

(b)a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

(i)within [the relevant number of] years from the date of the deposit, or

(ii)within [the relevant number of] years from the date on which any previous declaration was last lodged under this section.

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."

26. The legislation is clear that it is only the **complete** deposit and subsequent statutory declaration which effectively negates an intention to dedicate and I therefore agree with the appellant that the mere deposition of the map in 1995, without the subsequent declaration, is not sufficient in that regard. If it is not sufficient evidence of a lack of intention to dedicate is it hard to see how it can be an effective action in bringing the right of the public to use the way into question, following the principles set out in *Godmanchester.*

[1] i.e. the primary method of rebuttal is the erection of notices to that effect.

27. I therefore disagree with the Council and do not consider that the deposit of the map in 1995 constituted an act which brought the right of the public to use the way into question.

Was the Section 31(6) deposit sufficient evidence of a lack of intention to dedicate?

28. As I have set out above, Section 31(6) of the 1980 Act states that only the complete deposit and subsequent statutory declaration automatically constitutes the required sufficiency of evidence of a lack of intention to dedicate a highway over the land shown in the accompanying map. At the time the deposit was made it was necessary to make the accompanying declaration within 6 years of making the deposit. There is no evidence to show that such a declaration was made, and therefore I consider that the initial deposit, whilst perhaps being some evidence of the landowner's intentions, is not sufficient evidence to satisfy what is generally referred to as 'the proviso' of Section 31(1).

Did the deposit of the map have continuing effect as evidence of a lack of intention to dedicate?

29. Since I am of the view that the deposit was not sufficient evidence in itself in this regard, it follows that I do not consider that it can have had continuing effect to a sufficient degree. Furthermore, the submission from Wiltshire Council as landowner, in relation to this appeal, makes no reference to the matter whatsoever which suggests to me that they may not have been aware of its existence. This also undermines the ability of the deposit to provide an effective demonstration of the landowner's intention in terms of a continuing effect.

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

30. In the light of the views I have expressed above, I therefore agree with the appellant that the date on which the right of the public was brought into question is 2017, when the fence was erected across the way by the new tenant of the farm, and not 1995.

Whether there has been use of the way by the public during the relevant period of 20 years (1997 -2017)

31. In the Council's Decision Report, dated 4 January 2019, the investigating officer concluded (at paragraph 11.25) that there was a way of such character to be eligible for consideration under Section 31 of the 1980 Act. I accept that the aerial photographs may show other ways that have been used in addition to the claimed route, but I have no reason to contradict the Council's view that the claimed route is capable of being identifiable. Any slight deviation or error in the vicinity of point 1, as referred to in the submission by the Council as landowner, is a question of evidence, and may be explained by the scale of the map.

32. The investigating officer also concluded that the use that was made of the route was exercised without force, without secrecy and without clear permission. Thus the use of the way was as of right, albeit the report focusses on an earlier period of time (pre-1995). However there is no evidence that the nature of the use altered after 1995 other than to become even more frequent.

33. There is evidence that, in 2001, discussions were held between a body called the Melksham Trust Riverside Project and various other parties in connection with the creation of a permissive path alongside the River Avon. Wiltshire Council, in their submission as landowners, state that the tenant of the land crossed by the claimed path (Mr Burnell) was consulted about the proposals and was opposed to any increased access. However I see that in a contemporaneous note of a telephone call from Mr Burnell, dated 24 July 2001, Mr Burnell appears to have expressed no major objection. He is reported to have said that it was his neighbour who was 'dead against' it.

34. I note also that the appellant has referred to use of the land by 'hundreds of people with Don's[2] permission' but I take account of the fact that the appellant has subsequently clarified this by saying that she used the word permission in a colloquial sense meaning that she was 'able to use the route in the same way that I am able to use the roads around Melksham'. She confirms that she never asked for, or received, permission from anyone to use the route.

35. I am satisfied from the evidence available that no formal or implied permission was given to the large numbers of people claiming to have used the route, either by the tenant farmer, or by the Council. Consequently I agree with the Council that the use of the claimed route has been exercised as of right.

36. There is no evidence to show that the numbers of people claiming use of the route were in any way not representative of 'the public'.

37. I therefore conclude that there has been use of the claimed route by the public as of right for a period of 20 years dating back from 2017.

Whether there has been any interruption to use

38. With respect to the reported flooding of the claimed route, its location is one on which occasional and seasonal flooding might be expected. It is quite possible for highways to be dedicated subject to a limitation accepted by the public. In this case, the inability or difficulty of using the path for a few days or weeks could, in my view, fall into the category of a limitation and would not represent an interruption to use in the sense intended in Section 31 of the 1980 Act.

39. I therefore conclude that any interruption due to flooding may be considered to be a limitation to public's use of the ways concerned and, likewise, would not prevent the making of an order.

40. There is no evidence of any other interruption to the claimed use.

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

41. I have already expressed the view that the deposit made under Section 31 of the 1980 Act in 1995, and consequently prior to the relevant 20 year period, did not have continuing effect as it was never completed.

42. During the 20 year period dating back from 2017 there is no evidence of any equivalent act on the part of the landowner (i.e. Wiltshire Council or its

[2] Mr Burnell

predecessors) and the tenant appears to have had no major objection to the level of access which was being enjoyed by the public. The user evidence submitted has not been seriously disputed and, consequently, I infer that it is an accurate reflection of what was happening on the ground. The Council accepts in its Decision Report that from the evidence submitted with the application it can be deduced that usage had increased over time. Certainly routes were visible in aerial photographs by the year 2006, although not so clear prior to that in 2001. However that does not mean that the route was not being used as claimed, and Mr Burnell was certainly aware of some use of his field by 2001, and appears to have accepted it.

43. I conclude that there is insufficient evidence of any lack of intention to dedicate a highway over the claimed route during the relevant period of 20 years.

Common Law dedication

44. In the light of my conclusion with regard to a potential statutory dedication I have not needed to examine the evidence in relation to a common law dedication.

Conclusions on the evidence

45. I consider that there is little in the way of conflicting evidence but there are some legal points which may be arguable in relation to the status of the deposit made under Section 31 and intentions of the landowner. However, taking all the evidence together I consider that Test B is satisfied. It is reasonable to allege that a right of way exists over the claimed route and there is no incontrovertible evidence that it could not.

Conclusion

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

Formal Decision

47. The appeal is allowed, and Wiltshire Council is directed to make an Order within three months of the date of this decision.

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

Helen Slade

Inspector

APPENDIX 1