



Appeal Decision

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 22 May 2017

Appeal Ref: FPS/Z4310/14A/2

- 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 Liverpool City Council not to make an Order under section 53(2) of that Act.
- The application dated 29 January 2015 was refused by way of letter from Liverpool City Council dated 12 December 2016.
- The appellant claims that a footpath should be recorded on the Definitive Map and Statement for the area.

Summary of Decision: The appeal is dismissed

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

Description of the route

3. I understand the route to run along the top of a railway embankment to the south-east of the Liverpool to Ormskirk railway line, generally north-east from Orrell Lane to Warbreck Avenue. It is said to be part of a longer route, running alongside the railway line to the east and west, some parts of which are now recorded as public footpaths. It is my understanding that Network Rail ("NR") is the freehold landowner of the land crossed by the claimed route.

Main issues

4. In considering the evidence, I take account of the relevant part of the 1981 Act and relevant court judgements. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement ("the DMS") 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."

5. By reference to *R v SSE ex parte Bagshaw and Norton (1994)* and *Todd v Secretary of State for the Environment, Food and Rural Affairs (2004)*, there are two tests. An Order should be made where either are met:

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

There must be clear evidence in favour of the applicant 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, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then it must be a reasonable allegation.

6. Section 31 of the Highways Act 1980 ("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.
7. *R (on the application of Godmanchester and Drain) v SSEFRA (2007)* addresses the meaning of s31 (2) with regard to what acts constitute 'bringing into question.' By reference to earlier case law it indicates that: "*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.*"
8. Dedication can be inferred at common law, but both dedication by the owner and use by the public must occur to create 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.
9. In all cases, the test to be satisfied is on the balance of probabilities.

Assessment of the evidence

Section 31 of the Highways Act 1980

When the status of the claimed route was called into question

10. The 1980 Act requires that the twenty-year period is calculated retrospectively from a date of 'calling into question' of the public rights. It is indicated by Liverpool City Council ("LCC") that NR erected fences at either end of the claimed route, as shown in photographs, in 2005.
11. The user evidence forms ("UEFs") submitted with the application were dated February 2015 and said that gates were erected about 10 years ago.
12. On the available evidence, I am satisfied that the relevant twenty-year period is 1985 – 2005.

Evidence of use

13. The application was accompanied by only two UEFs, referring to use from 1955 – 1999 and 1959 – 1999. The appellant later indicated that he had used the route up to 2005, but not as frequently after 1999. He also referred to use by others and an interested party indicates that "*...the paths were well used by parents taking children to Rice Lane Primary School...*". I note the comment of the appellant that people were unwilling to fill in UEFs.

14. I do not consider that I am able to give weight to the claimed use without direct evidence from the users themselves. On the basis of the submitted evidence of use within the relevant twenty-year period, I agree with LCC that it is not sufficient to raise a presumption of dedication. The test of whether a reasonable allegation has been made that public rights subsist over the claimed route has not been met.
15. As I am not satisfied, on the balance of probabilities, that the case has been made under the statute, I shall go on to look at the evidence at common law.

Common Law

Documentary Evidence

Ordnance Survey mapping

16. The formation of the Ordnance Survey ("the OS") was in response to a military need for accurate maps. Later OS surveys and maps provide an accurate representation of routes on the ground at the time of the survey. However, the depiction of a way on an OS map is not, of itself, evidence of a highway.
17. The Epoch 3 OS map, 1904 - 1939, shows the claimed route in the same way as shown on the up-to-date OS mapping used by LCC to show the claimed route. As the actual published mapping date is not provided, the route may have existed prior to the provision of Orrell Park Station in 1906¹ or been constructed subsequently; that is the map provided could have been produced in 1904 or 1939, or at any date in between, within that epoch.
18. The appellant and another interested party referred to old maps showing that the claimed route replaced older rights of way which had crossed fields. As the maps were not provided I have not been able to take account of this argument.

Other mapping

19. The Bartholomew Guide to Liverpool, 1927, assists in showing the location of Orrell Park Station, indicated as 'Halt' on the OS mapping. I do not consider the map to be of sufficient detail to show that a route was identified.
20. The A - Z of Liverpool, undated, is also lacking in a key and does not identify a specific route, albeit that the space for it is visible.

The Definitive Map and Statement

21. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS. The copy of the map shows Footpaths 6, 8, 9 and 10 in close proximity to the railway line. The sections immediately north-east and south-west of the claimed route are not recorded as public rights of way.
22. I understand Footpath 8, Lynwood Road to Hornby Road, to have been recorded on the DMS following an Inquiry in 2005 and closed by a Gating Order in 2014².

¹ Evidence of the date of construction has not been provided but appears to be accepted by LCC and NR

² Section 129 of the Highways Act 1980

Landownership

23. NR indicated the land had been in their ownership, or that of predecessors, since the construction of the railway. This was said to be in excess of 160 years, that is from around the mid-nineteenth century, and the appellant indicates the relevant Railway Company to have been formed in 1846, with the line opened to traffic in April 1849.
24. NR argued that the route was a private, permissive, route provided for the use of passengers to access the stations, although it was not identified as a "Walk/Cycle Route" on the map I understand to be located at Orrell Park Station. NR provided a copy of section 57 of the British Transport Act, 1949 ("the 1949 Act"), which sets out "*As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*"
25. The appellant argues that the line originally ran from the junction of the Liverpool and Bury Railway (now the Merseyrail Liverpool to Kirkby line) at Walton Station, with Orrell Park Station opening in 1906. As a result, it was said, the path existed before the station and so could not have been built to provide access to the station.
26. I consider that a plain reading of the 1949 Act does not indicate any requirement that the route to which it applies must be built at the same time as, or subsequent to, the station in question. It is required to be "*...the property of the Commission and forming an access...to any station...of the Commission.*" NR are the successors of the British Transport Commission, the owners of the land crossed by the claimed route and I am satisfied from the mapping that the route provides access to Orrell Park Station and potentially other stations along the line, depending on direction of travel. The appellant indicates that NR is incorrect in their assessment that walkers did not use the route to access the station.
27. Taking all these factors into account, I do not consider that public rights could be acquired over the claimed route "*...as from the passing of [the 1949 Act]...*".

Physical characteristics

28. The appellant referred to NR replacing some wooden steps with metal steps on the claimed route in 2005. This was relied on this as an indication that the route was open to the public. However, NR indicated that this was only to assist passengers in access to the railway, although it appears that the route was never reopened after this work was carried out.
29. An interested party indicated that whilst a section from Lynwood Road to Chatsworth Avenue, to the south of the claimed route, used to have a 'Public Footpath' sign, this route was not signposted before it was closed off.

User evidence and landowners' intentions at common law

30. At common law the use by the public is only part of the story, as the burden of proof lies on the claimant to show that it was the intention of the landowner to dedicate a right of way. As I am satisfied that the 1949 Act prevents use after

that period leading to prescriptive rights, any use would need to arise from prior to that date. There is no user evidence prior to 1955.

Summary

31. Although the appellant refers to old maps these have not been provided and, therefore, the only documentary evidence available suggests the physical existence of a route on the claimed alignment from some point in the period 1904 – 1939. The physical existence of a route is insufficient to show that it was a public right of way.
32. The user evidence does not show use prior to the implementation of the 1949 Act. There is no evidence of express dedication and I am not satisfied that there is evidence sufficient to show implied dedication at common law.

Summary

33. Taking account of the evidence as a whole, I am not satisfied that it is sufficient, on the balance of probabilities, to satisfy the test that there is a reasonable allegation of the existence of a public right of way. The evidence presented is of insufficient substance to support the claim, either at statute or common law.

Other matters

34. The law does not allow me to consider such matters as the desirability or otherwise of the route; health and safety, including matters relating to pollution levels; whether the route would, or would not, be in line with LCC policies, such as the Rights of Way Improvement Plan, or Merseyrail policies; or, any concerns relating to the LCC processes regarding either this claim or any other potentially related matters. I have not taken account of these issues.

Conclusion

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

Formal decision

36. I dismiss the appeal.

Heidi Cruickshank

Inspector