



Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 20 March 2017

Appeal Ref: FPS/Z4718/14A/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 Kirklees Council not to make an Order under Section 53(2) of that Act.
- The Application dated 4 July 2014 was refused by Kirklees Council on 18 October 2016.
- The Appellant claims that the appeal route, part of Footpath 49 Batley commencing on Hey Beck Lane, Woodkirk, Dewsbury should be deleted from the definitive map and statement for the area, and a public footpath be added at Hey Beck Lane.

Summary of Decision: The appeal is allowed in part

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 ("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.
3. The Appeal concerns two routes. For ease I shall refer to the route which the Appellant claims should be deleted from the Definitive Map and Statement ("DMS") as 'Route A' and the route which the Appellant claims should be added to the DMS as 'Route B'. Route A runs from Hey Beck Lane in a south westerly direction between Nos. 75 and 75A Hey Beck Lane. Route B runs along Footpath 55, a track leading off Hey Beck Lane, in a south easterly direction to the south eastern corner of No. 75A where it turns to run across land at High Barn.

Main issues

4. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their DMS under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
5. Section 53(3)(c)(iii) of the 1981 Act specifies that a Modification Order should be made by an Authority following the discovery of evidence which (when considered with all other relevant evidence available to them) shows that there is no public right of way over land shown in the map and statement as a highway of any description.
6. The DMS is conclusive evidence as to the existence of a public right of way, unless and until it is modified by an order under the provisions of Section 53 of

the 1981 Act to show that the path had been included in error, there having been no public right of way over the path when it was added to the Definitive Map and Statement.

7. Guidance¹ provides that, *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements. These are that:*
 - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made*
 - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct*
 - *the evidence must be cogent"*.
8. In considering the evidence, I also have regard to the judgement in the *Trevelyan* case² and in particular to the following statement by Lord Phillips M.R., *"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists"*.
9. The *Leicestershire* case³, where the alignment of a route but not its existence was at issue, may also be relevant. Here, Collins J held that *"...it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed", and, "If [the Inspector] is in doubt and is not persuaded that there is sufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive...where you have a situation such as you have here, it seems to me that the issue is really that in reality section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around"*.
10. The main issue is whether the evidence shows that, on a balance of probability, an error had been made when Route A was recorded, and that it should be deleted. In considering the evidence, and in view of the above, my starting point is that Route A is presumed to exist. It is for those contending a mistake

¹ Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, Version 2 October 2009, paragraph 4.33

² *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001]

³ *Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs* [2002]

has been made to provide evidence which demonstrates that, on a balance of probability, no way existed over Route A when it was added to the DMS.

11. In this case it is argued that there is no right of way over Route A, and that Route A has been diverted by legal process to follow the line of Route B.
12. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows 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.

As made clear in the High Court in the case of *Norton and Bagshaw*⁴, this involves two tests:

Test A. Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities 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 the answer must be that it is reasonable to allege that one does subsist.

13. I shall consider the user evidence against the requirements of Section 31(1) of the Highways Act 1980 ("the 1980 Act") which provides that "*Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it*" and Section 31(2), that "*The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice ... or otherwise*".
14. The question of dedication may also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, stealth or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

Assessment of the evidence

Documentary evidence

The Definitive Map

15. The 1950 Survey Card, part of the process that led to the publication of the first DMS further to the National Parks and Access to the Countryside Act 1949,

⁴ R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]

recorded Footpath 49 Batley commencing on Hey Beck Lane. It was described as un-metalled and in fair condition, the reason for claiming it being uninterrupted use within living memory. It appeared on the Draft and Provisional Maps unchallenged and finally on the first DMS produced by West Riding County Council, with a relevant date of September 1952.

16. The successor authority, West Yorkshire Metropolitan County Council, subsequently produced a modified DMS with a relevant date of April 1985. This shows and describes the same route in the same location, there being no change to its alignment portrayed since its original depiction in 1952. Accordingly, there is no indication from the 1985 DMS that the alignment of Footpath 49 has altered since its first recording in 1952.
17. It is the Appellant's contention that an order was made by Batley Borough Council in the late 1960s or early 1970s to divert the definitive alignment (Route A) to an alternative line (Route B). Further, that such order was lost or destroyed.
18. No documentary evidence of the existence of a legal order affecting Route A has been adduced by either the Appellant or Kirklees Council ("the Council") to demonstrate that its alignment has been legally altered since 1952, or 1985. The Council's investigations have revealed nothing in newspaper or court records, nothing connected with the 1966 land sale by Savile Estate, the 1985 review of the DMS by West Yorkshire Metropolitan County Council, or anything relevant in any other sources researched.

Land Registry and conveyancing documents

19. In 1966, the then owners of 75 Hey Beck Lane, Mr and Mrs Buckley, purchased the triangle of land to the east of their property from the Savile Estate. The conveyance states the land was sold subject "To the footpath crossing the entire length of the North Western boundary of the property hereby conveyed as indicated on the said plan annexed hereto". The route referred to corresponds with Route A as recorded in the 1952 DMS. There is no evidence that in transferring the land in 1966 the Savile Estate realigned Footpath 49 on its own land. Indeed, the conveyance offers no support for such a contention.
20. It is common ground between the parties that since c.1966 and the development of stables on the triangle of land, the definitive line of Route A has not been available for public use. It was not until November 2003 when investigating the proposed diversion of another part of Footpath 49 that the Council discovered the legal alignment from Hey Beck Lane as recorded in the DMS was that of Route A.
21. A 1971 land registry document attached to a statutory declaration of Mr Buckley comprises an OS base map showing a footpath on a similar alignment to Route B. This records a physical feature in existence on the ground. The statutory declaration does not mention Footpath 49.
22. The Appellant purchased No. 75 Hey Beck Lane in 1981. The land search did not seek a response to the public right of way question in the optional Part II of the document, so it is unsurprising that no record of Footpath 49 was noted. The only land search provided which did document Footpaths 49 and 55 is dated July 1998. On a copy of the 1992 diversion order plan (paragraphs 31

and 32) a route equivalent to Route B is indicated as the alignment of Footpath 49.

23. These documents do not alter public rights of way, but can record their existence. The 1966 conveyance expressly includes Route A; and the 1998 land search indicates an understanding on behalf of the person completing it that the alignment of Footpath 49 was Route B. However, this in itself would not alter the legal record (the DMS).

Planning documents

24. Mr and Mrs Buckley were granted planning permission to construct a stable building on the triangle of land in January 1966. This included providing a screen fence around the curtilage of the land. In 1982 consent was granted to the Appellant to erect a garage on the site. Then in 2012, planning permission was granted for the conversion of the building to a dwelling, which became 75A Hey Beck Lane. The plans for this dwelling indicate the presence of Route A across the property, as shown in both the DMS of 1952 and 1985.
25. The granting of planning consent in itself does not authorise the stopping up or diversion of a public right of way, and none of the documents provided refer directly to the closure or diversion of the footpath.

Council records

26. A Batley Borough Council document dated December 1971 referring to an unlawful closure/obstruction further to the west along Footpath 49 described the path as "leading from the Farm, Hey Beck Lane". This is contemporary with the purchase of the triangle of land and alleged repositioning of Route A to Route B by the late 1960s/early 1970s. The same description appears in other Borough Council documents dated September and October 1971. The description appears more consistent with Route B than with Route A, and provides some support for the diversion of Route A, at least on the ground. However, the Council states that Batley Borough Council were not the highway authority.
27. The Appellant suggests that as enforcement action was taken elsewhere along Footpath 49, but not with regard to Route A which the evidence suggests was unavailable at this time, Route B was accepted as being the official route of Footpath 49. This remains possible, although as the Council points out, officers investigating an issue elsewhere on the Footpath may not have been aware of or identified a problem elsewhere along it.
28. A March 1972 Batley Corporation document describes Footpath 49 as running "from roughly the rear of 75 Hey Beck Lane" – this is somewhat ambiguous but could describe Route B rather than a route running through 75 Hey Beck Lane as it was at the time.
29. Kirklees Metropolitan Council's records of diversion orders made by the former highway authority appear to be incomplete⁵ so it cannot be established from these whether or not a relevant order was made and/or is missing.
30. Simon Bowett⁶ writing to Kirklees Metropolitan Council in 1988 referred to a Footpath sign being incorrectly placed near his property Heybeck Cottage, and

⁵ The available list comprises three pages, but a hand-written note indicates there should be five pages

⁶ A relative of Mr and Mrs Buckley

that it should be 25 yards nearer the main road. He corrected a Council map provided to him showing Route B by marking Route A as the line of Footpath 49. A handwritten note, presumably made by a Council officer, noted the sign was apparently on the definitive line and therefore no action was to be taken. This suggests the Council officer believed Route B to be the correct alignment in 1988.

1992 Diversion Order

31. In 1989 Mr Lilley purchased High Barn and shortly afterwards applied to have the path running across his land diverted. The order, made in 1992, named the path as Footpath 49 (part), showing it running from Footpath 55 at the south east corner of No. 75 Hey Beck Lane and crossing land at High Barn in a south westerly direction, to a new route (in part) adjacent to the southern boundaries of properties fronting Hey Beck Lane. Objections to the Order were made (including from the Appellant) and the matter was referred to the Secretary of State. A Public Inquiry followed. The appointed Inspector declined to confirm the Order⁷, so no legal change in the path's alignment was effected as a result.
32. The path proposed to be diverted followed an alignment similar to that of Route B, rather than Route A. None of those involved in this order and the subsequent Public Inquiry appeared to have noticed that the order route was not the definitive route recorded in the 1985 (and 1952) DMS.
33. Another diversion application concerning Route B, in 1997, did not proceed to the Council's Committee stage.
34. The Appellant also refers to an attempt by the Council to divert Footpath 49 in 1990. However, the diversion order provided by them concerns an entirely different route and has no bearing on this Appeal.

Ordnance Survey Maps

35. Extracts from a range of Ordnance Survey ("OS") maps have been provided. The earliest ones dating between 1893 and 1956 show a line consistent with Route A. A 1965 map shows a building at the location of the stables, but neither Route A or B is marked. Maps dating between 1970 and 1992 show a route similar to Route B, although it terminates slightly further south on Footpath 55. Some maps within this period and into the 2000s do not show either route. The Ordnance Survey Explorer map, on the other hand, which marks on it public rights of way, shows Route A.
36. OS maps provide good evidence of the physical features on the ground that the surveyors see, and those showing Route B post 1965 indicate the existence of a physical or worn feature on the ground at that time. The absence of Route A suggests there was no physical route on the ground to record. However, as the Explorer map shows the definitive line (Route A), this points to the OS having received no notification from the highway authority of any alteration to that alignment.

⁷ On 29 April 1994

Landowner statements

37. A Highway Authority footpath sign was placed at the south eastern corner of what is now 75A Hey Beck Lane, the commencement of Route B, at some point in the past. It is suggested this marked Route B, the alleged diversion route. In 1994, Kirklees Council advised the Appellant that it had been re-aligned to indicate the precise route of Footpath 49, the letter stating, "*The Footpaths Officer is of the opinion that the definitive route is clearly visible as a well-used line of tread across the grassed area*".
38. Margaret Hallas recalls that Mr and Mrs Buckley wished to re-route the footpath and existing footpath sign (Route A) in the late 1960s, placing this after the stables had been built. She believes this was completed officially in the early 1970s when footpath signs were put up showing the path running up the Farm lane (Footpath 55) and across the field behind the stables. Mr Lumb, a user, recalls being challenged by Mrs Buckley when walking Route A and told the path had been moved. However, he had no recollection of any formal notices referring to this. Simon Bowett also believes the path was diverted in the late 1960s, although this contradicts correspondence he had with the Council in 1988 (paragraph 30) that the correct route was Route A.

User evidence

39. As mentioned above, it is accepted by the parties that there has been no public use of Route A since around 1966 (paragraph 20). Correspondence from third parties Joan and Denis Lumb and Andrea Lumb refer to use over many years, although as regards Route A this could, on the evidence, only have been in recent years since that route was re-opened and made available to public use following enforcement action by the Council. It seems more likely to me that their use since around 1966 has been of Route B, although the frequency of such use is not clarified.
40. The Appellant asserts that Route B, shown as a physical feature on the 1970 OS map, gained public status over the following years, such that when Mr Lilley purchased High Barn, the level of use was sufficient enough for him to seek to divert the path (in 1992).
41. The Inspector's Decision Letter further to the Public Inquiry held into the 1992 diversion order (paragraph 31) described the path (then believed to be Footpath 49 (part)) and the proposed diversion along the back of the houses as "well worn". User evidence forms though have been completed by only a handful of users. Helen Morrissey claims use of Route B from 1957 to 1966, and Richard Child from 1960 to 1977. B Taylor used Route B from 1974 onwards, Stephen Brook from 1992, and Janet Blackledge from 2003. Third party correspondents Michael and Joanne Barker claim use for over 20 years.
42. There are references from others supporting the Appellants' view of use of Route B, at least by reputation, and of the existence of the footpath sign referred to above.
43. Use of Route B was prevented in August 2012 by Mr Lilley and this provides a bringing into question for the purposes of Section 31 of the 1980 Act, giving a 20 year period of 1992 to 2012. However, use of Route B was also prevented between August 1992 and March 1993 by Mr Lilley when the diversion order was under consideration. Accordingly, such interruption would not provide a

full 20 years of user to raise a presumption of dedication. Taking August 1992 as the date of bringing into question gives a 20 year period of 1972 to 1992. During this period there is claimed use by B Taylor and Richard Child, as well as by Joan and Denis Lumb and Andrea Lumb, although the frequency of their claimed use is not apparent from the papers, or for some the years they actually used it.

Conclusions from the evidence

44. It is the Appellant's contention that, on a balance of probability, Route A was diverted by lawful authority at some point between 1966 and 1971, and it is reasonable to allege that a footpath was established through express or presumed dedication along the alignment of Route B (later the subject of an unsuccessful diversion order). Further, that the proposed diversion and recording of Route B on the 1970 OS map support the Appellant's case.
45. The available evidence shows that Footpath 49 was recorded in both the 1952 and 1985 DMS on an alignment passing along the south eastern boundary of No. 75 Hey Beck Lane (Route A). The DMS is conclusive evidence as to the particulars it contains⁸, unless and until shown otherwise. No evidence has been adduced to show that Footpath 49 was incorrectly recorded on this alignment when first added to the DMS in 1952.
46. With the purchase of the adjoining triangle of land and its subsequent development following planning permission, the footpath fell within the property, the triangle subsequently becoming No. 75A Hey Beck Lane. Route A became unavailable for public use and/or stopped being used by the public in or soon after 1966. An alternative route became and/or was made available at or near the south eastern boundary of what became No. 75A (Route B). At some point an official fingerpost marked the route in use on the ground as a public footpath. Council records from the 1970s onwards (to 2003) show this route was regarded as the definitive line of Footpath 49, and in 1992 an order promoted to divert it to an alternative line was not confirmed, so had no legal effect on the alignment of either Route A or B.
47. There is some local witness evidence of a reputed diversion of Route A and some that no formal diversion took place. There is no documentary evidence from the investigations undertaken by either party of the consideration, making, confirmation or existence of a 'lost order' to either stop up or divert Route A, or which suggests that such an order was considered and/or made by the highway authority. I note the Appellant cites examples of what are said to be missing Council orders and legal events elsewhere. However, this is not in my view evidence that there is a missing order in this case.
48. Nothing within the planning permissions granted empowered the official diversion of Route A. Nothing within the land searches which answered the public right of way question had the legal effect of altering what was recorded on the DMS, the legal record of rights, either of 1952 or 1985.
49. As regards Route A, I find the available evidence neither of sufficient substance to displace the presumption the DMS is correct, or that it is cogent. Accordingly I conclude the available evidence falls short of what is necessary to trigger the making of an order to delete a public right of way.

⁸ Section 56 of the Wildlife and Countryside Act 1981

50. There has been use of Route B by the public, in all probability from c1966 onwards. For the purposes of Section 31 of the 1980 Act a twenty year period cannot be made out, in my view, prior to 2012 (when the path was closed) due to the acknowledged closure of the route to public use in 1992/3. Therefore it would be necessary to consider a 20 year period prior to August 1992, for which there is witness evidence of claimed use from 5 individuals, although the detail of such use is sketchy. There is support for the use of Route B having taken place including as evidenced by the diversion application, the order promoted by the highway authority, the comments in the Inspector's decision letter of 1994 and in OS mapping of a physical route on the ground from 1970 onwards. Taken together this is, in my view, sufficient to raise a reasonable allegation that a public right of way subsists over Route B, such that Test B (paragraph 12) has been met. I therefore conclude that an order should be made to add a public footpath to the DMS.

Conclusion

51. Having regard to these and all other matters raised in the written representations I conclude that the Appeal should be allowed in part.

Formal Decision

52. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Kirklees Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the West Yorkshire Metropolitan County Council Definitive Map and Statement for the Kirklees Metropolitan District Area to add a public footpath (from Footpath 55) as proposed in the application dated 4 July 2014. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

S Doran

Inspector