



Appeal Decision

by **Michael R Lowe** BSc (Hons)

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

Decision date: 17 August 2015

Appeal Ref: FPS/N4205/14A/2

Appeal by Keith John Wall

- This Appeal 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 Bolton Council not to make an Order under section 53(2) of that Act.
- The Application dated 12 June 2014 was refused by Bolton Council on 25 November 2014.
- The Appellant claims that the appeal route between 233 and 235 Leigh Road, Westoughton, Bolton, should be added to the definitive map and statement for the area as a footpath.

Summary of Decision: The appeal is dismissed

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. The appeal has been decided on the basis of the papers submitted.

Main issue

3. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act and court judgments.
4. 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, and clarified in the case of R v Secretary of State for Wales ex parte Emery.

Test A: Does a right of way subsist? This requires clear evidence in favour of public rights 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 but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.

Reasons

5. The appeal concerns a way between 233 and 235 Leigh Road, which I shall refer to as 'South Road'. It followed a dispute between Mr Wall and his

neighbours, Mr & Mrs Collins of 233 Leigh Road. The dispute led to several cases in the High Court and the Court of Appeal.

6. In Keith John Wall v Brian Collins & Jennifer Collins [2006] EWHC case No. 5BL01209, HHJ Pelling QC considered Mr Wall's claim for a private right of way over South Road and whether there was a public right of way over South Road. With regard to the claim for a public right of way HHJ Pelling QC said:

38. As is well known, local authorities have, and have had since 1949, a statutory duty now contained in the Wildlife and Countryside Act 1981 to make and keep a definitive map recording public rights-of-way in their area. If a public right-of-way appears on a definitive map, that is determinative but its absence is not. So it is open to Mr Wall to prove that South Road is a public right-of-way, either by proving an entry on the definitive map or an express dedication by the landowner or a presumed dedication. Absent express dedication, and whether reliance is placed on common law or on Section 31 of the Highways Act 1980, it is necessary to show a period of uninterrupted user by the public if an allegation of presumed dedication is to succeed. In relation to this last issue no witnesses other than the claimants have given evidence. No evidence was adduced from neighbours concerning the use of South Road, nor was any oral evidence adduced from any local authority officials that prove such a user.

39. Mr Wall's case on this issue involves first referring to a number of old ordnance survey sheets and plans in order, as I understand it, to demonstrate the existence of South Road or something equivalent to South Road prior to 1911. As I have already said, I do not think they show what Mr Wall alleges. The first drawing that he says shows a right-of-way over the route of South Road is the plan attached to the 1910 lease. He said that a dotted line in the southwest corner of the plot drawing at G/706A shows the route of such a way. I do not accept that that is so. There is nothing on the plan that suggests that such is the case. There is no explanation as to why the dotted line relied on by Mr Wall does not run along the whole of the southern boundary of the plot if, as he submits, it shows the route of such a way. The plan at G706(b) shows South Road. Where that plan came from was not proved; nor was its date. However, in evidence Mr Wall said it dated from 1910 to 1911 and comes from a neighbour's document of title. Assuming that to be correct, in my view the plan does not establish the existence of a public right-of-way over South Road. Indeed, it is noticeable there are no markings on the plan which suggest that to be the case.

40. Next, Mr Wall relies on the plan attached to the 1911 assignment. As I have already described, this shows South Road and a portion of back road for the purpose of identifying the route of the private right-of-way created by the 1911 assignment. Mr Wall contends the use of the word "*road*" on the plan means it is or was contended to be a way used by the public. I accept that the word "*road*" can have this meaning, but I do not accept that in this context the use of the word constitutes either an express dedication, if such be alleged, or an acknowledgment by the assignor that a public right-of-way ran along South Road. If that was the case then there would be no need to provide for a private right-of-way. The sole and exclusive purpose of this plan is described in the 1911 assignment and is to identify the route of the private right-of-way created by that document.

41. Mr Wall then seeks to rely upon the wording of the declaration contained in the 1911 assignment, the text of which I have set out in paragraph 11 above. The suggestion by Mr Wall was that the reference to "*drift way*" meant that such a way existed prior to the date of the 1911 assignment. In my judgment, this reflects a misunderstanding of what the assignment read as a whole actually says. In short, and as I have already held, reference to drift ways refers back to "*the streets*" and that phrase in turn refers back to the phrase in the preceding covenant, namely, "*such portion of the streets as be opposite to or are coextensive with the said plot of land.*" The assignment does not identify or evidence the existence of any that

existed at the time the 1911 assignment was entered into. It thus entirely begs the question I have to decide.

42. Mr Wall refers to two other ordnance survey sheets, that being for 1927 at G/704A and that for 1936 at G/703. The point he makes in relation to these is that each shows South Street open at both ends. In my view this does not demonstrate the presence of a public right-of-way in the absence of evidence of uninterrupted user by the public, particularly since the 1961 ordnance survey sheet at G/01 shows a solid line across the western entrance to South Road. In my view, all these plans show is what is present on the ground at the relevant date, not the status of what was present.

43. The next map on which Mr Wall relies is that at G/700. This document is one that had been made by Mr Wall. It is a copy of an original in the possession of the relevant local authority. On the copy now in the bundle there is an endorsement by Mr Poulson, a principal engineer employed by Bolton Metropolitan District Council, to the effect that, "*This is to certify that the areas coloured pink show the state of the unadopted roads and highways around 1978.*" Mr Paulson, gave evidence. He said that the map simply shows those areas not maintained at public expense and is irrelevant to the question whether or not there is a public right-of-way over those parts not maintained at public expense. I accept that evidence.

44. The ordnance sheet for 2002 (G/699) does not support the suggestion that there is any right-of-way of any sort, or indeed that there is even a road along the route of South Road. Mr Wall's explanation for this is that modern ordnance survey sheets are prepared by aerial survey and that such a survey would not pick up sufficient detail to enable a road such as South Road to be shown. That may or may not be so. There is no evidence in relation to the point, other than what Mr Wall says he was told by an unnamed ordnance survey official, but the one thing that is clear is that the 2002 ordnance survey sheet does not support Mr Wall's case on this issue.

45. Finally, Mr Wall relied upon a photograph at G/624 which shows a dropped kerb at the western junction of South Road with Leigh Road. In my view, this does not assist Mr Wall's case that there is a public right-of-way over South Road. It shows merely that at one time it was intended that South Road be used for wheeled vehicles.

46. As to user, the only evidence of user was that given by Mr and Mrs Wall who said they had seen children climbing over the gates erected by Mr Collins at the end of South Road. That to my mind is not evidence of relevant user. They also told me that adults had used South Road, having parked cars on back road. Mrs Wall's evidence was that for most of the first 3 years that Mr Wall had owned number 231 she was working at the back of number 231 on the work being done there and that she saw children and adults walking through South Road. She says that Mr and Mrs Wall used it, as had relatives of the Walls. I accept Mrs Wall's evidence on this issue but, taken as a whole with the other material I have mentioned, I do not think that it is in any way sufficient to establish a public right-of-way.

47. Mr Wall contended that the definitive map showed South Road to be a public right-of-way. Mr Poulson told me that the definitive map did not show South Road as being a public right-of-way. Mr Wall attacked this evidence as given by someone without the requisite knowledge. However, there are two letters in the bundle from a Mr Wagstaff, a Bolton Metropolitan District Council official who describes himself as a "*Public Right-of-Way Team Leader.*" In the first letter dated 22nd April 2005 in the purple bundle (hereafter 'P') at page 288 Mr Wagstaff says that there is no recorded public right-of-way between number 233 and number 235 Leigh Road - that is where South Road is located.

48. In the second letter dated the 16th August 2005 at G/730 Mr Wagstaff says, "*There is no highway of any status which runs down the side of your property and number 235 Leigh Road and Back Leigh Road.*" I should say that this letter was addressed to Mr Collins and the reference to "*your property*" is a reference to

number 233. Although Mr Wall says that he had been told by another more senior official that this is not correct, no evidence in support of that assertion has been produced.

49. The plan at G/686 is a copy of the definitive map. G/686A is a magnified version. Personally, I am unable to make anything of this beyond the fact that the plan is a copy of an ordnance survey sheet which shows on it a number of numbered footpaths. Plainly it cannot have been intended to deem every private driveway shown on the plan to be a public right-of-way. This, in combination with the oral evidence of Mr Poulson, which I accept, and the letters from Mr Wagstaff, lead me to conclude that South Road is not entered on the definitive map as a public right-of-way. I have no doubt that what Lord Scott said in R v The City of Sunderland at paragraph 39 reproduced at R/189J is correct. However, the evidence available to me does not begin to establish 20 years user by the public, much less a user with permission sufficient to establish a public right-of-way. In the result I conclude that there is not and never has been a public right-of-way over South Street. I return to the question of obstruction of Back Street by car parking at the end of this judgment.

7. At paragraph 92 the Judge concluded "there was never a public right-of-way over South Road". Mr Wall was granted leave to appeal the judgment concerning the disputed private right of way and the Court of Appeal (in Keith John Wall and Brian Collins & Anr. [2007] EWCA Civ 444) upheld that appeal. However, the decision of Judge Pelling concerning the disputed public right of way was not the subject of the Appeal Court judgment. The decision of Judge Pelling that South Road is not a public right of way therefore stands. It is a judgment that is binding upon me to the extent of the evidence considered at the time. There were further proceedings in the High Court in 2009 (Keith John Wall and Brian Collins & Jennifer Collins [2009] EWHC 2100 (Ch)) concerning parking and gates. In setting out the background to the case Judge Hodge QC said:

3. Part of the earlier dispute between the parties concerned Mr Wall's claim that there were public rights of way over the passageway. That claim was rejected by Judge Pelling QC; and there has been no appeal from that part of his decision. Despite Mr Wall's attempts to do so, it is not open to him to contend that the passageway is a public highway. ...

8. Mr Wall makes his appeal on the basis that the Court of Appeal overturned the decision of the High Court with regard to both the disputed public right of way claim and the private right of way claim. That is not correct. He submits the same documentary evidence of the deeds from 1910 and 1911, a series of Ordnance Survey maps and Council highway records as were considered by the High Court and found to be of no assistance in establishing South Road as a public right of way. I have looked again at the Council's records and accept that they clearly indicate that South Road is not a highway maintainable at public expense and do not provide any evidence that it is a public right of way. I appreciate Mr Wall's submission that a public right of way and a private right of way may co-exist. However, exercise of a private right of way does not give rise to a qualifying user to establish a public right of way.
9. I have also studied all the additional evidence supplied by Mr Wall including the evidence of public use of South Road. In my view the evidence of public user of South Road falls well short of sufficient use to demonstrate presumed dedication at common law or under the provisions of section 31 of the Highways Act 1980. Overall, I am not satisfied that the evidence is such as to justify a reasonable allegation that a public right of way exists.

Conclusion

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

Formal Decision

11. I dismiss the appeal.

Michael R Lowe

INSPECTOR