



Appeal Decision

by Sue M Arnott FIPROW

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

Decision date: 1 April 2016

Appeal Ref: FPS/Q4625/14A/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 Solihull Metropolitan Borough Council not to make an order under Section 53(2) of that Act.
- By application dated 23 October 2014 the appellant claimed that a route between Milcote Road and Warwick Road via Barley Green flats in Solihull should be added to the definitive map and statement for the area as a public footpath.
- The application was refused by Solihull Metropolitan Borough Council on 2 July 2015 and the appellant was informed of the decision by notice dated 7 July 2015.

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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted with this case.
2. The appellant requests that the Secretary of State directs Solihull Metropolitan Borough Council (SMBC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record as a public footpath the route which is the subject of this appeal. The route is shown on the plan which accompanied the application to SMBC and is identified as the "*line of purported footpath*" on a plan accompanying SMBC's Report to its delegated decision-maker, the Assistant Director for Managed Growth, dated June 2015.

Main issues

3. Section 53(2) of the 1981 Act requires the surveying authority (in this case SMBC) to make orders to modify its definitive map and statement in consequence of certain specified events set out in Section 53(3).
4. Sub-section 53(3)(b) describes one such event as "*the expiration ... of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path*".
5. Another event is set out in sub-section 53(3)(c)(i): "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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 ...*".
6. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) therefore comprises two separate questions, one of which must be answered in

the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order¹ requested by the appellant.

7. The issue was addressed in the High Court case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1995] JPL 1019 and later clarified in the case of *R v Secretary of State for Wales ex parte Emery* [1998] 96 LGR 83: when considering whether a right of way subsists (Test A) clear evidence in favour of the appellant is required and no credible evidence to the contrary. However when considering whether a right of way has been reasonably alleged to subsist (Test B), if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
8. For the purposes of this appeal, I need only be satisfied that the evidence meets the lesser test (B) although the higher test (A) would be applicable if the matter fell exclusively under sub-section 53(3)(b).
9. As regards the evidence of use by the public, Section 31 of the Highways Act 1980 (the 1980 Act) sets out the requirements for presumed dedication under statute. Firstly there must be sufficient evidence of use of the claimed route by the public, as of right and without interruption, over the twenty-year period immediately prior to its status being brought into question in order to raise a presumption of dedication. This presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the landowner during this period to dedicate the route as a public right of way.
10. Alternatively, if the case is not made out under statute, I may consider the evidence under the common law. In this case the issues to be addressed would be whether, during any relevant period, the owners of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owners, and whether there is evidence of acceptance of the claimed right by the public.

Reasons

Background

11. Whilst I have not seen the site, from the photographs and plans supplied I understand that the appeal route follows defined hard-surfaced roads and paths which also form the access to and between the buildings known as Barley Green flats. This is a residential complex built in the 1960s, comprised of blocks of flats set in maintained grounds.
12. The claimed right of way enters the site from the cul-de-sac Milcote Road via the access road which leads to the garages and parking areas associated with the flats. After passing adjacent to the block comprising Nos. 61-71, the route then follows paved footpaths through the private grounds, taking four right-angled turns before joining the footway in Warwick Road.

¹ The higher test would need to be satisfied to justify confirmation of an order.

13. In 2014, following concerns over security and reports of anti-social behaviour within the site, and with the support of residents of the Barney Green flats, the landowner's agents (CP Bigwood) made arrangements for the erection of a perimeter fence. Discussions were held over proposals to install locked gates to restrict pedestrian access to and from the site, including one gate on the claimed path at the Warwick Road end.
14. The application which led to this appeal was prompted by local concern over future access along the claimed public footpath given these proposed changes.
15. SMBC researched the evidence relevant to the case before compiling a detailed report that was considered by the designated officer on 2 July 2015. This addressed both the evidence from claimants supplied with the application and information gathered from other sources including agents for the landowner.
16. Having carried out its investigations, SMBC concluded there was no historical documentary evidence relevant in this case, and that the application therefore relies exclusively on user evidence as the basis of the claim.

Presumed dedication under statute

17. When the appellant was informed of SMBC's decision to refuse to make the order requested by his application, the reason given was that whilst use of the way was accepted, the Council took the view that this did not create a public footpath as there was sufficient evidence to demonstrate that the landowner did not intend to dedicate a right of way across the site.
18. In lodging his appeal against this decision, the appellant's arguments are two-fold. Firstly he submits that the claimed challenges by residents of the flats to people walking the disputed path were most probably aimed at people who had parked in the locality in order to walk into the centre of Solihull, not to residents of Milcote Road "*who were using the path as the quickest and most convenient route to Solihull centre from their homes*".
19. Secondly, the applicant questions the photographic evidence of signage indicating the area was private land, submitting that there is no proof that any of these notices were in place during the relevant 20 years.
20. Consequently the appellant challenges SMBC's conclusion, submitting instead that use of the claimed route by the public for the required length of time *does* establish a public path as the landowner did not make sufficiently clear a lack of intention to dedicate the way as a public footpath. He further submits that the evidence provided *is* sufficient to reasonably allege the existence of a public right of way and therefore that a definitive map modification order should be made to record it.
21. It is the appellant's case that the written statements from claimants show that use by the public went unchallenged for well over twenty years such that a right of way on foot should be presumed to have been dedicated by the owner of the land concerned.
22. Presumed dedication under the 1980 Act (as set out above) requires that the first matter to be established is when the public's rights were brought into question so that the relevant twenty year period can be calculated.
23. SMBC concluded that the users' evidence showed they claimed to have enjoyed unchallenged use of the route until the summer of 2014 when a number of

people cite being challenged whilst using the path, or being aware of others similarly challenged by residents of the flats.

24. I note that many of the claimants also make reference to new notices being put up around that time. Of particular concern were those erected at the entrance to the site from Milcote Road stating "Barley Green - Private Property and Grounds – Residents Only".
25. Taken together with the start of discussions over installing a locked gate across the path, these actions appear to have brought into question the status of the way and prompted the application to record it as a public path. SMBC therefore concluded that the twenty years between the summers of 1994 and 2014 should be the relevant period in this case. The appellant does not challenge this analysis and I concur with the Council's conclusion.

Evidence of use 1994-2014

26. I also concur with SMBC's general assessment of the user evidence and findings in respect of the quantity of user, the frequency of use and the purpose for which the claimed path was used. The evidence submitted indicates that the path was used at least weekly throughout the period in question with 16 out of the 26 claimants indicating that they used it at least once a week between 1994 and 2014.
27. There is only one aspect of this evidence of use that is questioned: the extent to which users were personally challenged whilst walking the claimed footpath. However none of those who completed evidence forms confirming their use of the way say they were ever challenged prior to 2014.
28. Consequently I accept the evidence of use during the relevant period 1994-2014 supplied in support of the claimed footpath is sufficient to raise a presumption of dedication as a public right of way.

Intentions of the landowner

29. The next consideration is whether there is evidence to show that during this period the owner of the land demonstrated a lack of intention to dedicate a public right of way over the claimed route.
30. Throughout the whole period the freehold owner of the land over which the claimed footpath passes was Taylor Wimpey (previously Bryant Homes who built the flats). In addition, 76 flat owners have a legal interest in the land since all have the right to quiet enjoyment of the grounds.
31. There are two actions that need to be considered here; the effect of the notice(s) that were posted at various points around the site, and the claims that people walking through on the path have been challenged by residents and told the area was private.
32. I considering the notices, I firstly note that sub-section 31(3) of the 1980 Act states that where an owner of land over which any way used by people for the required length of time "*has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway*" and has maintained that notice, in the absence of proof of a contrary intention, it is to be regarded as "*sufficient evidence to negative the intention to dedicate the way as a highway.*"

33. In this case there is photographic evidence confirming that a notice was fixed to the wall of the building containing flats 61-71 in close proximity to the claimed path. This notice read "NOTICE – HIGHWAYS ACT 1959 – THIS LAND IS PRIVATE – NO PUBLIC RIGHT OF WAY". A similar notice is said to have been attached to a tree near the Warwick Road entrance but removed when the tree was felled. Others were placed elsewhere around the site but are not directly relevant to the claimed footpath. This information is confirmed by several individual residents and by 31 people who signed a petition.
34. The appellant has questioned whether these notices were present during the relevant period 1994-2014. Neither the notice on the building or that fixed to the tree was present at the time of the application.
35. SMBC submits that the photograph (taken by a resident) of the notice attached to the building could not have been taken any earlier than October/November 2005 which is when the photographer moved to his or her flat. Since the notice must have been present since at least 1980 (when the Highways Act 1959 was replaced the 1980 Act) I conclude this notice must have been in place between 1994 and 2005, that is for at least 11 of the relevant 20 years.
36. Establishing exactly when the notice on the tree was removed is not easy since there is no information from which to date the removal of the tree. However I have noted the evidence of a resident who moved to Milcote Road in 2003. He recalls this notice and, sometime later, the tree being felled. I therefore conclude that this notice must have been visible from the claimed path until at least 2003, that is for a minimum of 9 of the 20 years.
37. The Courts have interpreted the legislation to mean that notices rebutting any presumption of dedication do not need to be present throughout the whole of the twenty years but only for some substantial time during that period.
38. It is clear from the evidence forms provided by the 26 claimants that they either did not see or have forgotten these notices, but I am satisfied that the evidence shows they did exist and that they were present for a substantial proportion of the relevant period, providing incontrovertible evidence that the landowner did not intend to dedicate rights of way over the path.
39. Whilst that conclusion is sufficient in itself to rebut any presumption of dedication, there is also the matter of the challenges by residents to non-residents walking through the grounds. I do not doubt that the appellant is correct in suggesting that *some* of these will have been to people parking without permission at Barney Green and using the path to reach the town centre. However letters provided by individual residents, recalling occasions when people *were* challenged, is good evidence that some users were told by people with a legal interest in the land that the way was not open to the public. The 26 claimants may not have been amongst those challenged whilst walking through during the relevant period but it seems clear that others were.
40. These challenges add further weight to the conclusion that those with a legal interest in the land took steps to make their position clear.
41. In summary, I concur with the conclusion reached by SMBC that the evidence is sufficient to show that the freehold owner of the land concerned continued to display clear notices throughout at least half the relevant period. Therefore the presumption of dedication raised by the long-standing use of the route by the public will be rebutted and no public right of way can be presumed to subsist.

42. In my view the requirements of Section 31 of the 1980 Act cannot be satisfied and, on balance, I conclude the evidence is not sufficient to show that a public right of way can be reasonably alleged to subsist over the appeal route.
43. Although no submissions have been made in relation to the common law approach, my finding that the landowner made its position clear through the notices, coupled with the occasional challenges to individuals reported by residents, offers little scope for any case to succeed on this alternative basis.

Other matters

44. One of the claimants wrote that the houses in Milcote Road were built at the same time as the flats and that there has been an unspoken and lasting understanding since 1966 that *all* residents in the street had access over the claimed path.
45. If such an arrangement were to be confirmed, this might possibly constitute a private easement enjoyed by the residents of Milcote Road, but could not establish a right of way enjoyed by the public at large.
46. I have also noted evidence from some correspondents who claim to have enjoyed unhindered access along the path at issue for many years whilst owning or visiting one of the flats. Since flat owners (and their tenants) are entitled to enjoyment of the grounds, their use of the path could not qualify as use by the public. Likewise, use of the path to visit flat residents would need to be discounted for similar reasons.
47. Amongst the correspondence from people who oppose the establishment of a public right of way and those who support it are comments on the likely problems the route may bring for residents of the flats as well as the difficulties that people living in the locality would face if unable to use the path as a short cut. Whilst all these issues are clearly of serious concern to those directly affected, they are not matters which can be considered when determining this appeal.

Conclusion

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

Formal Decision

49. The appeal is dismissed.

Sue Arnott

Inspector