



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: 24 March 2017

Appeal Ref: FPS/A0665/14A/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 Cheshire West & Chester Council not to make an Order under section 53(2) of that Act.
- The application dated 12 September 2013 was refused by way of a decision notice attached to a letter from Cheshire West & Chester Council dated 19 October 2016.
- The appellant, Mr Emery, claims that a number of routes should be recorded as public footpaths on the Definitive Map and Statement for the area.

Summary of Decision: The appeal is allowed in part.

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

Date of Appeal

2. An appeal under paragraph 4 to the 1981 Act must be made within 28 days of the date of notification of the decision on the application. There was initially a little confusion as to the date of notification because Cheshire West & Chester Council ("the Council") had sent out a copy of their report on the application in September. However, I am satisfied that the formal notification did not occur until October and the appeal was made at the correct time.

Notification to landowners

3. Paragraph 2.(1) of Schedule 14 to the 1981 Act states that "*Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates.*" Sub-paragraph (2) allows that a notice can be placed on the land to give notice to the "owner" or "occupier" of the land, if it is not possible to identify the owner or occupier.
4. The applicant certified to the Council that the owners and occupiers had been served notice, identifying three parties. Subsequently a further party gave notice of his interest in part of the land. I note the suggestion that the application may be invalid as a result of the failure to serve notice at the appropriate time. However, the affected landowner is now engaged in the process and has had full opportunity to provide relevant information to the Secretary of State in relation to the application. If any Order directed to be made affects these interests then he will, again, have the opportunity to present relevant information at that stage.
5. Although the oversight in identifying all the affected owners and occupiers is regrettable, I am satisfied that no prejudice arises as a result.

Description of the routes

6. The appeal relates to a number of routes crossing land to the north of Blacon, a suburb on the western side of Chester. The land is bordered to the east by the Shropshire Union Canal ("the canal") and north-east by the A540, Parkgate Road, with open fields to the north-west.
7. The claimed routes are mainly situated on the southern sections of the land, closest to the built up area with accesses from land, roads and closes off Shelley Road. Many follow field boundaries and a route runs along the north-eastern field boundary, adjacent to the A540.
8. I understand that the application was made at a time when there was a planning application under consideration for development of the land in question.

Main issues

9. The Council determined the matter by reference to section 53(3)(b) of the 1981 Act. Section 53(3)(b) relates to the situation where there has been "*the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path...*".
10. The required expiration of the period of use can be shown at common law with express or implied dedication by the owner and acceptance by the public creating 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.
11. It may also be shown by statutory deemed dedication under section 31 of the Highways Act 1980 ("the 1980 Act"). Section 31 of 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.
12. *R (on the application of Godmanchester and Drain) v SSEFRA, 2007¹*, ("*Godmanchester*") addresses the meaning of s31 (2) with regard to what acts constitute 'bringing into question.' By reference to earlier case law: "*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.*"
13. Where there is no identified event calling public rights into question section 31 (7) of the 1980 Act, as inserted by the Natural Environment and Rural Communities Act 2006, allows that the date of the application to be used.
14. The Council rely on *R(Lewis) v Redcar and Cleveland (No 2), 2010²* ("*Redcar*"), with regard to whether the use was 'as of right', as would be required in order to record a public right of way. For use to be 'as of right' it must be without force, without secrecy and without permission. The Council take the view that fences have been broken down and therefore, the use has been by force.

¹ [2007] UKHL 28

² [2010] UKSC 11

15. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement 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."*
16. *R v the Secretary of State for the Environment ex parte Norton and Bagshaw, 1994*³, as clarified in *R v Secretary of State for Wales ex parte Emery, 1997*⁴, sets out that there are two tests in relation to such applications and that an Order should be made where either of the following tests is met:
- (a) *Test A, does a right of way subsist on the balance of probabilities? There must be clear evidence in favour of the appellant and no credible evidence to the contrary.*
- (b) *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.*
17. It is stated that, *"...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."* The applicant in this case is Mr Emery and he argues that there is a conflict of evidence here which should be tested at the next stage, under Schedule 15 to the 1981 Act.
18. I must be satisfied that the relevant tests have been met on the balance of probabilities.

Reasons

Section 31 of the Highways Act 1980

When the status of the claimed routes were called into question

19. The user evidence forms ("UEFs") do not generally refer to obstructions or challenges prior to 'recently', which I take to be just prior to the application to record routes. In relation to the route E – A⁵ one user refers to having once been told that the land was private, in about 2007 or 2008. However, this does not appear to have stopped their continued use of the route up to the completion of the UEF in 2013.
20. A letter published in the Chester Leader and reprinted in the Chester Standard has not been provided but the response, from the owner of the majority of the affected land, which seems to have been printed in the Chester Leader on 21 March 2013, was. This referred to whether the land in question was *"...green space in which...many families in the area walk and exercise..."* saying that it was privately owned farmed land, which had been subject to trespass for over 45

³ [1994] 68 P & C.R. 402

⁴ [1998] 4 All ER 367

⁵ Letters used as shown on the Council Plan M0558

years. Two people appeared to view this as a challenge to their use, but continued to walk the routes up to the completion of their UEFs.

21. In relation to a circular route E – A – L – K – G – E one user referred to an "*old sign years ago trespassers will be prosecuted could hardly read it, illegible*". He did not clarify where the sign was or when it was removed but his use started in 1998 and so it must have been in place at this point. This does not seem to be the same sign as that referred to by Mrs Cadwaladr, who owns the majority of the affected land, in relation to photographs showing a plaque on a fence from which she indicates a "*private property*" sign had been removed. Later photographs, thought to date from 2016, show signs saying "*Private Land, Access Prohibited*" but the locations and dates of erection are not identified and appear to arise after the application date⁶.
22. *Godmanchester* refers to the need to read section 31 of the 1980 Act as a whole. It sets out that "*The primary example of an act which would negative an intention to dedicate is the erection and maintenance of a notice inconsistent with dedication "in such manner as to be visible to persons using the way": section 31(3). If the notice is torn down or defaced, notice to "the appropriate council" will have the same effect: section 31(5).*" Section 31 indicates that it is not enough to simply erect a notice to demonstrate a lack of intention to dedicate a right of way; it must be maintained, although no indication is given of how long this needs to be within the relevant twenty-year period. Enough, it would seem, that the action is 'open and notorious'. In this instance it is unclear whether the notice, or notices, referred to a particular route, or the land as a whole, where they were sited or how long it/they were in place.
23. There is also one reference to the route having been "*blocked off once*" but with no indication of where, when or by whom. Although Mrs Cadwaladr indicated that the Council had been neglectful with regard to the fencing, a member of the Council Service Delivery Team noted that, in the period 1993 – 2003, the in-house blacksmith had carried out repairs to the fence on an ad-hoc basis. There appears to be no record of where and when such repairs were made. These matters may be sufficient, depending on the facts of the case and following *Godmanchester*, to demonstrate an earlier date of use being called into question or be sufficient to show a lack of intention to dedicate a public right of way on the part of the landowner.
24. Photographs were provided by both the applicant and the main landowner, showing views of various access points. There was one set of photographs taken on 21 February 2011 and another set from 15 January 2016. Some of the applicant's photographs, attached to the UEFs with the application, are annotated '*after obstruction*' and appear to date from early 2013.
25. The landowner indicates that the photographs show damage, and therefore use by force. However, there is some difficulty in determining when any such damage occurred and, therefore, whether it was relevant to the claimed use by force. For example, point A2 provides an access onto the A540 and both sets of photographs show an opening in the rails, with a block-work 'step'. Mrs Cadwaladr indicates that "*This section is maliciously destroyed anytime it is repaired. Wooden fence sawn down repeatedly*". However, the photographs appear to show neat-ended fencing with greening on the cut ends shown on the 2016 photographs consistent with the aging of the remainder of the fence to the

⁶ The Council appear to have mistakenly referred to these photographs dating from 2011

west. The 2013 annotation is indicated to be "*before obstruction with rails*". It is possible that the reference to fences being sawn relates to matters since the use of the route was called into question.

26. It is also difficult to determine to where some of the photographs relate. For example, the photographs marked as point B differ to the extent that I am not certain that they show the same point. The 2011 photographs show fencing "*...erect and solid at B in 2011. No access to field*". However, the tarmac and brick paving does not seem to relate to what seem to be unsurfaced areas with a worn path either side of the "*Metal stile (after obstruction)*" in the applicants photograph. Some of the 2016 photographs refer to B and appear to show other areas, with the canal in some of the pictures, suggesting this may be on the alignment P – N, rather than at B.
27. In relation to point D the applicant shows a photograph of fencing to the west of the pipe or drain, which runs north-west of Meynell Place northwards into the field, annotated '*after obstruction*'. The 2011 photographs concentrate on the area to the east of the pipe, showing fencing in this area and commenting on there being no evidence of walkers or use. Some of the fencing shown in 2011 is clearly vandalised, suggesting access at these points – to the east – was by force.
28. There is reference in the 2016 photograph notes to there being overgrowth on the claimed routes. However, given that there appear to have been active steps to prevent use from at least 2013 it would not be surprising to find that routes were not in use at that time. This does not assist in showing whether they were, or were not, in use in the relevant twenty-year period.
29. The 1980 Act requires that the twenty-year period is calculated retrospectively from a date of 'calling into question' of the public rights. On the balance of probabilities that date appears to have been 2013, giving a relevant twenty-year period of 1993 – 2013. However, as noted above, on further examination of the evidence it may be that an earlier date of calling into question is identified, due to signs having been erected and maintained, people being turned back or accesses to the routes obstructed.
30. The evidence shows use on foot primarily from the mid-1970s, which would agree with the time of the building and occupation of properties in the area, as shown in the aerial photographs. The 1970 aerial photograph shows the area during the development, with no indication of use on the alignments of the claimed routes. The more recent aerial photographs show wear on the ground which appears to be consistent with the use of several of the claimed routes, or parts thereof, although there are other routes also visible.
31. The reported frequency of use is what might be expected in such an area, varying from monthly to weekly, daily or sometimes more than once a day. The more frequent use was generally in association with dog walking. There were some photographs attached to UEFs showing people and dogs at various points on the land in approximately 1992 and 2006.
32. The users have only indicated the route or routes which they have used, with further information becoming available through the interviews carried out by the Council. However, in my view, some of the routes do not have sufficient evidence of use to raise a presumption of dedication within the relevant twenty-year period. Running clockwise I consider that the routes K – L, L – A/A2, A/A2 – E, E – H, H – M, and M – G have sufficient evidence of use throughout that period to raise the presumption.

33. The joining routes to the west run from J and then north or south of what appear to be ponds, then to the east or west of the hedge boundary to point K. There may be sufficient evidence in relation to the later parts of the twenty-year period but, due to the choices in route used, I am not satisfied that the beginning of the period shows sufficient use to raise a presumption. This would mean that there would not be a route between G/G2 and point K. *Robinson Webster (Holdings) Ltd v Agombar and another* [2001]⁷ says “It is clear...that public rights may be established over a cul-de-sac by actual use as of right by members of the public”.
34. For the other routes identified to the south-east and, by some users, north-west, there is insufficient evidence in any part of the twenty-year period to raise a presumption of dedication as a public right of way.
35. *Emery* indicates that “...where the applicant...produces credible evidence of actual enjoyment of a way as a public right of way over a full period of twenty years...then the allegation that a right of way subsists is reasonable...”. I am not satisfied that the applicant has produced credible evidence in relation to the full period of twenty years and so do not consider it appropriate to direct that an Order be made in relation to the remaining routes.
36. In order for the reported use to lead to a presumption of dedication it is necessary for it to be ‘as of right’ and without interruption. Use ‘as of right’ is without force, without secrecy and without permission⁸.
37. The Council were of the view that the use was by force and so the claim must fail. However, one person indicated that Mr Cadwaladr had given permission for the erection of a stile in around 1991/92, which I believe to be at point B. It was said that he recognised that ‘the path’ was well-used by walkers; she has shown the route B – P. Mrs Cadwaladr referred to the Council having tried to put in a stile, which was removed after request from the landowner. It is unclear whether this is the same stile but clarification may assist in determining whether use was ‘as of right’, by permission or by force. There is insufficient evidence of use to raise a presumption on this route and so, depending on the position of the stile, this may not be relevant to the Order made.
38. I do not understand the situation to be as referred to by the Council regarding *Redcar* as there is only one person indicating use after being told not to. The main point of contention on force appears to be in relation to fencing and available entrances. As I have noted in relation to the photographs, it may not be the case that the entrance points have been subject to use by force in the relevant period. However, this is a clear matter of conflict between the evidence of each side, which does need to be tested further.
39. The landowners indicate that the presence of livestock in earlier years, and subsequently crops such as maize and grass for silage, would have meant that the routes could not have been used. The owner of the land to the west indicates that he has continually repaired and replaced fencing, preventing use on his land.
40. If there is evidence to show that the landowner did not intend to dedicate a public right of way within the relevant twenty-year period then the statutory presumption can be overturned. However, actions taken since the use of the route was called into question are not relevant.

⁷ (QBD)[2001] EWHC 510 (Ch)

⁸ *nec vi, nec clam, nec precario*

The conflict of evidence

41. To meet Test B, it is necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. I consider that reasonably accepting the evidence of the applicant there is sufficient evidence to raise a presumption of dedication of public rights of way in the period 1993 – 2013 in relation to some of the claimed routes. However, the Council and landowners raise reasonable questions as to whether such use has been by force and whether there have been actions taken sufficient to show a lack of intention to dedicate within that period.
42. *Emery* indicates that where there is conflicting evidence, which could only be tested or evaluated by cross-examination, an Order would seem likely to be appropriate. In my view, there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist. As a result, a reasonable allegation has been made. The making of an Order leaves both the applicant and objectors with the ability to object under Schedule 15. At that stage the conflicting evidence can be heard and those issues determined.

Common Law

43. Having determined the matter in relation to the statute for some of the routes there remain sections over which it has not been shown that a presumption of dedication arises. In relation to common law there is no minimum time of use to support the acceptance by the public of a dedication, either expressly or impliedly. There is some evidence suggestive of dedication, for example, the surfacing works on the section N – P, the suggestion that the landowner agreed to erection of a stile at point B and aerial photographs which, in a snapshot in time, suggest public use of certain defined lines.
44. At common law the onus lies on the applicant to demonstrate the intention of the landowner. In this case I am not satisfied that there is sufficient evidence to support a dedication at common law on any of the remaining routes. As a result, I do not intend to direct the Council to include them in any Order made.

Other Matters

45. I cannot take account of arguments as to the usefulness, or otherwise, of routes on this land; or, the potential effect of recording a right of way on the farming businesses. Whilst I understand that these matters may be of prime importance to the parties I have not considered them in relation to this decision.

Conclusion

46. 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

47. The appeal is allowed in part and Cheshire West & Chester Council are directed to make an Order, or Orders, to record on the Definitive Map and Statement the routes K – L, L – A/A2, A/A2 – E, E – H, H – M, and M – G, as shown in the Plan M0558.

Heidi Cruickshank

Inspector