



# Appeal Decision

**by Alison Lea MA (Cantab) Solicitor**

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

Decision date: 17 July 2017

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## Appeal Ref: FPS/B3600/14A/4

- This Appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Surrey County Council not to make an order under Section 53(2) of that Act.
- The Application made on 26 March 2013 was refused by Surrey County Council on 13 March 2017.
- The Appellant claims that the appeal route should be added to the definitive map and statement for the area as a public footpath.

## Summary of Decision: The appeal is allowed

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### 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 to the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.
3. The appeal relates to a route which runs from Chertsey Lane between Nos 119A and 121, Chertsey Lane, Egham, Surrey to the River Thames where it terminates (the Claimed Route). The land over which the Claimed Route runs (the Appeal Land) is owned by Surrey County Council, who, in 1999, granted a licence to the owners of No 119A Chertsey Lane to fence off and use the land as a private garden.

### The Main Issues

4. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered 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 in the area to which the map relates.
5. As set out in the case of *R v SSE ex parte Mrs J Norton and Mr R Bagshaw (1994) 68 P & CR 402 (Bagshaw)* there are 2 tests and an Order should be made where either test is met:

Test A: Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

6. Section 31 of the Highways Act 1980 (the 1980 Act) 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 deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

## **Reasons**

### **Documentary Evidence**

#### *Commercial and Ordnance Survey Maps*

7. The Claimed Route is not visible on any of the pre 1800 maps provided. The map produced by Colonel Mudge in 1816 appears to show Chertsey Lane linking to the Thames in approximately the position of the Claimed Route and Greenwood's map of 1823 shows a clear spur from Chertsey Lane to the Thames. The pecked boundary line also visible on the map suggests that the spur is in the location of the Claimed Route.
8. An Ordnance Survey (OS) drawing of 1804 appears to show a short spur leaving Chertsey Lane to the Thames in approximately the position of the Claimed Route. The earliest OS map provided is an extract dated 1888 and annotated "surveyed in 1865, 1869 and 1870". It shows a strip of land between Chertsey Lane and the riverbank in the location of the Claimed route, marked with the abbreviation "Und" (undefined). A circular enclosure is shown within the land. The map also shows a road on the opposite bank of the Thames which could suggest that there was a crossing at this point.
9. The 1914 OS map shows the Claimed Route separated from Chertsey Lane by pecked lines and the 1934 and 1939 maps show enclosed plots and properties to either side. Ferry Avenue is marked to the south-west of the Claimed Route, the naming of which may suggest access to a ferry crossing. The 1964 OS map indicates that posts have been placed at the western edge of the Claimed Route. At the eastern end there is an unmarked feature shown adjacent to the river.
10. OS maps are generally regarded as an accurate guide to what existed on the ground at the time they were surveyed. It appears from them, and supported by Greenwood's Map, that there has been an access from Chertsey Lane to the River Thames in the location of the Claimed Route since the 19<sup>th</sup> century. However, OS maps specifically did not indicate the status of routes in so far as public rights are concerned.

### *Thorpe Inclosure Award Map 1813*

11. The Thorpe Inclosure Award Map 1813 shows a route branching from Chertsey Lane leading to the river. It appears to be in the position of the Claimed Route and is shaded in the same way as Chertsey Lane. On the basis of the limited documentation produced there is nothing to suggest that the Award created the route. It is therefore likely that it existed prior to the making of the Award and had the same status as the route from which it branched.

### *Thorpe Tithe Award Map 1840*

12. Tithe documents were drawn up under statutory procedures laid down in the Tithe Commutation Act 1836. They had the sole purpose of identifying titheable or productive land and were not produced to identify public rights of way. However, they can sometimes be helpful in determining the existence and status of routes.
13. The Thorpe Tithe Award Map is similar to the Inclosure Award map, showing a route branching from Chertsey Lane towards the river. It is indistinguishable from Chertsey Lane suggesting that it had the same status as that lane.

### *Finance Act 1910*

14. Under the Finance (1909-1910) Act 1910 (the Finance Act) all land in England and Wales was valued. The boundaries of taxable parcels of land, called hereditaments, were shown on large scale OS maps. The value of a hereditament could be reduced if the landowner admitted to the presence of a right of way across it, and if so, this was recorded in the appropriate valuation and Field Books. In general, routes known to be public vehicular roads were excluded from the hereditaments and left uncoloured.
15. The Claimed Route is not apparent on the Finance Act plan provided. Part of the Appeal Land is shown within hereditament 163 and part is within an area of uncoloured land fronting the river. No deductions for public rights of way are shown in relation to hereditament 163. From the limited extracts provided to me there is nothing to suggest that at the time of the valuation there was a public right of way in the location of the Claimed Route.

### *Thames Conservancy Board records*

16. Thames Conservancy Board minutes dated 10 January 1921 refer to a piece of land belonging to the Conservators "immediately above Plot No 1" which "could be rendered available as a landing place for the public". It was resolved that "the land shown above plot No 1 be made available and reserved for use by the public". No plan is attached but a later plan annotated with various dates in 1925 shows an area annotated as Plot 1 (the 1925 Plan). There is no bounded plot other than the Appeal Land shown "above Plot No 1".
17. Handwritten minutes of 12 October 1925, which are stated to be minutes of the Thames Conservancy Committee, record a request being made to establish or licence a ferry across the river at the upper end of Truss's island. The request was declined on the grounds of absence of general demand for a ferry. The minutes also record a resolution to erect posts "to prevent the public right of way at the upper end of the Eyot to Chertsey Lane being used by vehicles". The 1925 Plan shows the Claimed Route marked "Right of way" and is annotated

“W.S.W ordered to erect 4 No posts at entrance to right of way..... Posts placed in position W.S.W 20.11 25”.

18. An extract of a document headed “Works, Navigation and Regulation of Water Committee” and hand annotated “12 March 1934” contains a resolution that a report of the Committee of the 12 February be received. It records that the Committee has “given authority for protective works to be carried out to the frontage of the public landing owned by the Conservators above Truss’s Eyot, Staines, at an estimated cost of £200 which can be met from the amount allocated to tow-paths and river banks for the current year”. Given that the 1925 minutes refer to “the Eyot to Chertsey Lane” in relation to the right of way it is likely that the reference to a public landing above Truss’s Eyot is on the Appeal Land. It could however be a reference to a landing stage slightly to the south.
19. Under a conveyance dated 25 March 1963 various plots of land fronting the river at Truss’s Island were conveyed to the Council with the intention that after 14 years all buildings would be removed and the land would be laid out as open space. The plan provided is similar to the 1925 Plan and it is unclear whether Plot No 1 as described included the Appeal Land. However, the Council has confirmed that it acquired the Appeal Land pursuant to that conveyance. The Environment Agency (EA), as successor to the Thames Conservancy, state in a letter dated 9 July 2002 to the Council, that the land was conveyed cheaply for the purpose of laying out open space for public access to the river and the Council refers to the Appeal Land as having been required as part of a since abandoned “Windows on the River” policy which aimed to prevent development and provide an attractive area adjoining the River Thames to which the public should have access.

#### *Definitive Map*

20. No public rights are recorded on the Definitive Map or in the Definitive Statement. The Claimed Route does not appear on any earlier versions of the Definitive Map dating back to 1952 including the draft map and the Council states that it has not been put forward previously for inclusion on any of these maps. The Claimed Route does not appear on the map prepared under the 1932 Rights of Way Act by Egham Urban District Council in 1938.

#### *Licence of land for use as private garden*

21. In 1996 purchasers of No 119A Chertsey Lane inquired if they could purchase the Appeal Land. The Council stated that a sale into private occupation would require the agreement of the National Rivers Authority (now the EA) as statutory successors to the Conservators and reported that the National Rivers Authority had requested that the Council retain the land as open space. A licence to occupy was proposed.
22. A Council internal memo from Estates Strategy to the Rights of Way Division dated 28 October 1998 states “I have checked that there is no definitive footpath through this land, but in view of the Old Ferry Crossing, can you please comment as to whether there is an established right of way from the river bank to Chertsey Lane across this land. Subject to your views, my recommendation would be to grant a licence, pointing out that to fence across the frontage may prompt a claimed right of way which would have to be

investigated and could result in a right being established". No definitive response was received.

23. In 1999 a Private Garden Licence was granted. The copies provided are incomplete but it appears that the licence allowed for the Appeal Land to be fenced and was renewable annually.
24. A letter from the EA dated 9 July 2002 states that the EA is concerned that "this public landing place has been obstructed at its westward end by garden fencing panels preventing access from Chertsey Lane". The EA refer to the Thames Conservancy minutes with regard to dedication of the public landing and repairs to it and states that "the ferry is understood to have crossed the river to Wheatsheaf Lane on the opposite bank". The letter asks the Council to require the fencing panels to be removed "so as to recognise the public landing and right of way established by dedication". A letter dated 30 June 2003 from the Council reassures the EA that the Council is continuing to look into the matter. No further relevant correspondence has been provided.
25. In 2004 the land was declared surplus to requirements by the Council.

### **Evidence of Use**

26. In a letter dated 25 August 1998 from Bruton Knowles (acting as agents for the Council) to the Council the site is described as over grown with a well-worn footpath to the riverbank. The owner of No 119A is reported at stating that the land was frequented by young people who congregated in the area to smoke and was used by an individual who occasionally crossed the river and moored his boat by the bank.
27. On 14 April 2011 the Surrey Herald contained a report from the River Users Group, a forum designed to keep river users up to date with developments affecting the river. It referred to public access to a "historic public landing place" being prevented by fencing next to a property in Chertsey Lane and asked if anyone remembered people using the landing. A response was received from a retired butcher who has subsequently written in support of the appeal. He states that during the 1990s he kept a dinghy at "the Thorpe public landing place situated between 119a and 121 Chertsey Lane and used the dinghy to ferry myself and my bike directly across the river to the public landing steps at the bottom of Wheatsheaf Lane". He states that he did this journey to and from his shop on a daily basis, 6 days a week except for holidays and sickness. When the land was fenced off and access prevented he contacted the Council and was invited to submit an application to claim a right of way, but he did not do so.
28. No other user evidence has been provided.

### **Conclusions on the evidence**

29. The OS and some earlier commercial maps suggest that a route to the river existed on the ground in the location of the Claimed Route since during the 19<sup>th</sup> century. The Inclosure Award Map and Tithe Map are consistent with this and suggest that the route had the same status as Chertsey Lane. The Finance Act documentation provided does not support the existence of a public right of way or indeed of a physical route on the ground. This is not however conclusive evidence that no right of way existed, as there was no requirement to admit to the presence of a right of way or to claim any deduction for it.

30. The minutes of the Thames Conservancy Council (TCC) refer to a public landing stage and the minute of 1925 clearly refers to a public right of way. The fact that posts were introduced at the "entrance to the right of way" to prevent vehicular access is strong evidence that the TCC, who owned the land, considered that there was a public footpath along the Claimed Route at that time.
31. It appears that no route was claimed in this location when the first definitive map was prepared. However the fact that the route has never appeared on the definitive map does not mean that it does not exist. The Council refers to the there being "no single piece of evidence" which demonstrates the status of the route conclusively. I agree that there is not. However, that is not the test to be applied to the evidence and I have set out the relevant tests in paragraphs 4-6 of this decision.
32. No-one has suggested that the user evidence available is sufficient to support a claim based on use, either under Section 31 of the 1980 Act or at common law and I agree. However, the minutes of the TCC are strong evidence in favour of this claim and the Inclosure and Tithe Award maps are consistent with this. There is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist and accordingly Test B as set out above is met.

### **Other matters**

33. Reference has been made to anti-social behaviour and vandalism occurring prior to the Appeal Land being fenced off. However, the occurrence of such matters is not relevant to consideration of whether a public right of way exists.
34. It is also stated that the Claimed Route is not needed as there are several landing stages nearby to meet the needs of the legitimate public. However, need is not a relevant consideration in determining this appeal.

### **Conclusion**

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

### **Formal Decision**

36. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Surrey County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify its Definitive Map and Statement by adding the Claimed Route as a footpath. This decision is made without prejudice to any decisions that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Alison Lea*

**Inspector**