



Order Decision

Inquiry opened on 2 October 2018

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 08 November 2018

Order Ref: ROW/3192264

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as Wiltshire Council Parish of Whiteparish Path No. 41 Rights of Way Modification Order 2017.
- The Order is dated 8 May 2017 and proposes to record a public footpath in the Parish of Whiteparish. Full details of the route is given in the Order plan and described in the Order Schedule.
- There were four objections and representations outstanding at the commencement of the Inquiry.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. As noted by Wiltshire Council, the order-making authority ("the OMA"), the applicants for the Order failed to serve notice on the shooting syndicate, who have been operating since at least 1952 and have rights over this land. I consider that the OMA were correct in their assessment that the failure to serve notice was not fatal to the application. The landowner had notified the syndicate and involved them in his response to the application and the Order itself. As a result, I am satisfied that no prejudice has arisen.

Procedural Matters

2. On 27 October 2016 an application was made to the OMA under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), to add a footpath to the Definitive Map and Statement ("the DMS") for the area. The OMA were satisfied that an Order should be made to record the route and support confirmation.
3. I made an unaccompanied site inspection on 1 October 2018 and opened a Public Inquiry into the Order at the Whiteparish Memorial Centre on 2 October, closing it on 3 October. No one requested an accompanied site visit following the close of the Inquiry.
4. Judgments referred to in closing were not submitted in hard copy during the Inquiry, as would normally be expected. The relevant documents were submitted electronically¹.

Main issues

5. The Order is made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c), which states that an Order should be made to modify the DMS on the

¹ Inquiry Document number 24

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."

6. The OMA relied on the statute, section 31 of the Highways Act 1980 ("the 1980 Act"). The sub-sections of particular relevance are set out below:

(1) 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.

(2) 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 such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(a) 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

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway...

...

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land [...], and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, declarations in valid form made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

(i) within the relevant number of years from the date of the deposit, or

(ii) within the relevant number of years from the date on which any previous declaration was last lodged under this section.

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodging of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(6A) Where the land is in England—

- (a) a map deposited under subsection (6)(a) and a statement deposited under subsection (6)(b) must be in the prescribed form,*
- (b) a declaration is in valid form for the purposes of subsection (6) if it is in the prescribed form, and*
- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 20 years.*

...

(7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) , (6), (6C) and (13) "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsections (6), (6C) and (13)) is situated or, where the way or land is situated in the City, the Common Council.

7. Before a presumption of dedication can be inferred under the statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is brought into question. There was agreement that the date of a deposit made under section 31(6) of the 1980 Act was the appropriate date for this purpose.
8. To give rise to a presumption of dedication, it needs to be shown that there has been use, without interruption, as of right, that is without force, secrecy or permission, throughout the relevant twenty-year period. The main case for the landowner² was that the use had been by permission such that a presumption of dedication could not be shown, the use being 'by right' rather than 'as of right' as required. The case in support accepted that there was some evidence of permissive use but argued that the requirement for permission in general had not been adequately communicated to the users so as to negate the use.
9. If the statutory test fails then I need to consider whether there is evidence of dedication at common law.
10. I can only confirm the Order if I am satisfied, on the balance of probabilities, that a public right of way subsists.

Reasons

Background

11. The Order route runs near the western side of Mean Wood ("the woods") with recorded public footpaths, Footpaths 20 and 21, running generally east – west at the northern and southern ends of the claimed route respectively. Footpath 23 ("FP23") runs on the eastern edge of the field to the west of the woods, approximately parallel with the Order route and also connecting to the northern and southern footpaths.

² For personal reasons the landowner was not a statutory objector to the Order. Where I refer to 'the landowner' in this decision I am referring to the case made on his behalf, as an interested party

Section 31 of the Highways Act 1980

The relevant twenty-year period

12. Section 31(2) of the 1980 Act sets out that the period of twenty years 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. The application to record the route was made in 2016, following physical blocking of the route in 2015. However, it was common ground that the date of bringing into question related to a deposit made by the landowner under section 31(6) of the 1980 Act in 2012. This gives rise to the relevant twenty-year period of 1992 – 2012.

Evidence of use

13. The evidence of use arises from the user evidence forms (“UEFs”) submitted in connection with the application, letters, e-mails and evidence given directly to the Inquiry from both sides. There was discussion as to whether some UEFs referred to the Order route and there are a couple of instances where people showed use of only part of the route. However, taking account of drafting capability and the likelihood of there being another route within the woods in this vicinity, I am on balance satisfied that people were referring to the Order route. I have given appropriate weight to the use in part.
14. Within the relevant twenty-year period at least 38 – 66 people used the route in each year. The reported frequency of use varies from occasional, often in connection with viewing bluebells in the spring, to frequent, often walking dogs. As would be expected the frequency of use varies over time, perhaps walking more often when children were younger or once people had retired, less often having moved away from the area and only visiting family or friends infrequently. Although some use was infrequent, which the landowner referred to as ‘qualified’ use, I am satisfied, taking account of the use as a whole, that the use was of sufficient frequency throughout each of the relevant years to support the claim.
15. In addition to local people being aware of and using the route there was evidence of use by the wider public as recorded on certain internet walking sites within the latter part of the twenty-year period. This demonstrates a general public awareness of the route in later years, the use of which increased over time.
16. A statutory objector³ referred to the existence of FP23 running almost parallel to the Order route, saying it would be unlikely for there to be two routes so close together. Although this might be unusual as an historic dedication, it does not negate the evidence of use of the claimed route. The field to the west is in different ownership to the woods, with users indicating that the field edge route was often ploughed and cropped to the boundary, with brambles to the northern end. It appears that use was often difficult, if not impossible. In comparison it seems that the Order route was easy to use and some people clearly thought it to be the line of FP23.
17. Some of the use was associated with particular activities, for example the shoot, Brownies and church groups. The use includes some by members of the landowning family, who also used the route with horses at times.

³ Who had made an objection as the Chairman of the South Wiltshire Group of the Campaign to Protect Rural England but was speaking at the Inquiry as an individual

18. Although it was argued for the landowner that use was limited, particularly in the earlier part of the twenty-year period, I am satisfied that the frequency of use was sufficient in each of those years to support the claim. I am satisfied that the Order route was available and used throughout the period 1992 - 2012.

Use as of right

19. In order for the reported use to lead to a presumption of dedication it is necessary to look at matters relating to whether or not that use was 'as of right'. To be as of right the use must be without force, without secrecy and without permission. There was no claim of use by force or secrecy but there was an argument from Whiteparish Parish Council ("the Parish Council"), as a statutory objector, and the landowner that this was well known as a permissive route and, therefore, use was 'by right' rather than 'as of right', as required by the statute.

Permission

20. Whilst I understand the query of the OMA as to how the Parish Council, as a corporate body, could know that the route was permissive without evidence from records, such as the Parish Council minutes, I accept that the current Parish Councillors were satisfied individually that they believed the route to be permissive. It was fairly agreed that the individuals who had attended a Parish Council meeting, and apparently accepted that the route was permissive, were not those involved in the application which led to this Order.
21. There was some discussion over the Parish Magazine entries, with one from 'Tony (The Street)' in March 2015 referring to the route as a '*permissible footpath*' whilst the April 2015 entry from the eventual applicants to the Order set out the requirements for applications to record rights of way. The applicants were unable to identify the author of the earlier article. I do not consider it can be said that the applicants had 'knowledge' that the route was permissive, which was ignored in making their application.
22. The landowner referred to the evidence of permissive use from a number of parties, which had been submitted to the OMA during their investigation of the claim. It was suggested that significant weight could be placed on this untested evidence, as these people had nothing to gain on a personal level. Although it might be for some that there would be no gain, a number of these statements were connected with the shoot and raised issues of concern to them, such as access to the woods by dogs. Not having been able to explore when or how their knowledge of permission arose I feel unable to place significant weight on these statements.
23. It was argued, by reference to *Taylor v Betterment Properties (Weymouth) Ltd, 2012*⁴ ("*Betterment*"), that the measures taken were sufficient to show that any use of the route was only by permission; the measures need not be failsafe but proportionate. I agree with the OMA that the reliance on this case is misplaced. Significantly, in *Betterment*, unlike here, notices had been displayed and in the overall circumstances of that case, under a different statutory regime, the landowner was found to have done enough to defeat the claimed use 'as of right'.
24. The leading case in rights of way referring to such matters is *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs, 2007*

⁴ [2012] EWCA Civ 250

("Godmanchester")⁵. In that case it was said that in "...the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885)⁶, to "disabuse [him]" of the notion that the way was a public highway...It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate...In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind...the objective acts must be perceptible by the relevant audience."

25. It was clear that a number of groups had permission, although in some cases I agree with the OMA that this appeared to relate to wider use of the land than simply walking on the Order route. Those who gave evidence to the Inquiry that their use was by permission were clearly walking with the blessing of the owner. For some people this was an express verbal permission but others believed there to be blanket permission, allowing them to walk the route. I agree with the OMA that use by some with permission does not negate use by others without it.
26. The landowner sought to show that a number of those putting in UEFs in support of the claim were walking with permission. I do not accept the arguments made, such as that knowledge of use by groups showed an awareness that this use, and by extension their own use, was by permission; or reference that the 'landowner was happy for people to walk there' demonstrates any knowledge of permission.
27. It was agreed that there had never been signs on the route indicating that use was permissive. The argument that the lack of a public footpath sign indicated that it was not a public footpath is of no assistance; the evidence was of an open route which looked like a continuation of the recorded public footpaths, particularly when approaching from the northern end and, as noted, some people thought that this was FP23. Even one of the objectors indicated that the landowners had shown a generosity of heart and completely failed to restrict in any way those who wished to walk through the woods for many years.
28. It was clear from the users speaking in support of the Order that there was no understanding of blanket permission given to everyone to walk the route; some clearly said that they would not have walked there without seeking permission had they thought it was required. If individuals do not understand that they have been given permission to use the route then any communication that the landowner may believe he has given has been ineffective. It was suggested that memory might affect whether people did or did not believe that they had permission; however, it is for the landowner to ensure, by acts from time to time, that people are aware of permission. I am not satisfied that the evidence supports this having occurred.
29. In such circumstances it is difficult to see how a landowner could expect people to know that they are walking with permission. I note the argument that the landowner being pleasant and exchanging greetings with users, not objecting to them being in the woods, would be as expected from a landowner who had given

⁵ [2007] UKHL 28

⁶ [1885] HL 378, 10 App Cas 378

permission for the public to use the path. However, this would not be behaviour that a reasonable user would understand to disabuse them of the notion that the way was a public highway. I am not satisfied that the evidence as a whole demonstrates that the intention that the route should be used only by permission was made clear to the relevant audience by way of objective acts which would be, or was, understood by the reasonable user.

30. I found the evidence that I heard generally credible and indicative of a not unusual situation in these cases, where the viewpoint of the individual affects the way in which they interpret the matter. As a result of the extensive evidence, given under cross-examination, I do not consider that it was shown to be the case that those who submitted evidence in support of the claim had walked with permission, either express or implied. As a result, I am not satisfied that the landowner has demonstrated this use to be 'qualified'.
31. I accept, as did the OMA, that there is a body of use by people who have used the route 'by right'. I also accept that the landowner may have believed that his intention was clear in this respect. However, taking account of the evidence as a whole, there is a significant amount of use which has not been shown to relate to permissive use. I consider, on the balance of probabilities, that the use 'as of right' was sufficient in quality and frequency to give rise to a presumption of dedication of a public right of way over the relevant twenty-year period.

Interruption

32. In addition to the use needing to be 'as of right' it must also be without interruption throughout the identified twenty-year period. To be an effective interruption there must be a positive and physical act interrupting the enjoyment of use and it must be, by or on behalf of, the landowner. Two matters were raised as showing interruption to the use.

Challenges

33. Although it was argued that there had been challenges to those using the route without permission I agree with the OMA that there is an inherent tension in the idea of blanket permission for anyone to use the route and the challenging of users. It was agreed by objector witnesses that it was not possible to know who had permission and who did not.
34. In relation to the landowners family the approach seemed consistent with the family generosity over the years, along the lines of '*can I help you, are you lost, do you know who owner is?*' The witness said that he would only speak to people he did not recognise, perhaps 2 or 3 people in total, as otherwise it was assumed that they were using the route under a general permission. Those he approached either had permission or were lost but he may have turned back a couple in around 2004. I agree with the OMA that this witness was not the landowner at the relevant time and the challenge is at odds with other objector witnesses who indicated that the permission was not restricted to a particular geographical area. On that basis it does not seem that any challenge to public use was with the authority of the landowner.
35. In relation to the shooting syndicate the evidence indicated that people were asked to keep dogs under control, particularly with regard to the field north-east of point B, where people would let their dogs run around. The main concern was the pheasant pens which were nearby, but if people were not causing an issue

then there was no need to speak to them. The only specific information relating to the Order route was when assistance was provided to a lost couple.

36. One person referred to having seen people with shotguns but not having been stopped from walking. The user evidence does not show that anyone was stopped from using the route prior to the erection of the barbed wire in 2015.
37. I do not consider that the evidence supports there having been an effective challenge to use of the Order route, giving rise to any interruption to the use.

Shooting

38. The argument was made that on shoot days the public were overtly excluded from the woods and, therefore, there was an interruption to use, with the users avoiding the area entirely.
39. Some users were unaware that there was a shoot in this area but I do not find this as surprising as suggested given that the main shooting areas were to the south and east. At most, the shoot would be in this area for five occasions in a season, 1 October to 1 February, with each drive lasting no more than half an hour. Only two of the drives, and occasionally a third, might impact on the claimed route. The only sign put up during shooting was to the south of the woods, directing visiting guns to the parking area, to the east of point B, with 'shooting in the area' on the other side, therefore only visible to people heading south, away from the woods.
40. One person said that she would have avoided the woods if she had heard shooting, as she had a gundog herself; however, as noted above, there was some use of the route when there were guns in the area. The shoot were aware of the need to take account of the recorded rights of way in the area, including FP23 running almost parallel to the claimed route. I understand that during drives the shoot organisers would stand at either end of the beaters line, keeping in touch with phones, starting and stopping the drive with whistles if anyone was in the area. This was supported by one user who shouted to let them know he was there, which stopped the guns.
41. I do not find the evidence demonstrates that the landowner, or anyone acting on his behalf, was actively excluding users from the area during periods of shooting, which may have demonstrated use by permission as referred to in *R v City of Sunderland ex parte Beresford, 2003*⁷. Some people may have avoided the woods for these very short periods of time, although I do not consider there to be strong evidence that this was the case. If it did occur then, at most, these individuals may have been acting with civility, courtesy and common sense as referred to in *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and another, 2010*⁸. The majority were simply unaware of the shooting and it had no effect on their use.
42. I do not consider that the evidence shows that it was the intention of the shoot to prevent use of the Order route or that it did in fact prevent such use. On the balance of probabilities, no effective interruption arose as a result of shooting activity in the area.

⁷ [2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160

⁸ [2010] UKSC 11

Conclusions

43. I am satisfied, on the balance of probabilities, that the evidence of use by the public, as of right and without interruption throughout the relevant twenty-year period, is sufficient to raise a presumption that the way has been dedicated as a public footpath.

Whether there is sufficient evidence of a lack of intention to dedicate a public right of way within the relevant twenty-year period (the proviso)

44. Being satisfied that the presumption of dedication arises I must consider whether there is sufficient evidence that the landowner did not intend to dedicate a public right of way within the relevant twenty-year period. If so, then the statutory presumption will be overturned. I agree that a single act of interruption on the part of the landowner will carry greater weight in relation to indicating the intention to dedicate than many acts of enjoyment. However, as already noted, that interruption must be effective, with the users respecting it and so demonstrating recognition of that intention.

45. I have already referred to the requirements set out in *Godmanchester* in relation to section 31(1) of the 1980 Act. I have also discussed the matters in relation to both permission and interruption which I have found insufficient to prevent the presumption of dedication from arising. Such minimal evidence of interruption to use by strangers of the route was not an overt act brought to the attention of the general users of the route and so insufficient to show a lack of intention. The users were unaware of it and continued in their use after that date as they had done beforehand.

46. I do not find that there is any other evidence sufficient to show a lack of intention to dedicate during the relevant twenty-year period and so satisfy the proviso. As such I do not consider that the presumption of dedication is overturned.

Conclusions

47. I accept that the landowner felt that he had done enough that his generosity in permitting use of the Order route by certain groups and individuals made it clear that all use was by permission. Unfortunately, that understanding was not adequately communicated to the general public and the continued acquiescence in their use over many years, without taking positive steps to demonstrate his intention in this regard, has led to the use being sufficient to raise the presumption that he did intend to dedicate a public right of way. There is insufficient evidence to show a lack of intention to dedicate the route in the relevant twenty-year period. As a result I consider, on the balance of probabilities that a public footpath has been shown to subsist over the route.

Documentary evidence

48. The statute relies upon evidence of use to show whether or not a presumption of dedication arises and so I have not found it necessary to consider other documentary evidence in detail. Nevertheless I agree with the OMA, as set out in their 2016 report, that there has been an indication of a route on some maps, in whole or part, in this approximate location for over one hundred years. It has more recently been shown in photographs both online and handed in to the Inquiry. Whilst the existence of a physical route does not necessarily assist with determining status it does support the reported use of an available route.

49. There is nothing within the documentary evidence to indicate that the route could not be presumed to be dedicated as a public right of way within the relevant period. Being satisfied that the case has been shown under the statute I have not found it necessary to consider the case at common law.

Alignment

50. There was some information about minor changes to the route over time in connection with fallen trees. I agree with the OMA that any such changes do not appear to have amounted to alteration of the route and the landowner does not dispute its existence. There was also some evidence that people parked to the north of the route, near the mast off Ashmore Lane, and walked from there to the route in question. The evidence is insufficient to suggest that a public right of way subsists to the north-west of point A.

Other matters

51. The law does not allow me to consider such matters as the desirability or otherwise of the route; whether the recording of it would affect the viability of the shoot; disturbance of fauna or flora; or concerns that confirmation of this Order may lead to the closure of permissive routes elsewhere.

52. I would also note that I am unable to take account of the issues raised in relation to the manner in which the Parish Council, or individual Councillors, were perceived to have acted. As I have already mentioned, people will have come to this issue with their own understanding and beliefs and my decision has been taken on the evidence as a whole, on the balance of probabilities.

Conclusions

53. Considering the evidence as a whole I am satisfied, on the balance of probabilities, that the Order route should be recorded as a public footpath. The way has been used by the public as of right and without interruption in the twenty-year period 1992 – 2012 and there is insufficient evidence of a lack of intention to dedicate a public right of way on the part of any landowner during that period.

54. Having regard to these and all other matters raised at the Inquiry, and in the written representations, I conclude that the Order should be confirmed.

Formal Decision

55. I have confirmed the Order.

Heidi Cruickshank

Inspector

In Objection to the Order:

Dr P Claydon

Mr T King *on behalf of* himself and Whiteparish Parish Council

Mr A Minhinick Burgess Salmon *on behalf of* Mr B Newman
who called:

 Mr A Newman

 Mr M Barrett

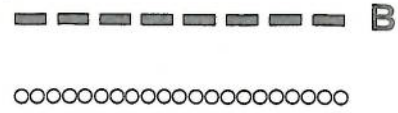
Cllr L Randall

Mrs H Randall

INQUIRY DOCUMENTS

- 1 The Order
- 2 Documentary evidence
- 3 Closing submissions on behalf of the OMA, with attachments
- 4 Statement from Christopher John Baker
- 5 Statement of use, Revd Marion Clutterbuck
- 6 Statement, Summer de Graffham
- 7 Statement, Margaret Down, with attachments
- 8 Statement of use, Jay Greene
- 9 Statement, Jenny Harrison, with attachments
- 10 Statement, Sheila Harrison-King
- 11 Statement, Diane Herrett
- 12 Statement, Keith Hobbs
- 13 Statement, Alec Knight
- 14 Statement by Mrs Jane Lax, with attachments
- 15 Statement, Mr J Puttock
- 16 Statement, John Sillence
- 17 Statement, Paul Witcher
- 18 Statement, Pat Woodruffe
- 19 Statements and correspondence presented in support of the Order
- 20 Statement, Peter Claydon, with attachments
- 21 Burges Salmon, Opening Statement on behalf of the Newmans
- 22 Burges Salmon, Summary of documentary evidence
- 23 Burges Salmon, Closing Statement for the Newmans
- 24 Attachments to closings, submitted by email

Whiteparish 41 Order Plan
Footpath to be added A
Existing public footpaths
on definitive map



MAP NOT TO ORIGINAL SCALE

