
Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 05 December 2018

Appeal Refs: FPS/W0340/14A/5 and 6

- These appeals, both dated 13 June 2018, are made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of West Berkshire District Council ('the Council') not to make Orders under 53(2) of that Act.
- Both applications, made on 22 February 2017, were refused by the Council and the applicant was notified by letter dated 25 May 2018.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the appeal routes as Public Footpaths.

Summary of Decision: The appeals are allowed.

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 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. Submissions have been made by the appellant (Mr Jon Szegota) and by West Berkshire District Council ('the Council'). A statement has been submitted by Antoinette Westall on behalf of the present landowners, represented by Forsters LLP.
4. The Council distinguished between the two applications by referring to one as the forked route across Saltney Mead, and the other as the forked route west of Springs Farm. In this decision I refer to the Saltney Mead appeal as Appeal A, and the Springs Farm appeal as Appeal B.

The Main Issues

5. The applications were made under Section 53(2) of the 1981 Act which requires surveying authorities to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
 6. Section 53(3)(b) of the 1981 Act provides that one of those events is the expiration of a period of time during which there has been enjoyment of the route by the public sufficient to raise a presumption that the way has been dedicated as a public path.
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7. Another event is set out in Section 53(3)(c)(i) of the 1981 Act which provides that an order to modify the DMS 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* [1994] 68 P & CR 402, and upheld in *R v. Secretary of State for Wales ex parte Gordon Michael Emery* [1997] EWCA Civ 2064:
- Test A: Does a right of way subsist on the balance of probabilities?
 - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

8. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to so dedicate during that period. 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.
9. It is also open to me to consider whether dedication of the way as a highway could have taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way could be shown to have occurred expressly or, alternatively, whether dedication could be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.
10. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances.
11. I must also have regard to advice and guidance issued by the Department for Environment, Food and Rural Affairs ('Defra') and judgements of the courts.
12. The principal issue in both these appeals is whether or not the Council was correct to conclude that the interruption to use which occurred during the Foot and Mouth outbreak in 2001 prevented the statutory dedication of public footpaths.

Reasons

Description of Appeal A route

13. This is a forked route linking public footpaths Purley-on-Thames 7 and 8 by running generally south-eastwards and then east-north-easterly from the eastern end of Pangbourne Meadow, across Saltney Mead, and then turning to the south-east again to go over a bridge spanning the Sulham Brook (E-C2-C1-C). A spur runs north-west from C2 to meet the riverside path (Purley-on-Thames 8) at Point F. A map of this route is attached to this decision as Appendix 1.

Description of Appeal B route

14. This is also a forked route. It commences on Purley-on-Thames footpath 1 and runs in a northerly direction alongside a boundary fence to Point A1 where it turns west and runs along a former track to Point B. A fork diverges short of Point B, at Point A2, and runs north-west to Point C, where it meets Purley-on-Thames footpath 7 and the termination of the path described above. A map of this route is attached to this decision as Appendix 2.

Background

15. Both applications were supported by completed user evidence forms, and other user evidence was submitted during the Council's investigation. The Council's decision report contains detailed information about the evidence investigated and relied upon in reaching its decision including the user evidence forms; further information sought by the Council from user witnesses; information and witness statements received on behalf of the landowners; and a variety of historical and documentary evidence. The evidence from the landowners included statements from two previous tenants of the land, and from the current owner and his site manager. A statement was also made by Antoinette Westall, who was the Administrator and Estate Manager from 1989 to 2014. Following the appeal, and having had sight of the appeal submission from the Council, Ms Westall made a further witness statement to address the issue of the period of Foot and Mouth Disease ('FMD').
16. Mr Szegota does not dispute the findings for the most part, but bases his appeal on the conclusion by the Council to refuse his applications on the basis of the interruption to the period of 20 year's use caused by the temporary legal closure of land and footpaths due to the outbreak of FMD in 2001.

Historical and Documentary Evidence

Mapping

17. The Council's decision report contains a detailed summary of the historical and documentary evidence that has been examined, including maps and aerial photography. These demonstrate that, for the most part, the claimed routes have developed relatively recently.
18. In the case of **Appeal A**, no part of the claimed route is shown on any Ordnance Survey ('OS') mapping and aerial photography suggests that the usage has arisen over time, commencing during the last 25 years or so of the 20th century.

19. In the case of **Appeal B**, part of the claimed route is a long standing farm track (A1-A2-B on the map at Appendix 2 to this decision) and has been shown on OS maps since at least 1879. The aerial photography suggests that the remainder of the route appears to have come into being relatively recently, since about 1991.
20. The Council concluded that the historical documentary evidence did not demonstrate that public rights of way existed and the appellant has not disagreed with their findings. I agree with the investigating officer's conclusion. Nevertheless, there is nothing in the historical evidence which renders it impossible for public rights of way to have been dedicated, although none of the documentary sources provides evidence of express dedication. It is necessary to examine the evidence of use.

Statutory Dedication: Section 31 of the 1980 Act

Appeal A

21. The Council considers that the right of the public to use the claimed route was brought into question in December 2016 when the route was blocked by security fencing at Point C/C1. The appropriate statutory period during which to examine the evidence is therefore the 20 years dating back from December 2016. The investigating officer concluded that the user evidence and the aerial photographs combined to indicate that the public appeared to have used the route during that period.
22. The Council considered that there was conflicting evidence as to whether that use had been as of right (i.e. whether or not it had been exercised openly, without force and without permission) but that there was no incontrovertible evidence to support the assertion on behalf of the landowner that there had been a locked gate preventing use during part of that period and that any use had therefore been exercised by force.
23. In terms of the actions of the landowner, the investigating officer reported that although the deposit of a statement has been made with the Council under the provisions of Section 31(6) of the 1980 Act, this did not affect the relevant 20 year period as it was made in February 2017. Furthermore it does not come fully into effect in terms of demonstrating a lack of intention to dedicate a highway until the corresponding declaration is lodged with the Council by the landowner.
24. The report stated that, despite the conflicting evidence, if the matter were to be decided on this evidence alone, it would be reasonable to allege that the claimed route existed as there was no incontrovertible evidence that the use had not taken place as claimed. This would justify an order being made.
25. However, the investigating officer concluded that the interruption to use during the relevant 20 year period, caused by the closure of the land due to the FMD outbreak, was sufficient to mean that there had not been the necessary 20 years of uninterrupted use as of right by the public required for a deemed dedication of the way under the statutory provisions. There was also a suggestion that the use of the route, or parts of it, may have been interrupted by flooding. As a consequence the criteria for deemed dedication could not be met and the Council refused the application.

26. I agree with the view of the investigating officer set out in paragraph 24 above. However, I consider in paragraphs 31 onwards, in relation to both appeals, the issue of the interruption to use.

Appeal B

27. The Council considers that the right of the public to use the claimed route was brought into question in November/December 2016 when much of the route was ploughed up (A-A1-A2) and the route was blocked by security fencing at Point C. The appropriate statutory period during which to examine the evidence is therefore the 20 years dating back from November/December 2016. As with the claimed route in Appeal A, the investigating officer concluded that the user evidence forms, comments from path users and the aerial photographs all indicated that the public actually enjoyed the route as of right during that period.
28. The deposit of a statement and plan under Section 31(6), as mentioned above in paragraph 23, is similarly ineffective in demonstrating a lack of intention to dedicate and the Council's report highlights some inconsistencies between the statements submitted by the landowner's witnesses. There was no incontrovertible evidence to gainsay the evidence of use and therefore the investigating officer indicated that, if the evidence to this point were relied upon, there would be nothing to prevent an order being made.
29. However, as before, the investigating officer concluded that the interruption to use during the relevant 20 year period, caused by the closure of the land due to the FMD outbreak, was sufficient to mean that there had not been the necessary 20 years of uninterrupted use as of right by the public required for a deemed dedication of the way under the 1980 Act provisions, and the application was refused on that basis.
30. I do not disagree with the view of the investigating officer set out in paragraph 28 above, but it is now necessary to consider the question of the interruption to use, principally in relation to the outbreak of FMD but I also address the issue of flooding.

Whether there has been any interruption to the period of 20 years use of the claimed routes which are the subject of Appeals A and B

31. Since the principal reason for refusal to make an order was the same for both paths, I address this issue in respect of both Appeals.
32. It is a fact that between the end of February 2001 and the 1 June 2001 the land crossed by the routes which are the subject of both appeals was lawfully closed by an order made under the Foot and Mouth Disease Order 1983 (as amended). The evidence examined by the Council suggests that the formal notices advertising the closure were not removed from the land until 6th July, resulting in the land appearing to be closed for a further month or so. As a consequence of this issue being raised as part of the objection by the landowners to the application, the Council sought further information from those people who had provided evidence of use.
33. Some of the users did not recall the closure period at all, whilst other responded to say that they had not used any footpaths at all during that period because of the widespread closures affecting most, if not all, of the public rights of way in the area at that time. Still others said that they used

the routes notwithstanding, and never saw any notices. Nevertheless, it cannot be disputed that the closure order affected both appeal routes. It would have been necessary to use recorded public rights of way over lawfully closed land to reach both claimed routes.

34. The advice from Defra with regard to the effect of the FMD outbreak in 2001 on claims for public rights of way is set out in Rights of Way Advice Note 15, issued by the Planning Inspectorate in November 2012 (5th revision). It sets out the view of the Planning Inspectorate and Defra on the matter. Comparing and contrasting the situation with closure orders under other national powers, the view is expressed that it did not seem that the temporary cessation of use of ways solely because of the implementation of measures under the FMD Order 1983 could be classified as an 'interruption' under section 31(1) of the 1980 Act.
35. In November 2017, a judgement in the High Court was reached in the case of R (Roxlena Ltd) v Cumbria County Council and another¹ ('Roxlena'). The case concerned a judicial review of Cumbria County Council's decision to make an order to modify their Definitive Map and Statement to add a number of rights of way over land owned by Roxlena Ltd. In his judgement on the matter (which covered a number of issues) Mr Justice Kerr expressed his disagreement with the proposition contained in Advice Note 15, whilst concluding that it had not been incumbent upon Cumbria County Council to seek further evidence in relation to the period of FMD closures in their area. They were entitled, at the stage of deciding whether or not to make an order, to rely on the evidence provided by the user witnesses.²
36. The question of whether or not the actual interruption to user was sufficient to prevent the dedication of rights of way was not before the judge, and his opinion on the guidance is therefore *obiter dicta*.³ Nevertheless, the Council points out that, in considering this matter, other guidance issued by the Planning Inspectorate suggests that such remarks, although not legally binding, should normally be followed as they represent the view of a distinguished judge.⁴
37. *Obiter dicta* comments can be – and are – cited by barristers making legal arguments; but it has to be made clear that they are just that, and not a part of the judgement, and the weight they carry is just like any other argument deployed which is short of legal precedent (i.e. a binding judgement).
38. There can be arguments against taking such comments into account. The law consists of the legislation passed, together with any binding case law. That remains the case until there is further change by statute or judgement. If a future judgement was anticipated by acting upon the strength of *obiter dicta* comments, it would be getting ahead of the law as it stands and could be criticised for undermining legal certainty.
39. The guidance given in Advice Note 15 is still current and there is therefore a conflict of views on this matter. Given that, at this stage of the process, I only need to be satisfied that the requirements of the lesser test (Test B) are

¹ [2017] EWHC 2651 (Admin)

² Paragraphs 73 – 78

³ A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.

⁴ Paragraph 3.6 of the Planning Inspectorate Consistency Guidelines

met, this conflict is not one that I have to resolve. Until the matter has been determined by the courts there may be a conflict of views or opinion, but there is no incontrovertible evidence that the interruption to use caused by FMD closures is of a type which is relevant to the criteria set out in Section 31 of the 1980 Act.

40. With respect to the flooding of the claimed routes, their location is one on which occasional and seasonal flooding might be expected. It is quite possible for highways to be dedicated subject to a limitation accepted by the public. In this case, the inability or difficulty of using the paths for a few days or weeks could, in my view, fall into the category of a limitation and would not represent an interruption to use in the sense intended in Section 31 of the 1980 Act.
41. I therefore conclude that the interruption to use during the period of the FMD closure order is a matter open to argument and does not prevent the making of a modification order by the Council. Any interruption due to flooding may be considered to be a limitation to public's use of the ways concerned and, likewise, would not prevent the making of an order. Test B is satisfied.

Common Law dedication

42. Dedication at common law requires either that there be evidence of an express intention to dedicate a way as a highway, together with the acceptance of that dedication by the public; or alternatively, sufficient evidence from which it is possible to infer that a dedication must have taken place. Whilst user can be evidence that supports a dedication, it does not raise a presumption as such. The onus is on the person asserting that the right exists to show that the facts overall show that an inference can be drawn that there was an intention to dedicate a highway.
43. The investigating officer concluded that there was no evidence to support an inference of an express dedication of any the routes I have been considering. This finding has not been disputed by Mr Szegota and I have no reason to disagree with the Council's decision in this respect.

Conclusions on the evidence

44. I consider that there is some conflicting evidence and there are some legal points which are arguable either way. However, taking all the evidence together I consider that Test B is satisfied (see paragraph 7 above) and that it is reasonable to allege that a right of way exists over both of the claimed routes and that there is no incontrovertible evidence that it could not.

Conclusions

45. Having regard to these, and to all other relevant matters raised in the written representations I conclude that the appeals should be allowed.

Formal Decision

Appeal A

46. The appeal is allowed.

Appeal B

47. The appeal is allowed.

48. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Helen Slade

Inspector

APPENDIX 1



