



Appeal Decision

by **Mark Yates** BA(Hons) MIPROW

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

Decision date: 14 February 2020

Appeal Ref: FPS/C1245/14A/12

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of the Dorset Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 11 July 2011 was refused by the Council on 31 July 2019.
- The appellant claims that a footpath between Higher Holt Farm and Fuzzy Grounds, in the parish of Melbury Osmond ("the claimed route"), should be added to the definitive map and statement for the area.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. I have been directed 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 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.

Main Issues

3. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that *"a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist..."*.
4. In considering this issue there are two tests to be applied:
 - 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.

5. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as
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of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

6. Alternatively, an implication of dedication may be shown at common law if there is evidence from which it can be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.

Reasons

Statutory dedication

When the status of the claimed route was brought into question

7. A public inquiry was held in 1978 to consider a number of alleged rights of way as part of a special review. One of the alleged ways coincided with a section of the claimed route. It is apparent that some documentary evidence was considered and the agent for the landowner provided a statement to the inquiry outlining that the owner denied this way was a footpath. The Inspector's decision was to turn down the relevant route on the basis of the evidence available at that time.
8. The statement made on behalf of the landowner constituted a declaration of there being no acknowledged public rights over a proportion of the claimed route and could bring into question the status of the route. Further, there is no evidence of any substance to support an earlier dedication of a footpath over the claimed route. This matter is relevant to the determination of whether there was a subsequent twenty-year period available for the purpose of statutory dedication. Reference has been to the *Wild*¹ case in respect of this matter.
9. It is apparent from reading the *Wild* judgment that the way in question had also been considered at a public inquiry in 1978 and found to not be a right of way. A subsequent decision that was challenged had considered a twenty-year period for the purpose of statutory dedication prior to 1978. Whilst the evidence was not considered sufficient to satisfy the statutory test, the Inspector concluded that a footpath had been dedicated under common law for a period that post-dated 1978.
10. The *Wild* judgment may mean that a case reliant on common law dedication would fail in relation to the claimed route. However, the same cannot necessarily be said to apply in terms of statutory dedication, which was not a matter before the Court of Appeal. Statutory dedication requires a period of user of at least twenty years dating back from when use of the route was challenged. It does not matter if action was taken to challenge public use at some point in time earlier or later than the relevant period. I find support for this view in paragraph 21 of the *Paterson*² case.
11. I now turn to the other events that could have subsequently brought the status of the claimed route into question. The parties have made submissions regarding various documents tendered by the landowner under Section 31(6) of the 1980 Act. Section 31(6) states that:

¹ James Wild v Secretary of State for Environment, Food and Rural Affairs and another [2009] EWCA Civ 1406

² Brian Paterson v Secretary of State for Environment, Food and Rural Affairs and others [2010] EWHC 394 (Admin)

“An owner of land may at any time deposit with the appropriate council—

(a) a map of the land on a scale not less than 6 inches to 1 mile; 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, statutory declarations 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.”

12. A deposit was made by the landowner under Section 31(6) in 1995. At that time, the period for the lodging of a statutory declaration following a deposit was 6 years. However, no statutory declaration was submitted in connection with the 1995 deposit. This also applies to a deposit made in 1998. The landowner nonetheless views the 1995 deposit as being sufficient to bring the status of the claimed route into question. In support, reliance is placed on the Schedule 15 Decision of an Inspector³. The contrary view of the appellant relies on the recent Schedule 14 Decision of another Inspector⁴.
13. I am not in a position to know the extent of the submissions made in the respective cases. In reaching my view, I have had regard to the submissions made to me on this matter. Of particular relevance is the judgment involving the appeal to the House of Lords in the *Godmanchester*⁵ case.
14. Lord Hoffman states in paragraph 37 of the *Godmanchester* judgment that *“I do not say that all acts which count as negating an intention to dedicate would also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31 (5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we do not need to decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts”*.
15. The obiter dictum⁶ comments of Lord Hoffman are supportive of there being symmetry between acts that are sufficient to bring the status of the way into question and those that demonstrate a lack of intention to dedicate a way.

³ Planning Inspectorate Ref: ROW/3191249

⁴ Planning Inspectorate Ref: FPS/Y3940/14A/13

⁵ *Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28

⁶ An opinion given in the judgment that is not essential to the decision and therefore not legally binding as a precedent.

They are supportive of declarations made under Section 31(6) constituting such an act. Lord Hope of Craighead outlines at paragraph 53 of *Godmanchester* that a Section 31(6) deposit will demonstrate a lack of intention to dedicate if it is backed up by a statutory declaration.

16. It is clear that for a landowner to make use of the Section 31(6) provision in order to demonstrate a lack of intention to dedicate additional ways over their land they need to deposit a map and statement and within the required period lodge a statutory declaration. It is not enough to make only an initial deposit. In light of *Godmanchester*, it is unlikely that a deposit by itself will be sufficient to bring the status of the route into question. For the purpose of reaching a view at the Schedule 14 stage, I agree with the conclusions of the second Inspector on this matter. This means that the deposit alone would not have brought the status of the route into question.
17. A statutory declaration was lodged in connection with a Section 31(6) deposit made in 2007. It follows from the above that this would constitute an event that brought the status of the claimed route into question. This means that the relevant period for the purpose of statutory dedication ("the relevant period") should be taken to be 1987-2007. It is therefore not necessary to consider the later action taken to challenge use of the claimed route.

Public use of the claimed route

18. Ten user evidence forms ("UEFs") have been submitted in support of use of the claimed route. It is apparent that one of these users had permission to use the route. The landowner asserts that certain users were aware that the way was not public, use was less frequent than specified in the UEFs and some people did not actually use the route. Reference is also made to additional people having permission to use the route. In support, statements have been submitted by six people with knowledge of the estate.
19. Although the evidence reveals that the current track was constructed in around 1984, this does not necessarily mean that people were unable to previously use the claimed route. There is some evidence that is supportive of use prior to the construction of the track. It should also be borne in mind that this event pre-dates the onset of the relevant period and the provision of a track may have served to encourage or facilitate public use. Furthermore, a lack of observed use does not mean that the claimed use did not occur.
20. The UEFs provide evidence of use throughout the relevant period. There is evidence of use by between five and nine of the users during each year of this period. I note that the specified use is generally stated to have occurred on a regular basis. There is a clear conflict between the written submissions of the parties. Nonetheless, the user evidence is sufficient to reasonably allege that there was use during the relevant period to raise a presumption of the dedication of a footpath.

Whether the landowner demonstrated a lack of intention to dedicate a footpath

21. I have addressed the issue of statutory deposits above. In the absence of a statutory declaration, a deposit would not constitute a lack of intention to dedicate any additional public rights of way over the land in question. A tenancy agreement would also not be a sufficiently overt act to demonstrate a lack of intention to dedicate.

22. Reference is made to the erection of a locked gate to deter horse riders. However, there is no evidence to show that pedestrians were prevented from using the route by way of any structure. I note that the users refer to a gate or gates that were open or not locked.
23. There is evidence contained in the statements supplied by the landowner of challenges being issued to people seen on the claimed route. This evidence directly conflicts with the UEFs where none of the users' state that they were challenged. In terms of people being aware of challenges issued to other people, it cannot be determined when any such challenges occurred. Any event that occurred after 2007 would not be relevant in this case.

Conclusion

24. Having regard to the above, I find there to be a conflict of credible evidence and that an order should be made on the ground that a right of way can be reasonably alleged to subsist. I reach this conclusion on the basis of statutory dedication. This means there is no need for me to consider the user evidence in the context of common law dedication. However, the *Wild* judgment may mean that any reliance on common law dedication would not succeed.

Overall Conclusion

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

Formal Decision

26. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act the Dorset Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath over the route as proposed in the application dated 11 July 2011. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 to the 1981 Act.

Mark Yates

Inspector