The Planning Inspectorate

Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 11 May 2017

Appeal Ref: FPS/M1900/14A/7

- 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 Hertfordshire County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 23 July 2013 was refused by Hertfordshire County Council on 24 October 2016.
- 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

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 Wildlife and Countryside Act 1981 ('the 1981 Act').

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

3. The appeal concerns an application made by Aldenham Country Park Trust Ltd ('the Appellant') to add a public footpath at Aldenham Reservoir near Elstree running from Aldenham Footpath 52 and following the western and southern edges of the Reservoir to Elstree and Borehamwood Footpath 5, a distance of approximately 1815 metres. The appeal route is referred to in some of the submissions as the 'Lakeside Walk'. Liberty Lake Leisure Ltd ('the Landowner') is the freehold owner of the land.

4. New evidence and argument has been provided in the submissions further to that submitted with the application and considered by Hertfordshire County Council ('the Council') in reaching its decision not to make an Order. The parties have had an opportunity to comment on the additional submissions and I have taken into account all the evidence available to me in this decision.

Main issues

5. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).

6. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant

evidence available, shows 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.

As made clear in the High Court in the case of *Norton and Bagshaw*[1], this involves two tests:

Test A. Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities 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 the answer must be that it is reasonable to allege that one does subsist.

7. The case of *Emery*[2] approved *Norton and Bagshaw*, providing further clarification of the reasonably alleged test at the Schedule 14 stage. It held that where there is a conflict of apparently credible evidence, a public right of way is reasonably alleged to subsist if reasonably accepting the evidence of one side and reasonably rejecting that of the other, the right would be shown to exist.

8. The case of *Todd and Bradley*[3] clarified that, at the Schedule 14 stage and in reaching my decision, I need only be satisfied that the evidence meets test B. Therefore, if evidence has been discovered which shows that it is reasonable to make an allegation that a public right of way as claimed exists over the Appeal route, then an Order should be made.

9. In this case there is evidence of claimed use of the appeal route by the public, and some documentary evidence to consider. For the purposes of the appeal, the Appellant relies on claimed use by the public. The user evidence can be considered against the requirements of Section 31(1) of the Highways Act 1980 ('the 1980 Act') which 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 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"* and Section 31(2), that "*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 … or otherwise"*.

10. The question of dedication may also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, stealth or permission) however, there is no fixed period of use, and depending

[1] R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]
[2] R v Secretary of State for Wales ex parte Emery [1998]
[3] Todd and Bradley v Secretary of State for Environment, Food and Rural Affairs [2004]

on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

11. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

Reasons

Documentary evidence

12. Whilst some of the historical documentary sources researched by the Council show the existence of the Reservoir, none provides evidence as regards the existence or otherwise of the appeal route.

13. Aerial photographs dated between 1973 and 2010 provide supporting evidence of the physical existence of sections of the appeal route, although much of its course is obscured by woodland.

14. A 1974 lease between British Waterways Board, the then landowners, and the Council is relevant. It contains a clause that permits use of the property only for recreational purposes as part of Aldenham Country Park.

15. A letter dated 12 June 1992 from the Head of Countryside and Community (as tenant of land including the Reservoir) to the then owner states, "The general public has permissive access to much of the land surrounding the reservoir"; and an email dated 25 February 2015 from the Senior Rural Estate Officer at the Council (as tenant of land including the Reservoir) to the agent for the then owner states, "It is my view that users of the path around the reservoir have done so under the licence of the Country Park in conjunction with their use of the park". I consider the effect of these documents below.

Claimed use by the public

16. Some 41 user evidence forms were submitted with the application claiming use between 1963 and 2013 (the date of the application). Claimed use is predominantly on foot with 3 people referring to use also with a bicycle and one with a horse (for two years). Claimed use varies from weekly (14 people), to monthly (20 people) and annually (6 people). The majority describe use of the whole route and the remainder of parts of it.

17. A further 19 user evidence forms have since been submitted claiming use between 1936 and 2016 on foot and by 5 people with a bicycle. These claimants all provide evidence of use prior to the 1974 lease (paragraph 14). Of these, 6 people used it weekly, 12 monthly, and one person used it annually. Two people used part of the appeal route.

18. None of the 60 users were given or sought permission, nor were challenged whilst using the appeal route. Many refer to structures including a small wooden bridge in place from the 1960s until around 2002, though according to the Council not all the features described are on the appeal route: an obstruction when the dam was repaired in around 2000, for example, was not on the appeal route. Five claimants, whose use covers the period prior to

1974, refer to recreational activities in addition to walking, which took place on the land or the Reservoir.

19. About a third of users claim to have used the appeal route starting from and returning to the car park where they are required to pay a fee. It is arguable that their use is as part of the Country Park and thus by invitation or permissive. The vast majority of users describe a circular walk around the Reservoir. About a third refer to starting from Aldenham Road (although they do not specify whether they follow the public right of way, or the entrance to the Country Park), Watford Road or crossing fields to reach the appeal route (although it is not clear what route they are taking or what point they reach). This suggests that these users are passing and repassing along the appeal route having reached it by way of other public highways rather than using it as part of the Country Park.

20. Some people describe informative notices. These include signs indicating 'Lakeside Walk', and various other signs and information boards located on the land: signs of one sort or another having been present over a period of some 30 years. None refer to any signs indicating a contrary intention.

21. There does not appear to be an event that brought the public's right to use the appeal route into question. Accordingly, the date of the application itself would provide such a date giving a 20 year period of 1993 to 2013 for the purposes of Section 31 of the 1980 Act. It is possible that, having regard to *Godmanchester*[4], the terms of the lease which the Landowner argues is incontrovertible evidence of a lack of intention to dedicate, could act also as a bringing into question if overtly communicated to the public. This would give a 20 year period of 1954 to 1974. In the alternative, the use claimed prior to 1974 can be considered at common law.

22. The Landowner considers the total number of those claiming use of the appeal route is small given the locality, thus insufficient to satisfy the tests under Section 31 of the 1980 Act. They question some of the facts recalled by users, in particular by those claiming use in the earlier years, and the reliability of the position and extent of the path claimed. Further concerns are that the land was treed and subject to flooding; that the existence of a path is not mentioned in an article written in 1972 about rights of way in the area; and that plans for this period show insufficient room for a path between the water's edge and the road. Further, it is suggested that the appeal route does not connect to a highway, and accesses land that is private.

23. There is no requirement for a specific number of users to provide evidence. I note the appeal route is shown to connect to public highways, in this case existing public footpaths and Watford Road to the south. Further, many public rights of way cross private land. The other issues raised indicate that there is a conflict of credible evidence between that of the users and that presented by the Landowner and Council.

24. There is no evidence to show that the landowner (past or present) did not have the capacity to dedicate a public right of way over the land. By 1974, the date of the lease, claimed use by the public had been taking place over a period of

[4] R (oao) Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs and Cambridgeshire County Council [2007]

38 years, such that an intention to dedicate could be inferred, subject to that use being as of right.

25. The claimed use post 1974 does not appear to be challenged by the parties. However, it is argued that it is permissive.

Permissive use and lack of intention to dedicate

26. The Council and the Landowner regard use as permissive on the basis of the 1974 lease, and that this is supported by the correspondence from 1992 and 2015 (paragraphs 14 and 15). The Landowner maintains that as a consequence of leasing the land to the Council it was clearly communicated to the users of the land that it was under the control and management of the Council and not the freeholder, and following *Godmanchester*, this was an overt act. Further, that as a tenant, the Council had no capacity to dedicate a public right of way, and no consent to do so from the landowner.

27. The Council maintains that the terms of the lease clearly comprehended permissive recreational use by the public and that they used the appeal route subject to clear signage around the Reservoir and in the Country Park placing restrictions on their use. Such restrictions included opening times, the control of dogs and so forth. Several users refer to use of the car park to access the appeal route for which there is a charge. Collectively, the Council says, these indicate the public's use was permissive, and accordingly it was clearly communicated to users of the land that the land was under the control and management of the Council. Accordingly, applying the *Sunningwell*[5] judgement, as to whether user was 'as of right' by how the matter would have appeared to the owner of the land, would lead to the conclusion that a reasonable local authority would have regarded the presence of members of the public on the land, walking with or without dogs, taking part in sports or letting their children play, as being pursuant to a publicly based licence to be on the land (in this case further to its lease). Thus, while the public would not have been exercising a statutory right to be on the land and to use it for these activities, they would nevertheless have been exercising a permissive right to do so given that the appeal route formed part of a wider area being held and maintained by the Council for recreational purposes.

28. The Council cites the case of *Barkas*[6]. It concerned a village green application about land held by the local authority for recreational purposes pursuant to a statutory power. By reference to that power, it was held that the public's use was by right rather than as of right. However, both this case and *Newhaven*[7], another village green case cited in which the land was held by reference to statute, differ to the present case as no statutory power applies to the land: there is only the 1974 lease which referred to use for recreational purposes as part of the Country Park.

29. The case of *Naylor*[8] is also cited. Similarly, it concerns a village green, but is similar to the present circumstances whereby a local authority managed private land on behalf of a private entity, although in that case there was no lease. It held that permission to use the land must be communicated, but that communication may be inferred from conduct, thus, the Council argues in the

[5] R v Oxfordshire County Council and others ex parte Sunningwell Parish Council [1999]
[6] R (oao) Barkas v North Yorkshire County Council and another [2014]
[7] Newhaven Port and Properties v East Sussex County Council [2013]
[8] Naylor v Essex County Council [2014]

present case, constituting an overt act showing that the landowner had no intention to dedicate a public right of way. In *Naylor*, implied permission was held to have been sufficiently communicated by grass cutting and the erection of a dog waste bin.

30. Together with public footpaths to the north and east of the Reservoir, the appeal route forms a circular walk within the Country Park. It seems that the appeal route itself was established on the ground by the Council (as the tenant) when the Country Park was first set up in the early 1970s. Various notices in the Country Park describe the route, and these may be regarded as inviting the public to use it. Other signs request that children be supervised, dogs be kept under control and dog mess and litter be removed, and refer to the lighting of barbecues and fires. Further signs refer to car parking charges. Together, the signs are regarded by the Landowner and Council as indicative of a permissive right to use the appeal route whereby its use is regulated by strict controls regarding the public's behaviour. Further that such permission was revocable and therefore use was 'by right' rather than 'as of right'.

31. Whilst the Council's overall conduct in managing the Country Park, including signage, may be argued to imply use of the land is by right rather than as of right, there is no indication through them of the intention of the landowner. As the Applicant points out, none of the signs are inconsistent with the dedication of a public right of way. Indeed, many highways are subject to signage, for example regarding the control of dogs, but these are not inconsistent with dedication as a highway. The acquisition of a public right of way could be prevented by the use of appropriately worded signage or through a deposit and statutory declaration made by the landowner under Section 31(6) of the 1980 Act.

32. The Appellant points out that *Barkas* refers to the distinction to be made between private easements over land and public rights of way over land, and between the ways in which a public right of way can come into existence and the ways in which a town or village green comes into existence. The Applicant also refers to a decision[9] in which the Inspector considered a claimed right of way crossing land leased as a playing field and determined that use there between two highways amounted to use of a different character to use of the land itself for recreation. It is the case, however, that the circumstances in the present appeal are materially different. Here, for example, the terms of the lease are known.

33. The Appellant, however, maintains the lease does not establish incontrovertibly that the landowner had no intention to dedicate. Further there is no evidence that the lease was made known to the public and accordingly was not, itself, communicated to them. Indeed, the Council does not dispute that the lease and associated correspondence would not have been available to the public.

34. In *Fairey*[10] it was held that the landowner must make it known in an open and notorious fashion that use was by permission. *Godmanchester* held that overt acts by the landowner directed at users of the way are necessary to demonstrate a lack of intention to dedicate. There is nothing to suggest to me here that the landowner (or the tenant) overtly made known the terms of the lease to the public such that they would have been made aware that their use

[9] Planning Inspectorate reference FPS/Q2371/7/51
[10] Fairey v Southampton County Council [1956]

of the appeal route was permissive (or by right), or indeed that they (the landowner) had no intention to dedicate a public right of way.

Conclusions

35. There is no dispute between the parties that there has been actual enjoyment of the appeal route by the public such as to raise a presumption of dedication under Section 31 of the 1980 Act. Although it is argued that the 1974 lease is incontrovertible evidence that should defeat the claim for the 20 year period ending in 2013, the available evidence does not indicate that it, or the landowners' intention, was overtly communicated to the public. Further, and in any event, there is a body of credible user evidence capable of satisfying the common law requirements prior to 1974 (the date of the lease). There is a conflict of credible evidence between that adduced by the claimants and that adduced by the Landowner and Council, and no incontrovertible evidence. Accordingly, in my view, Test B is met and it is reasonable to allege that a right of way subsists. This is sufficient to justify the making of an order.

Conclusion

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

Formal Decision

37. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Hertfordshire County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the Hertfordshire County Council Definitive Map and Statement to add a public footpath as proposed in the application dated 23 July 2013. 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 of the 1981 Act.

S Doran

Inspector

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