
Appeal Decisions

by Peter Millman BA

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

Decision date: 30 September 2016

Appeal Ref: FPS/W2275/14A/16 (Appeal A)

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of Kent County Council not to make an Order under Section 53(2) of that Act.
- The Application, dated 28 August 2012, was refused by Kent County Council on 11 November 2015.
- The appellant, Mr N Jepps, claims that an Order should be made to add a footpath or bridleway to Kent County Council's Definitive Map and Statement along Linden Chase in Sevenoaks.

Summary of Decision: The Appeal is allowed to the extent set out in the formal decision below.

Appeal Ref: FPS/W2275/14A/17 (Appeal B)

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act against the decision of Kent County Council not to make an Order under Section 53(2) of that Act.
- The Application, dated 1 September 2012, was refused by Kent County Council on 11 November 2015.
- The appellant, Mr N Jepps, claims that an Order should be made to add a footpath running between Bradbourne Road and Linden Chase to Kent County Council's Definitive Map and Statement.

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 two appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.
2. I have not visited the site of the claimed rights of way but I am satisfied that I can make decisions without the need to do so.

Main issues – both appeals

3. Section 53(2)(b) of the 1981 Act gives surveying authorities (such as the County Council) the duty of making modification orders following certain events. The event in this case would be that described in Section 53(c)(i), *the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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...* The more specific event in
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relation to evidence of use of a way is set out in Section 53(3)(b), which is *the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.*

4. The event described in Section 53(3)(b) relates to the test in Section 31 of the Highways Act 1980, which reads as follows: *(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...*
5. For the statutory test to be satisfied, therefore, it must be shown that there is a way, and that it is of the appropriate character. The public must have used the way, and this use must have been as of right, i.e. neither by force, secretly, or by revocable permission, actual or implied. The use must have been without interruption, and in order to determine whether there has been use for a full period of 20 years, it must be decided when the right of the public to use the way was brought into question. Finally, if the other aspects of the test have been met, there must be consideration of whether there is sufficient evidence that during the 20 year period there was no intention on the part of the landowner that the way should be dedicated.
6. The test for 'subsists' is the balance of probabilities. The difference between the tests of 'subsists' and 'reasonably alleged to subsist' (paragraph 3 above) in cases based on user evidence was clarified in the case of *R v Secretary of State for Wales, ex parte Emery* [1998]. In his judgment Lord Justice Roch stated: *Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under Section 31 [of the Highways Act 1980], then the allegation that the right of way subsists is reasonable, and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.*
7. The County Council should therefore have made an order if it had discovered evidence, or had evidence presented to it, which showed that it was at least reasonable to make an allegation that public rights of way existed over one or both of the appeal routes.

Reasons

Appeal A

8. The appeal route runs along a private road called Linden Chase. This road first came into existence in or shortly before 1895; a conveyance of that year refers to it by name as a 'new road'. It is shown on the first map attached at the end of this decision.

9. The road has no known owner; it is not registered at the Land Registry but it is, according to the County Council, 'occupied' by Linden Chase Residents Ltd, and was previously by the Linden Chase Residents Association, who maintained it and the gates at either end of it. The County Council believes that the legal maxim *ad medium filum viae* applies, so that there is a rebuttable presumption (not rebutted in this case) that the adjoining owners own the soil of the road up to its mid-line. If the County Council is correct a considerable number of short lengths of the soil of Linden Chase will be owned by different people.
10. The County Council accepts that Linden Chase has been used on foot by a sufficient number of people to represent the public. Because there has been no direct 'bringing into question' of pedestrians' right to use it, the County Council has correctly taken the end of the 20 year period to be the date of the application for the order in 2012. The County Council does not consider that there has been sufficient evidence of use of the route as a bridleway to amount to use by the public. The appellant does not take issue with that view, stating that it was: *accepted that sufficient evidence may not have been presented to justify the claimed route being registered as a bridleway...* I agree that there is insufficient evidence of equestrian use. The County Council also argues that use would not have been 'as of right' (paragraphs 4 and 5 above) because it was by implied permission. The County Council also argues, although rather tentatively, that there might have been sufficient evidence of a lack of intention to dedicate a right of way to pedestrians on the part of the landowner (see paragraphs 4, 5 and 6 above).
11. I deal first with the 'as of right' argument. Use of a route which is 'as of right' is use which is *nec vi, nec clam, nec precario*; accepted judicial interpretations of the Latin phrase are 'peaceable, open, and not based on any licence from the owner of the land' or, as noted at paragraph 5, 'neither by force, secretly, or by revocable permission, actual or implied'. In this case there is no evidence that use was in secret or contentious; the County Council argues that it was *precario*, i.e. by the implied permission of the owner of the land.
12. Its argument, set out in paragraph 54 of the Delegated Authority Report, is as follows. *However, over the years, and certainly during the material period [i.e. 1992 to 2012] the barriers at each end of the claimed route have been closed and manned several times a year in order to prevent vehicular access [see paragraph 9 above]. It is clear that no pedestrian has ever been prevented from using the claimed route by these barriers and although the majority of the time the barriers are open and do not impact on the public's use, the Residents' Association members who man the barriers are exercising control over who they permit through at that time. Members of the public approaching the road and seeing the barrier closed, unless they were already aware of this matter, would likely assume that access was not possible. It would only become apparent that they would be allowed access if they went right up to the barrier and it was then opened to allow them passage. This constitutes an implied permission for certain groups of the public and therefore the requirement that use should be without permission is not satisfied in this case.*
13. There is no doubt that the law accepts that permission may be implied by conduct, but it must be the conduct of the owner of the land or someone acting on his or her behalf. The conduct must be such that it communicates to the public that its use of the route in question is by permission.

14. It is necessary at this point to return to the question of ownership (see paragraph 9 above). Who owns, or can be presumed to own, the soil (i.e. the land under) Linden Chase, and can it be said that the Residents' Association acts on the landowner's behalf? The Residents' Association had in 2004 a judge, John Colyer QC, among its members. He researched the question of the ownership of Linden Chase and concluded: *The common law presumption as to ownership by the freeholders on either side of the road cannot be relied upon as each and every title to such properties which is registered carefully limits the title to the 'fence line'. Contrast the position in Lyle Park and Pineneedle Lane [two neighbouring private roads] where- Lyle Park - each owner has title to the middle of the road. Pineneedle Lane - The titles to the properties exclude the roadway, but the roadway up to its junction with Linden Chase is comprised in a separate title vested in 'Pineneedle Management Co. Ltd'. Thus Pineneedle and Lyle Park demonstrate the two different ways by which in modern conveyancing the problem of who shall own the road is dealt with. In contrast, Linden Chase examples the earlier approach whereby a landowner laid out a road, retained title to it, and sold off plots on either side together with rights of way. That the original conveyances of frontage properties excluded the road is confirmed by the meticulous exclusion of the road from all registered titles. The Land Registry concur in this view.*
15. If the County Council is correct about the application of the *ad medium filum viae* presumption then the land under Linden Chase is in multiple ownerships. It has produced no evidence that the Residents' Association or Residents Ltd acts formally on behalf of all or any of the owners. If the appellant is correct and it is clearly established that the soil of the road was never conveyed when the houses were built and sold at the beginning of the 20th century, then it cannot be the case that the Residents' Association acts on behalf of the current unknown landowner.
16. The County Council seems to believe that this does not matter because, it states: *It is possible that the Association has no legal authority to prevent anyone using the claimed route by any means, but it has; it has been controlling that use. Therefore, as concluded in paragraph 54 of the delegated authority report, the claimed route has not "been actually enjoyed by the public as of right", irrespective of the assertion that the members of the Association are not owners of the road.* I do not understand that argument. It does not follow from the fact that an organization takes it upon itself to control access to a road which it does not own that it is entitled or is enabled to license use of that road.
17. I conclude that the Residents' Association (in its current incarnation) does not own the soil of Linden Chase and can therefore not license use of it. I conclude further that whether the soil of the road is owned by a number of adjoining landowners or some unknown landowner, the Residents' Association cannot be said to be acting on the owner's behalf in controlling use of the road.
18. Even if the Residents' Association were acting on behalf of the owner of Linden Chase, it does not seem to me that the opening of the gate or barrier to let pedestrians through could amount to an implied permission. There is no evidence to support what the County Council suggests would be the thought processes of pedestrians approaching one of the barriers when it was closed (paragraph 12 above). It might well appear to a disinterested observer of the scene that those manning the barriers and stopping any vehicles that

approached were simply acting out of politeness in opening them for pedestrians.

19. I now deal with the arguments as to whether there was sufficient evidence of an intention not to dedicate public rights during the period 1992 to 2012. The County Council stated, at paragraph 56 of its Delegated Authority Report: *In this case signs stating 'Private Road' have been in place at either end of the claimed route for many years and certainly during the material period. This does not show an intention not to dedicate the way as a public right of way (except possibly in a vehicle) by itself and could be considered to be more of an informative notice. However, the closing and manning of the barriers as described above shows, at the very least, an intention not to dedicate the way to vehicles and possibly to other users of the route.*
20. This rather tentative statement is repeated in the County Council's Statement of Case in relation to the appeal, which states, concerning the date at which pedestrian use might have been brought into question (paragraphs 4 and 5 above), that *there is no evidence that the use of the claimed route, other than in a vehicle, has ever been challenged in any way.* It is difficult to see, in this case, how actions which would not have brought public use into question could nevertheless be sufficient evidence of an intention not to dedicate a right of way. In any event, however, lack of intention to dedicate must be evidenced by or on behalf of the landowner, and the barriers in this case were not manned by the landowner or his agents. I conclude that there is no evidence of a lack of intention to dedicate.
21. From the evidence and submissions discussed in the preceding paragraphs I conclude that Linden Chase was used by the public on foot as of right and without interruption for a full period of 20 years between 1992 and 2012, and that there is insufficient evidence that, during the 20 year period, the owner of the land did not intend to dedicate a public right of way.

Appeal B

22. Appeal route B leaves Linden Chase almost opposite Pine Needle Lane and runs in a north-easterly direction to join Bradbourne Road opposite its junction with Amherst Road. It passes an Adult Education Centre, running through a car park for part of the way. The land it crosses is owned by the County Council. It is shown on the second map attached to this decision.
23. Before I consider the date of bringing into question, and whether the appeal route was used by the public as of right, there are two preliminary questions to be answered. These are, first, whether there is a 'way' that can be clearly defined on the ground, and then, if there is, whether it is of such a character that use of it by the public could not give rise at common law to any presumption of dedication (see paragraph 3 above).
24. From the Bradbourne Road end there is said by the County Council to be a marked-out pedestrian walkway leading to the Adult Education Centre. It is said that some of those who completed user evidence forms may have been accessing that Centre. It is also suggested that people may have used more than one route across the car park depending upon the position of parked cars.
25. There is a question on the user evidence forms which asks: *When using the claimed route what was the purpose of your journey?* Three of the 28 people who completed these forms or were interviewed by the County Council stated

that they used the route to get to the Adult Education Centre, but all three gave other destinations in addition. All marked a single line on the map intended to show the route they had walked. None, as far as can be ascertained from the evidence presented, indicated that they had had to walk around parked cars. Their evidence, taken at face value, is credible. The appellant has provided photographs which, he states, illustrate a 'clear, direct and unobstructed' route for pedestrians. It would be reasonable, in my view, to allege that there was a single, identifiable way.

26. The County Council states: *In addition, as the Adult Education Centre is a public building and requires public access to it, the County Council considers that it [the appeal route] does not have the nature of 'a way of such character' whereby public rights can become established by long user.*
27. I accept that people going to the Adult Education Centre might have been using a path by invitation, and that their use of that path might therefore not give rise to a presumption of dedication, but it does not seem to me that use of a through route by people not having any intention of visiting the Centre would be seen by an objective observer as anything other than the exercise of a right to pass and repass. The County Council argues in support of its case that the owner could not stop people. *The staff of the Centre would not be able to differentiate between people using the area to access the building and the general public walking through.* I do not accept that argument. They could put up a notice at each end of the route stating that access was only permitted to those wishing to get to the Adult Education Centre and not to those wanting to use a through route. Neither the Adult Education Centre nor the County Council in its capacity as landowner and education authority responded to the County Council's invitation to comment on the appeal. I conclude that the appeal route is not *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.*
28. The County Council was inclined to take the date of bringing into question as the date of the application for an order, which was at the start of September 2012. The appellant, however, produced an email sent to members of the St John's Residents Association on 3 May 2012 (St John's is an area of Sevenoaks which includes the appeal routes) which stated: *Earlier today the Adult Education Centre put up a notice announcing the closure of the footpath through their car park linking Bradbourne Road to Linden Chase.* Although the notice was taken down shortly thereafter it seems to have provoked something of a local outcry and clearly, in my view, brought the public's right to use the route into question. The relevant 20 year period would therefore be from 3 May 1992 to 3 May 2012.
29. The application for a modification order was accompanied by 28 completed user evidence forms, but the County Council accepts in any event that the appeal route was widely used by the public on foot throughout the 20 year period. There is no evidence that use was in secret or by permission, but the County Council was puzzled about the possible use of force. It expressed its puzzlement in this way: *There is nothing to indicate that use by anyone has ever been with force, however, this provides a dilemma of a kind. At the Bradbourne Road end, most people use the pedestrian gate to the west of the vehicular gates, and this has always been open, according to witnesses. At the Linden Chase end, although some witnesses state that both of the metal gates have been locked on occasions, no-one appears to have climbed over or forced*

their way through. However, none of these stated that the gates prevented them from using the route either, which is somewhat baffling.

30. The appellant argues that references to locked gates (and notices) in completed user evidence forms, some of which were not completed until 2015, related to the time around May 2012 when the Adult Education Centre was advised by the County Council to tighten security. The County Council, while maintaining that it is not clear when the actions took place, concedes: *It is possible that they did all occur in 2012.*
31. I conclude from the available evidence that it would be reasonable to allege that use of the appeal route between May 1992 and May 2012 was not by force.
32. The County Council argues, in its Delegated Authority Report, that there is sufficient evidence of a lack of intention to dedicate a right of way during the 20 year period, the evidence consisting of the locking of one of the gates at the Linden Chase end and notices seen by some of those who completed user evidence forms. The County Council, however, as noted in paragraph 30 above, concedes that it is possible that the erection of notices and the locked gates took place at or close to the time the 20 year period was brought to a close, in other words they were the same events that brought the public's right to use the route into question. If that is the case, and in my view it could reasonable be argued to be so, then use of the route during the 20 year period would neither have been by force, nor would it have been interrupted, and nor would any intention not to dedicate a public right have way been manifested.
33. I conclude that it would be reasonable to allege the existence of a public right of way on foot on appeal route B.

Conclusion Appeal A

34. Having regard to these and all other matters raised in the written representations I conclude that an Order should be made to show Linden Chase as a footpath on the County Council's Definitive Map.

Conclusion Appeal B

35. Having regard to these and all other matters raised in the written representations I conclude that an Order should be made to show a footpath on the County Council's Definitive Map running between Linden Chase and Bradbourne Road.

Formal Decision Appeal A

36. The appeal is allowed but only with respect to footpath rights.
37. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Kent County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify its Definitive Map and Statement by adding to it a footpath along Linden Chase. 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.

Formal Decision Appeal B

38. The appeal is allowed.

39. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Kent County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify its Definitive Map and Statement by adding to it a footpath between Linden Chase and Bradbourne Road. 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.

Peter Millman

Inspector



