



Appeal Decision

by Alison Lea MA (Cantab) Solicitor

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

Decision date: 15 September 2017

Order Ref: FPS/T1600/14A/1

- This Appeal is made under Section 53(5) and Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Gloucestershire County Council not to make an Order under Section 53(2) of that Act.
- The Application made on 5 June 2013 was refused by Gloucestershire County Council on 30 March 2017.
- The Appellant claims that the appeal routes at Claymeadow Farm, Parish of South Cerney should be added to Gloucestershire County Council's Definitive Map and Statement as public footpaths. The routes are shown marked A to C and F to G on the attached plan.

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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 (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. An incomplete application was submitted to the Council under cover of a letter dated 9 April 2013. It was accompanied by 94 public path evidence forms, completed by 102 individuals and an additional letter, all of which referred to an annotated, lettered plan submitted with the application. The plan shows the claimed routes in the locations marked A-C and F-G on the plan attached to this decision. The revised application dated 5 June 2013, which application is the subject of this appeal, was accompanied by a plan showing 2 paths which are marked J-D and F-H on the attached plan. The appellant has confirmed that the revised application should have referred to the routes shown on the plan which accompanied the evidence forms, namely A-C and F-G, and that the other routes referred to are transposition errors. I shall therefore consider the appeal on that basis.
4. The route A-C leads from an old railway line at point A (where it joins public footpath BSC3) to join public footpath BSC1, which runs alongside the former Thames and Severn Canal, at point C. Slightly to the south of BSC1 and parallel to it is a track running along a mound (the Mound Track). The route F-G leads west from public footpath BSC1 (the canal towpath) at Point F, meets the River Churn near a footbridge and then runs alongside the River Churn to meet the former railway line at Point G. There is no public right of way along

the railway track but the Council states that it was used as a de facto permissive path between Point A and Siddington until it was blocked in 2016.

5. Both routes are within land forming part of Claymeadow Farm, the majority of which was owned until September 2012 by Gloucestershire County Council. The remainder forms part of the Bathurst Estate. From 1997 until 2012 Claymeadow, including the Bathurst Estate land, was used by the Council as a Rural Interpretation Centre. An information board was erected in the south-eastern corner of Claymeadow in September 1997 which showed permissive paths and the positions of stiles and gates.

The Main Issues

6. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered 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 in the area to which the map relates.
7. As set out in the case of *R v SSE ex parte Mrs J Norton and Mr R Bagshaw (1994) 68 P & CR 402 (Bagshaw)* there are 2 tests and an Order should be made where either test is met:

Test A: Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If there is a conflict of credible evidence and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

8. The application is made on the basis of the user evidence submitted. Section 31 of the Highways Act 1980 (the 1980 Act) 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 deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. 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. I shall also consider the position at common law. In order for the routes to have been dedicated at common law the evidence should be such that it can be inferred that the owner(s) of the land over which the routes pass intended, at some time in the past, to dedicate public footpath rights and the public, by using the routes, accepted that dedication.

Reasons

Section 31 of the 1980 Act

10. The right of the public to use the appeal routes appears to have been brought into question by the erection of fencing and blocking of the routes in 2012.

The relevant 20 year period, as considered by the Council, is therefore 1992 to 2012.

Evidence of Use

11. The evidence of use in support of the application is substantial with over 100 people claiming use of the routes. 64 people claim to have walked the routes for 20 years or more, with many claiming use of more than once per week.
12. There are, however, a number of factors which cast doubt on the strength of this evidence. Some parts of the evidence forms, such as the description of the routes, appear to have been completed electronically before being presented to witnesses and, although the typed description of the routes on the form refers to an enclosed map, the individual forms provided to me are not accompanied by a map.
13. It is unclear to what extent the witnesses referred to the map when completing the forms. Indeed comments on a number of forms appear to refer to routes other than A to C and F to G. A number of people refer to circular walks to Siddington or walks along the canal and river to Siddington. For example Jennifer Gardiner states that "in 1961 it was not easy to walk along the canal tow path therefore the footpath C-F was used regularly with three styles on it". Richard Webb describes his walk as "from Siddington along canal, to South Cerney then returning" and states that "the link of Siddington to South Cerney by foot is historically important to our villages".
14. Paula Watson and Chris Brown state that the routes "provide invaluable access into Siddington and Cirencester, which both myself and my partner need to walk to for work as well as pleasure on occasions.....how inconvenient it is to not be able to do this anymore, and how this previous public footpath route was quicker and definitely safer than the other options left available to us". Geoffrey Rickard whilst referring to A-C states that it was signposted from the road and other forms refer to a footpath sign at the road "adjacent to C". However, neither Point C nor any part of the appeal routes meets the road. Others refer to the route(s) being public and shown as such on maps.
15. Nevertheless some forms appear to more clearly refer to the appeal routes. For example James Hill states that he used "both paths" between December 2001 and December 2012 "from old railway line to canal and vice versa – both paths". He describes them as "two distinct and obvious paths used frequently by many people in the village". Joanne Dickson states that she walked frequently from 1980 between G-F, F-C and C-A. Peter Elphick refers specifically to A-C and G-F. Other forms appear more likely than not to be referring to one or both of the appeal routes. For example Mrs V Ponting describes her routes as "along railway line and cut across stile to the canal path and use stile at end to cut back across" and others refer to walks to the canal and railway and to cutting through to the old railway track. Peggy and Paul Hillman describe their route, from about 2000, as crossing "from old railway line to canal".
16. The Council states that the towpath was obstructed at both the Lock House and west from Point C along the canal from at least 1970 up until October 1993 when clearance work was undertaken and stiles provided through 2 fences at Lock House. Evidence of this has been provided and does not appear to be directly disputed. I am also informed that steps and stiles were put in at point

C in 1997 by canal trust volunteers and it seems that access to Point C, if walking from Point A, may have been difficult prior to this time. On the basis of this evidence the Council claims that "at most we only have 19 years of use over the claimed route A to C".

17. During the time that the towpath at Point C was inaccessible it seems more likely than not that walkers approaching from Point A would have joined the Mound Track prior to reaching Point C, as on reaching Point C they would have been unable to continue with their walk. Most of the evidence of use forms are silent on this point although I note, for example, that Peter and Angela Gough after stating that they have walked the path for 50 years, add that the "canal path was only opened in the 1980s, always used the field beforehand". It also seems highly unlikely that walkers would have proceeded along the short distance between where route A to C crosses the Mound Track and Point C merely to access the canal at a time when the towpath was inaccessible, particularly if access was difficult due to a lack of steps and a stile. None of the evidence of use forms describes such an activity and I consider that the Council's evidence casts serious doubt on the claimed use of the route from the Mound Track to Point C prior to 1993.
18. The Council also states that between Points A and C there is a field boundary which runs roughly north-south and that before 2012 there were gates half way up the boundary and at the northern end where the Mound Track runs east-west parallel to the canal. The Council states that the route shown by the appellant runs through what was a solid metal fence of which traces can still be seen. The current owner of Claymeadow states that the route crosses a metal fence and hedge which would have been difficult or impossible to cross but little evidence has been provided to substantiate the extent to which this may have hindered or prevented use.
19. There is no suggestion on any of the evidence forms that the route from A to C was at any time obstructed. In answer to the question "Have you ever known any obstructions on the path?" nearly every form contains the response "No". One of the few that contains a comment is Ken Hector who states that he has used the path 15-20 times a year since 1985 and refers to a "gate in fence/hedge line perpendicular to disused canal on route C-A". He refers to having marked it on an attached map, but this has not been provided to me.
20. Despite the various deficiencies which I have mentioned, the evidence of use forms claim considerable use of both of the appeal routes for a period of well in excess of 20 years. The evidence provided by the Council and the current owner of Claymeadow partly conflicts with this but I consider that there is no incontrovertible evidence that a right of way between Points A and the Mound Track and between Points F and G cannot be reasonably alleged to subsist. With regard to the short section between the Mound Track and Point C, although many people appear to claim use of this section during the full 20 year period, the evidence shows that any such use would have been difficult and lacking in purpose, particularly prior to 1993.

Whether the use was as of right and without interruption

21. To be as of right the use must have been without force, without secrecy and without permission. There is no suggestion that the use has been in secret or that access has been gained by breaking down any barriers. However, use can

- be considered to be contentious if it takes place in contradiction of a clear notice denying access.
22. The Council states that it erected signs in September 1997 at Points C, E and F, all of which are situated along public footpath BSC1 (the towpath). At each of the points a stile led from the public footpath into the Rural Interpretation Centre. The wording was "G.C.C. Private Property Keep to public footpath". The signs at E and F were in place until 2012 and the sign at C appears to have been removed when the stile upon which it was situated was replaced with a kissing gate in 2010. A similar sign was prepared by the Council for the Bathurst Estate which read "Bathurst Estate Private Property Keep to public footpath". One of these signs was erected at Point G.
 23. The Council states that the signs at C, E and F were attached to the stiles and faced footpath BSC1 and were therefore clearly referring to public footpath BSC1. To the contrary the appellant states that the signs encouraged walkers to cross the stiles into the Rural Interpretation Centre and to keep to the routes they could see on the ground.
 24. The majority of evidence of use forms state that there were no notices on the paths. However, some do refer to the footpath notices on the stiles. For example, Stephen and Katharine Isles recall the Bathurst Estate sign saying "Keep to Public Footpath" and Annette Law refers to a sign at Point F which might have said "Bathurst Estate – please keep to footpath". She comments that she was not expressly given permission to use the paths as she assumed that they were public rights of way. Jennifer Gardiner refers to notices saying "Keep to the footpath" and states that "freedom of access was clearly given by styles, kissing gates and well walked paths. Also one or two styles had a footpath notice on them". James Hill recalls signs saying "Please keep to footpath" and states "path obvious and stiles in place to encourage use".
 25. The evidence before me suggests that these signs were ambiguous. It is not suggested that other signs referred to by witnesses, such as the interpretation board and embossed plaques which contained information regarding the history of the site were sufficient to render the use contentious.
 26. The Council has considered whether use of the routes was permissive while the land was used as a Rural Interpretation Centre. This is on the basis that school parties and youth organisations were allowed onto the land by prior arrangement and were able to follow a waymarked network of permissive paths connecting points of interest detailed on an interpretation board and in interpretative leaflets provided to school children and teachers. I agree with the Council that there is insufficient evidence to suggest that use was with permission.
 27. The Council also suggests that use of the route A-C was "by right" rather than "as of right" as the public were exercising their right to deviate from a public footpath obstructed by the owner of the land crossed by the way onto other land belonging to the same landowner. It is suggested that as the towpath was obstructed from before 1970 until 1993 and the stile at Point B was obstructed by vegetation, it was not possible to walk from Point A to Point B along public footpath BSC3. Instead it is suggested that if walkers were heading west they walked from A to D or if heading east, walked from Point A towards Point C and then along the parallel Mound Track to the Cirencester Road.

28. However, there is no suggestion in the evidence of use forms that use of A to C was due to an obstruction or that walkers were exercising a right to deviate.

Evidence of Landowners' intentions

29. The Council states that the signs erected at Points C, E, F and G show sufficient evidence of a lack of intention to dedicate the routes as public during the relevant period and the fact that the interpretation centre was open by arrangement also shows a lack of intention to dedicate. However, the evidence of use forms do not suggest that any of the notices were sufficient to bring to the minds of those using the routes that the landowner was denying access to the routes. Indeed the contrary appears to be the case.

30. Section 31(6) of the 1980 Act enables a landowner to deposit with the highway authority a map and statement showing the ways (if any) that he admits are dedicated as highways. If he then, within a period specified by statute, deposits a statutory declaration that no additional ways have been dedicated since the deposit of the map, this is sufficient, in the absence of proof to the contrary, to establish that no additional ways have in fact been dedicated. The landowner may continue to deposit similar declarations at the specified intervals.

31. I am informed that Gloucestershire County Council deposited a statement and plan on 11 August 1998 but that no statutory declaration was deposited within the requisite period of 6 years. I am further informed that a statement and plan were deposited on 22 February 2005 showing the permissive paths which had been created to facilitate school visits to the land. A copy of this plan has been provided to me. However no statutory declaration was deposited and the Council accepts that the requirements of section 31(6) have not been met and that the deposits made are not evidence of a lack of intention to dedicate the appeal routes.

32. The Bathurst Estate also appears to have made various deposits including statutory declarations. The Council considers that these effectively show a lack of intention to dedicate a right of way over their land from 1987 to date but no documentation has been provided to me. The Council lists the depositions and statutory declarations in its report to the Commons and Rights of Way Committee of 30 March 2017¹. The documents listed are a statement dated 28 April 1987 and statutory declarations dated 27 August 1992, 30 June 1993, 20 June 1999 and 22 June 2009. In the list there is no reference to the initial statement having been accompanied by a map, the first reference to any map or plan being "plans show public rights of way marked" in relation to the statutory declaration of 27 August 1992. The statutory declaration dated 30 June 1999 is stated as being accompanied by large plans showing only the outline of the estate.

33. The information available to me is insufficient to show that the requirements of section 31(6) have been satisfied. Accordingly I do not accept that this is incontrovertible evidence that, in relation to the part of route F-G which crosses the Bathurst Estate, a lack of intention to dedicate has been demonstrated.

34. For the sake of completeness I should add that if on examination it became clear that the requirements of Section 31(6) had been met by the various

¹ Paragraph 8.29

deposits and declarations, then it is likely that the right of the public to use the route was also brought into question in 1987. The possibility of 20 years use prior to 1987 would then have to be considered and I note that some of the people providing user evidence claim use in excess of 50 years.

35. The Council questions whether the Bathurst Estate was legally capable of dedicating the right of way on the basis that the land is held by trustees for beneficiaries. However, the information provided is insufficient to lead me to conclude that there was a lack of capacity to dedicate during the relevant period.

Other Matters

36. At Point G, Route F-G connects with the former trackbed of the Midland and South Western Junction Railway which closed in 1964 and was sold by the operating company in 1971. No public right of way along the trackbed is shown on the definitive map. The Council states that prior to the sale in 1971 any use of the trackbed would have been a criminal act and that since 2016 use by pedestrians has been by the placing of 2 large tree trunks across the way. Nevertheless the Council admits that the former trackbed has been used by the public on foot. Whether that use is sufficient to claim public footpath rights along the trackbed is not a matter for me to consider as part of this appeal. Similarly whether or not use of the Mound Track is sufficient to claim public footpath rights is not a matter for me.

Conclusions on the evidence

37. There are a number of conflicts of evidence in this case. However, the evidence of use is, on the face of it, substantial. On the basis of the evidence provided to me I consider that it is reasonable to allege that on the balance of probabilities a right of way subsists in relation to Route A as far as the Mound Track and along Route F-G. Accordingly I conclude that Test B is met in relation to those routes.
38. However, the evidence shows that it is highly unlikely that there has been sufficient use between the whole of the period from 1992 to 2012 of the route from the Mound Track to Point C to satisfy the statutory requirements. In relation to the 1980 Act it is therefore not reasonable to allege on the balance of probabilities that a right of way subsists in relation to this part of the route. Accordingly I conclude that neither Test A nor Test B is met in relation to the part of the route A to C from the Mound Track to Point C.

Common Law

39. For public use of a route to raise an inference of dedication it must be sufficient to carry to the mind of a reasonable landowner the fact that a continuous right of enjoyment is being asserted and ought to be resisted. In this case the claimed use of those who completed user evidence forms spans a considerable period of very frequent use. In relation to the route from A to C, even if there was little or no use of the short distance from the Mound Track to Point C until 1993, the evidence of use forms appear to demonstrate substantial use since that date which it is reasonable to assert would raise an inference of dedication.
40. The Council states that the erection of signs in 1997 and the making of depositions under S31(6) do not indicate an intention by the landowners to

dedicate a right of way. I draw the same conclusions about the effectiveness of these actions as in relation to the statutory test. On the basis of all the evidence before me I conclude that, at common law, it can reasonably be alleged that the owners of the land over which the appeal routes A to C and F to G pass dedicated public rights on foot and that the public has accepted that dedication.

Conclusion

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

Formal Decision

42. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Gloucestershire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify its Definitive Map and Statement by adding the routes at Claymeadow Farm, shown as A to C and F to G on the attached plan, as footpaths. This decision is made without prejudice to any decisions that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alison Lea

Inspector

