



Order Decision

Site visit made on 29 November 2019

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 16 March 2020

Order Ref: ROW/3222595

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cheshire West and Chester Borough Council (Addition of Footpath No.37 in the Parish of Beeston) Modification Order 2017.
- The Order is dated 22 June 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Cheshire West and Chester Borough Council (the "Council") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Preliminary matters and background

1. FP19 is a significant link in the network of public footpaths for circular leisure routes in the Beeston/Spurston area, and regionally as part of the Two Saints Way. There has been a long running dispute about the correct line of a section of this path where the definitive route passes through Mr and Mrs Porter's property, Ivy Cottage which they bought in 2007. This section of FP19 appears to have been obstructed for several years prior to 2007 and there is some evidence, discussed below, that a parallel alternative route has in consequence been used within the adjacent field owned by Mr Jenkins. Mr Jenkins has lived in the area since 1959 but only acquired the adjacent field in question in 2010.
 2. In 2016 Mr and Mrs Porter applied to the Council for an order that would have repositioned the relevant section of FP19 to within the adjacent field, essentially along the line of the claimed route in the current Order. The Council however found that the definitive map was conclusive of the location of FP19, and the evidence was insufficient to show that its line should be altered.
 3. However the Council considered that the Order should nevertheless be made as it appeared reasonable to allege a new public right of way had come into being within the Mr Jenkins' field due to a footpath being shown on a map deposited by the owner of the field, together with some evidence that it had been used as a public footpath by walkers who provided user evidence forms.
 4. The effect of the Order, if confirmed without modifications, would be to modify the Definitive Map and Statement (DMS) for the area by adding Footpath No 37 (FP37) in the Parish of Beeston commencing on Moss Lane (C810) at OS grid reference SJ 55475 58344 (Point A on the Order map) and running in a generally north westerly direction for approximately 94 metres to its termination point on Footpath 19 (FP19) at OS grid reference SJ 55398 58389 (Point B) having a width of 1 metre throughout.
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5. The Council, as the Order Making Authority (OMA), after reviewing the evidence no longer supports the Order and takes a neutral stance.
6. Although no point is taken on it, I should draw attention to the fact that the plan attached to the delegated report, on the basis of which I assume authority to make the order is derived, shows that the proposed new footpath, whilst it would start from Point A on the Order map before me, would end at the junction with FP19 at a point further west by a few metres than Point B is shown on the Order map. This slight foreshortening of (as opposed to extending) the proposed route from that considered in the report, does not seem to me to exceed the limits of the Council's authority and is therefore unnecessary to consider further.

Site visit

7. No party requested an inquiry or hearing into the Order, therefore I considered the written representations supplied. I made an unaccompanied site inspection around noon on 29 November 2019 and saw that the definitive line of FP19 is currently blocked by the front gates of Ivy Cottage and the hedge separating that property from the adjacent field.
8. As to the claimed route through Mr Jenkins' field, the way was blocked by a combination of timber board, wire betting and barbed wire. These items had been placed across two posts which appeared to be a former gate or opening beyond which the proposed route of FP37 lies. On one of the posts a small circular notice states "PRIVATE no right of way".
9. I should record that Mr Jenkins had indicated he was very willing to give access to his property. However I have reviewed the evidence including the photographs of the field and curtilage of Ivy Cottage, and find I am able to come to a decision based on my site visit and the information before me.

Interim order relating to the width of FP19

10. Mr Jenkins has also sought to record a change to the DMS for FP19, to restrict its width to within the curtilage of Ivy Cottage and outside his field. However in Order Decision, 22 February 2019 (ROW/3199856) the Inspector proposed to confirm the Order with a modification which in effect would widen the footpath as it is shown on the OS map for 1910 between points A-C on the order map for that decision. This matter is proceeding separately from the current Order before me.

The Main Issue

11. The main issue is whether the evidence discovered by the Council, taken with all other relevant evidence is sufficient to show on a balance of probabilities that a new public right of way, being a footpath and not shown in the Definitive Map and Statement, subsists over land in the area shown on the Map.
12. Issues about loss of privacy, safety and security, suitability of the route and the existence of other alternatives are not relevant to the main issue.

The law

13. By s32 Highways Act 1980 (the 1980 Act) I have to take account of any "map, plan or history of the locality or other relevant document" offered in evidence and give such weight to it as is justified by the circumstances, including its

antiquity, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

14. Section 31 of the 1980 Act sets out a statutory presumption of dedication: if public use of a way for twenty years or more is shown, the way is deemed to have been dedicated as a highway of that description unless there is sufficient evidence from which it can be concluded there was no such intention during that period to dedicate it. The twenty-year period must be calculated retrospectively from the date when the public's right to use the way as claimed is brought into question. Further, at common law it may be inferred that a way was dedicated and accepted for public use for periods less than 20 years.
15. Landowners may make use of a statutory right¹ to deposit with the Council a statement and plan showing admitted public rights of way and subsequently to make a declaration that no additional rights of way over it have been dedicated since the date the plan was deposited. In the absence of proof of a contrary intention, the deposit and declaration are deemed to negate the intention of the owner or successors in title to dedicate additional ways as a highway.

Procedural objection

16. An objection is taken by Mr Jenkins in that the Order states on its face that it bears the seal of Cheshire County Council (CCC) whereas, as he points out, when it was made in June 2017 CCC had ceased to exist. Nevertheless the seal of Cheshire West and Cheshire Borough Council is clearly affixed to it. The Order is otherwise clearly made by the Council as OMA and the reference to CCC is a simple error correctable by modification if the Order were confirmed.

Reasons

Documentary evidence

17. A deposit was made under section 31(6) of the 1980 Act by the Rt Hon Lord Tollemache (register ref CWAC125) on 15 May 2008. The estate land is shaded yellow on the deposit plan, a base OS 1:11000 map. The key to the whole map states that lines shown in red/pink are "paths as per Definitive Map", red broken lines are "permissive foot path" and broken green lines depict "Bridle path". The relevant extract only shows only unbroken red lines.
18. Ivy Cottage is excluded from the extent of the estate but adjacent fields were included. An unbroken red line is clearly shown running through the adjacent field, (A-B on the Order map) and connecting with the continuation of FP 19 as shown by a broken black line. Thus it is claimed that the deposit shows the landowner's intention to dedicate a public footpath through the adjacent field.
19. Although there are discrepancies with the dates of the map and statement, taken together in my view they refer to what the owner or his agent believed were the lines of pre-existing definitive footpaths. It is uncertain to say the least whether there was intent to dedicate public rights of way on the claimed route. The agents were asked whether the intention was to dedicate the route as shown on the Order map but replied in a non-committal way that they did not wish to alter the statement and plan. This does not remove the uncertainty over their original intention with regard to the deposit.

¹ Highways Act 1980, section 31(6)

20. Mr and Mrs Porter believe that the hedge separating the house and the field, and in their ownership, was planted to separate the cottage from the footpath. The Parish Survey schedule states the "lane" to be 20' wide and as their drive is 13' wide, the hedge must, according to them have been planted after the map was drawn, there being no document to support movement of the path.
21. An aerial photograph of 1969 suggests that there was a path between two hedges as indicated on the parish survey. Mr Jenkins states he recalls a grass lane between two hedges as shown on the photograph. However the 1955 parish survey was the preliminary survey for publication of the DMS and does not state at what point measurements are taken, so it is unclear whether its width was 20' at the Ivy Cottage drive junction with Moss Lane. Whilst the Council accepts that the width of FP19 was variable between 3.30m and 5.6m, no evidence is submitted that makes it likely in my view that the boundary hedge was re-planted so the path would run on the field side.
22. Information related to a planning application around 2007/8 for an outbuilding at Ivy Cottage has also been considered, however it does not provide robust evidence, as suggested, that a hedge was removed or that the boundary lines had changed.
23. A Ramblers Association (RA) report of obstructions on various routes made in November 1994, says of FP19 "presumably the path has been taken out of garden into adjacent field by diversion order" and requests clarification. However the Council holds no evidence that it has ever been lawfully diverted. Mr Jenkins suggests the RA report in effect brings into question the correct line of the footpath such that the 20-year period of user must be calculated prior to 1994. However the obstruction of the FP19 definitive line through Ivy Cottage is not directly at issue here, but rather actions taken in respect of the alleged new route through Mr Jenkins' field.
24. The aerial images after 1969 demonstrate to my mind the likelihood that the line of FP19 through Ivy Cottage was gradually obstructed to the point where eventually it became inaccessible. The user evidence is consistent with use of the claimed route as an alternative route once FP19 became unwalkable.
25. Mr Jenkins stated in his comments on Mr and Mrs Porter's submissions that "*I know there was no footpath in the field until the early nineties.*" In May 2014 the Council emailed Mr Jenkins acknowledging that the "*path still remains (as far as the Council is concerned) incorrectly on your land*". It invited him to leave the path open until the situation was resolved, offering to install signage advising the public that the route is not a public right of way and available for use by the landowner's permission. Mr Jenkins accepted this suggestion and was "*happy for the footpath to be left open on a temporary basis*". Signage then erected on his behalf by the Council, copies of which are supplied, made it likely that users would have been made aware that the owner had challenged their right to use the way as a highway. Mr Jenkins blocked this route in 2016, but the 20-year period should be calculated before May 2014.

User evidence

26. A letter in 2015 from a former tenant of Ivy Cottage, Mr Fowles, states that he occupied the cottage from 1985 to 2007, the previous owners being the Tollemache Estate. Mr Fowles also states "*the position of the footpath is the same now as it was then. The styles were renewed twenty or so years ago*".

27. Mr Fowles also stated that when he moved into the property the current hedge separating the cottage drive from the field was overgrown which he had to cut back, finding thereupon the remains of a stile in the hedge (the first part of the hedge running up the drive). Mr Porter asserts that the footpath may have run through into the field at the corner of the hedge and may have returned through the hedge to run along the remains of an old "lane". It was said that "rangers" came in about 1986 and put the stile in "round the corner".
28. Two members of the Cestrian Ramblers group supplied user evidence forms, stating that they occasionally used a footpath from Moss Lane from 2008 and 2016. The path ran from Moss Lane on the east side of a boundary hedge described on one form as *"it just goes from the finger post at the road to the field with the cottage and gardens to one side"*.
29. Mrs French's April 2019 letter entitled "Footpath in field adjacent to Ivy Cottage" states *"for the past 20 years I and my family have used this footpath on a daily basis walking with our dogs"* and *"since its closure"* they have to use Moss Lane. This is at odds with evidence that the route was blocked in 2016.
30. Mr and Mrs Porter's son wrote a fairly detailed letter in June 2019 the salient points of which state that he lived at Ivy Cottage from August 2007 to May 2019, and from 2007 until its closure he had walked the claimed FP37 route *"from the corner of their house driveway (where the green finger post sign and styal [sic] were located) through the field to the other end where there was a little bridge and styal leading on to the continuation across the arable field in the back"*. Cross country runners used the route annually on a run called the NSPCC Sandstone Trail, which began according to their website in 2003. From his bedroom window he could see the footpath/field and saw individuals and people with children going through the field. The online definitive map for FP19 *"showed it actually going through the proposed area FP37 for five years before being removed on procurement of the field by Mr Jenkins"*.
31. A letter from his partner dated June 2019 states FP37 has been in use as FP19 for at least the period from March 2011 until the footpath was closed in 2013. After she moved into Ivy Cottage in 2012 she walked it up to twice a day with her dog and Mrs Porter's dogs. She recalls the Council strimming the areas around both styal and people using the fields as *"dogs would bark and our window had direct visualisation to the footpath section"*. She states it was:

"briefly turned into a permissive path and the round badges removed from the styal. Shortly thereafter the permissible path signs were removed and both styal were boarded over and a private property sign placed [sic]."
32. The user evidence form completed by the occupier of the nearby Elms Cottage, asserts the route was signed between 2011 and 2016 *"as a public right of way"*, which is at odds with the evidence that signs were erected showing it to be a permissive route.
33. The District Inspector for the Mid-Cheshire Footpath Society states that he used the route on foot with others from 1999 to 2015 during which time this was the only available route, running parallel to FP19 which was never used as it was inaccessible. He ringed the "No" reply to answer whether he had ever sought or been given permission to use the route, or been told the route was not public, and elsewhere stated that sometimes there was a finger post on Moss Lane. The frequency of user is unclear in this statement.

34. In all there were six user evidence forms, three of which state their use of the claimed footpath was once a year, the other three forms respectively indicating use occasionally, weekly, and in the case of Mr Porter, daily. Only two forms indicate a full twenty-year period of use, this being from the 1990s to 2016 and from 1994 to 2016.
35. From the foregoing I find it likely that the claimed route became an alternative permissive route until it also was blocked in 2016, however signage in 2014 had made it clear to the public that the route was permissive only. Whether the width of FP19 ever extended across to encompass the claimed route is not a matter before me. As far as concerns the claim that a new public footpath has been dedicated, I find that the user evidence is of insufficient quality and quantity. It fails to demonstrate that over the full 20-year period the claimed route was on the balance of probability used by a sufficient number of people to show that it was used by the public or to bring home to the mind of the landowners that the public were asserting a continuous right to use the route in question.
36. Furthermore, to the extent that reliance is placed on a user period less than 20 years, or a user period expiring before the bringing into question of the public's right to use the way, the common law rules of dedication must be considered. However the information available does not disclose an intensity of user nor evidence about the knowledge and acquiescence of the successive landowners that is sufficiently compelling to raise an inference of dedication of FP37.

Other matter

37. It appears there may have been a period where Ivy Cottage and the adjoining field were in the same ownership, with FP19 obstructed during a part or the whole of this time. In such circumstances, a right to deviate from the definitive line may have arisen with use of the alternative route being "by right" rather than "as of right" as would be required for a presumed dedication of a new public right of way. It would only be when the ownership of the cottage and the field diverged that user of the alternative path would have been as of right and therefore could be taken into account in establishing a presumed dedication of FP37. However, as the evidence is unclear on the relevant matters of ownership and overall responsibility for the gradual obstruction of FP19, I have not treated the use being "by right" in this case but instead given the benefit of the doubt to the use as being "as of right".

Conclusion

38. Considering the individual documentary evidence in its individual context, as well as all the evidence taken together, including the user evidence, I am satisfied on the balance of probabilities that the use and reputation of the claimed route was not such as to justify the inference that it has been dedicated as a public footpath.
39. For the above reasons and considering all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal decision

40. I do not confirm the Order.

Grahame Kean

INSPECTOR