RIGHTS OF WAY AND PUBLIC FOOTPATHS

BELIEF, INTENTION AND THE CAPACITY TO DEDICATE

Stephen Whale

1. In this paper I intend briefly to discuss three topics which often arise in rights of way cases particularly when considering the presumption of dedication in accordance with section 31 of the Highways Act 1980:

   (1) the extent to which, if at all, the state of mind of either the users of the way or the landowner has any continuing relevance;

   (2) the operation of the proviso to section 31(1) of the Act post the decision in Godmanchester; and

   (3) the need for an owner with capacity to dedicate (common law dedication).

State of mind

2. It is appropriate to remind ourselves that, for the statutory presumption of dedication to arise, there must at the very least be actual enjoyment by the public as of right (*nec vi, nec clam, nec precario*) and without interruption for a full period of 20 years ending with the date on which rights were called into question.

3. In considering whether this is satisfied in any case it can now be said as a broad statement of principle that the subjective state of mind of either the users or the owner of the way has no continuing relevance. Thus: "It is clear on high authority that the subjective state of mind of the person exercising the claimed right is irrelevant. The

subjective state of mind of the owner is equally irrelevant."[1] The particular high authority Lewison LJ relied upon was the speech of Lord Hoffman in R v Oxfordshire CC, ex p Sunningwell Parish Council [2000] 1 AC 335. However, although Lord Hoffman was very clear in excluding the subjective state of mind of the users as a relevant consideration, he did in fact leave some ambiguity as to the relevance of the owner's state of mind. This arises principally from his references to Lord Blackburn in Mann v Brodie (1884-85) LR 10 App Cas 378, "how the matter would have appeared to the owner of the land" and that the use must be such as, "would suggest to a reasonable landowner that they believed they were exercising a public right".

4. Thus it was assumed in a number of cases, including by Sullivan J (as he then was) in the village green case of R (Laing Homes Ltd) v Buckinghamshire CC [2004] 1 P&CR 573 that it was appropriate to consider how it would have appeared to the reasonable landowner. Thus it was submitted on behalf of the Council as a "general proposition" in R (Lewis) v Redcar and Cleveland BC [2010] 2 AC 70 that the public "must by their conduct bring home to the landowner that a right is being asserted against him".[2]

5. In the Lewis case, the Supreme Court considered and rejected the argument that there is any such requirement. The Court had to decide whether deference by local residents to golfers meant that their use of the golf course was not "as of right" because it would not have appeared to the golfers that any public right was being asserted. The unanimous decision of the Court was that the residents' deference did not preclude use as of right. As Lord Walker said at [36]:

[1] *Per* Lewison LJ in London Tara Hotel Ltd v Kensington Close Hotel Ltd [2011] EWCA Civ 1356; [2012] 1 P&CR 13 at [60].

[2] See Lord Walker at [30].

> "…courteous and sensible though they were…the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough,…A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it…"

6. The Court focused on the familiar tripartite test for use as of right (i.e. that it should be *nec vi, nec clam, nec precario*) and rejected the proposition that there was any additional question that had to be addressed. As Lord Brown put it at [107]:

> "I see no good reason whatever to superimpose upon the conventional tripartite test…a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging".

7. The Court did at [36] refer back to Lord Hoffman's statement in Sunningwell that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land (or if there was an absentee owner, to a reasonable owner who was on the spot)." Lords Rodger, and Kerr expressly agreed with him. All three however held, together with the other members of the Court, that whether the user is as of right is sufficiently answered by the tripartite test.

8. Lewis was followed by the Court of Appeal in the Tara Hotel case. Lord Neuberger MR held at [29] that for Tara to succeed they would have to show the use was *vi, clam* or *precario* "when judged by the actual use as viewed from the perspective of a

reasonable person in the position of Tara". At [74], Lewison LJ said, after referring to Lewis:

> "…this is clear authority at the highest level that if a use satisfies the tripartite test (not by force, nor stealth, nor the licence of the owner) then a prescriptive right will be established. There is no further criterion that must be satisfied"

9. Do these authorities mean that the "appearance principle" is now completely irrelevant and "stone dead"?

10. In my opinion it does have a continuing, but very limited, role. In every case there must be use of, "such amount and in such manner as would reasonably be regarded as being the assertion of a public right" and if so, "the owner will be taken to have acquiesced in it – unless he can claim that one of the three vitiating circumstances applied in his case".[3] It seems to me therefore that there is an initial question: is there sufficient use, in terms of amount or manner, to put the owner on notice? If so, the right will be established unless it is vitiated by the tripartite test. There is no further test or criterion. In most cases, the matter will be resolved by the tripartite test. But there will be some cases in which the tripartite test isn't reached; cases such as those where it is alleged that the level of use is too insignificant to put the owner on notice.

The Proviso

11. Section 31 (1) provides that if there has been use as of right and without interruption for a full period of 20 years, the way is deemed to be dedicated "unless there is sufficient evidence that there was no intention during that period to dedicate it."

[3] Lord Hope in Lewis at [67].

12. Following the decision in R (Godmanchester Town Council) v Secretary of State for the Environment and Rural Affairs [2008] AC 221, a landowner who wishes to rely upon the proviso, and rebut the presumption of dedication which will arise from 20 years user as of right, must, at some stage during that period, act in some manner which brings home to users of the way that he has no intention to dedicate the way as a public right of way. To satisfy this requirement he may rely on one of the methods mentioned in subsections (3), (5) and (6), but he is not limited to these.

13. However, one effect of Godmanchester is the practical difficulty of relying upon the proviso as a means of defeating an asserted prescriptive right as part of a case that rights were brought into question later. That is because of the possibility that seeking to rely upon the proviso will at the *same time* bring the right of the public to use the way into question. So if, for example, a landowner erects today pursuant to subsection (3) a notice of the kind inconsistent with the dedication of the way as a highway but in so doing also brings the right of the public to use the way into question then there will be a perfect symmetry between the two concepts. Lord Hoffman at [37] indicated that the 1980 Act clearly contemplates that there will ordinarily be symmetry between the two concepts of negativing an intention to dedicate and bringing rights into question, although he was careful to say that the House did not need to decide the point. Lord Hope at [57] said that the essential point is that the presumption of dedication at common law (against the background of which he said the subsection was drafted) involves a "dialogue" between the landowner and the public, which is to say acts on the part of the public to indicate an assertion of a right and, if he wishes to deny it, acts on the part of the landowner to indicate the contrary. The word "dialogue" here may, strictly, be correct linguistically, but it is perhaps not apt to describe the way in which most landowners

and the public interact on the ground. Lord Scott at [70] did indicate that there is no necessary symmetry between acts that bring the public right into question and acts of the landowner to demonstrate that he does not intend dedication. Personally, I incline to this point of view. For one thing, it could be said to render otiose the distinction between subsection (2) on the one hand and subsections (3), (5), (6) on the other if the two concepts are necessarily symmetrical. Second, there is something dubious about the proposition that a purely private act, unknown to the public, such as a subsection (6) deposit, suffices to bring public rights into question. There is some support for the proposition that rights are effectively brought into question by open acts, not by private acts, in Fortune v Wiltshire CC [2010] EWHC B33 (Ch) at [555].[4]

14. Landowners must of course generally be astute to ensure they make their intentions known to users as soon as possible if they are to prevent rights accruing. If they do so, as they will no doubt be advised, it may bring forward the time when the public right is brought into question. In some instances, user which might have gone on to achieve maturity after 20 years might now be abruptly curtailed before the 20 year period has elapsed. One unforeseen consequence of the Godmanchester decision may therefore be that it might actually prove more difficult to establish public rights of way in future. It would be interesting to know what has been the experience in this respect.

Capacity to dedicate at common law

15. Rights of way can be added to the definitive map and statement solely on the basis of documentary evidence. Such evidence is likely to vary according to its nature and effect. For instance, if a road was established as part of an enclosure award that may itself confirm its status. Other documentary evidence may not of itself establish the

[4] Proposition unaffected by Court of Appeal judgment: [2013] 1 WLR 808.

status of the way but simply provide evidence that indicates that there was at some time a dedication of the way (e.g. Ordnance Survey or other maps). This historic evidence can be defeated if it is established that during the period when dedication is presumed to have occurred, there was no-one with the capacity to dedicate.

16. As Halsbury's Laws 5th ed volume 55 para 111 states:

> "An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, a person who is absolute owner in fee simple".

See also A-G Ex Rel Yorkshire Derwent Trust v Brotherton [1992] 1AC 425, 438 *per* Lord Oliver at 438:

> "The private landowner, for his part, was able to resist the presumption of dedication arising from user by demonstrating that the land was in strict settlement at the material time so that there was no landowner competent to dedicate."

17. In the case of land under strict settlement,[5] prior to the passage of section 56(2) of the Settled Land Act 1925 there was no power for a tenant for life to dedicate land within the settlement. Thereafter, the tenant for life was conferred the same power as an absolute owner. Although the section was not itself retrospective, the 4th Schedule to the 1925 Act retrospectively amended the Settled Land Acts 1882 -1890, providing that the tenant for life shall be deemed always to have had the power, but this relates back only to 1882 and not any earlier. If, therefore, prior to 1882 land was the subject

[5] The word "settlement" strictly connotes "succession". In law it refers to any instrument (or series of instruments) by which successive interests are carved out of realty or personalty and under which, in the case of land, there will usually be at any given time some person entitled to a beneficial interest for life.

of a strict settlement, no presumption of dedication could be inferred, and this would be likely to trump documentary evidence adduced to cover the same period.

STEPHEN WHALE

18 SEPTEMBER 2013