Neutral Citation Number: [2021] EWCA Civ 1098

Case No: C1/2020/1414

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (PLANNING COURT)
TIMOTHY MOULD QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
CO/3695/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2021

Before:

LORD JUSTICE BEAN
LORD JUSTICE STUART-SMITH
and
SIR PATRICK ELIAS

- -

Between:

PAUL GARLAND and HAROUN SALAMAN

Appellants

- and –

(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

(2) SURREY COUNTY COUNCIL

Interested Party

- -

The Appellants represented themselves
Ned Westaway (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 8 July 2021

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Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10.30am on Tuesday 20 July 2021.

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Approved Judgment

Sir Patrick Elias:

Introduction.

1. There is a track which runs between Sanway Road in Byfleet and Wisley Lane in Wisley, which is known locally as Muddy Lane. The Definitive Map and Statement ("DMS"), which is a map providing a definitive statement of the various legal rights of way in the area, had shown it as a footpath which therefore could only be used by pedestrians. In fact cyclists and, much less frequently, horses have for many years also used the track. In view of this use, on 1 June 2013, two cycling groups, the Woking Cycle Users Group and the Elmbridge Cycle Group, applied to the Surrey County Council for an order modifying the DMS so as to describe the track as a bridleway. This would entitle both bicycles and horses lawfully to use the track. The Council, as the relevant Surveying Authority for the area, has a duty to keep the map under continuous review, and this includes altering the designation of a highway if it is shown that a different designation is appropriate: see section 53 (2)(b) read with section 53(3)(a)(ii) of the Wildlife and Countryside Act 1981 ("WCA"). Following a consideration of various objections made by the Appellants, amongst others, and a detailed report from the Council's Countryside Access Officer, who supported the modification, the Council acceded to the cycling groups' application and made the Order on 20 July 2016. It is inelegantly, if accurately, called the Surry County Council Footpath No. 129 Byfleet, 3 Wisley (Part) and 566 (Wisley) Definitive Map Modification Order 2016 ("the Order").

2. Eleven objections were lodged against the Order. They included objections from the Appellants who have since 2006 been the joint owners and occupiers of a dwelling which fronts onto the Western section of the Order route. In view of these objections, by paragraph 7 of Schedule 15 to the Wildlife and Countryside Act 1981 the Order had to be sent to the Secretary of State for confirmation and he appointed an Inspector to conduct a local public inquiry. By paragraph 10 of Schedule 15 to the WCA, the case was one where the Inspector was required to take the decision on behalf of the Secretary of State.

3. The Inquiry took five days between 22 May 2018 and 20 March 2019. Interested parties were able to advance their evidence and to cross-examine opponents. The Appellants were present throughout. The Inspector twice visited the Order route, one being an accompanied visit and the other not.

4. The Inspector had to determine, in the light of the evidence before him and on the balance of probabilities, whether the description of the track as a footpath was wrong so that it should be re-designated as a bridleway. The argument advanced before him was that the nature of the use by bicycles in particular was sufficient to show that there had been a deemed dedication of the track as a bridleway either by statute, pursuant to section 31 of the Highways Act 1980, or at common law. The Inspector found that there had not been an uninterrupted user claimed as of right for twenty years prior to its status being brought into question, as section 31 required, and therefore no statutory dedication could be established. However, he held that there was dedication at common law. In the course of reaching that conclusion, the Inspector had to consider a submission

advanced by the Appellants that the use of the track as a bridleway constituted a public nuisance. It was contended that pedestrians walking part of the track which went under the M25 motorway were in danger from horses using that part of the route. If this had been established, it would have prevented any dedication from arising. The Inspector rejected that submission and confirmed the Order.

5. The Appellants applied to quash the Order pursuant to paragraph 12 of Schedule 15 to the WCA. This provides the only means by which an Order of this kind can be challenged. As Charles J explained in *R (Elveden Farms Limited) v Secretary of State for Environment, Food and Rural Affairs* [2012] EWHC 64 (Admin), the permissible grounds of challenge are essentially the same as in an ordinary application for judicial review.

6. The application was heard by Timothy Mould QC sitting as a Deputy High Court Judge in the Planning Court. There were numerous grounds of challenge but they were all rejected. The Appellants appealed to this court on a variety of grounds but the only set of grounds on which permission was granted by Stuart-Smith LJ related to the Inspector's finding that the route's re-designation as a bridleway would not constitute a public nuisance.

Common law dedication and public nuisance.

7. There are three conditions necessary to establish common law dedication:

   a. the owner of the land over which the alleged right of way runs must have capacity to dedicate it;

   b. the owner did in fact expressly or impliedly dedicate it;

   c. there had been acceptance of the dedication by the public.

8. In practice, dedication usually has to be implied because the landowner rarely dedicates expressly. Acquiescence will often suffice, as Lord Blackburn noted in *Mann v Brodie* (1885) 10 App Cas 378,386.

9. Evidence of user by the public will be relevant both to the question of implied dedication and to the question whether there has been acceptance by the public.

10. There is, however, a limitation on the power of a landowner to dedicate his land. In *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519, Lord Scott of Foscote observed that whilst a landowner may authorise a use prohibited by statute (this being contrary to the previous understanding of the law), he could not authorise something which would amount to a public nuisance:

> "It would not, in my opinion, have been open to the landowner to have dedicated the footpath as a public vehicular highway if use by the vehicles would have constituted a public nuisance to pedestrians using the highway."(para.42).

11. In adopting this approach, Lord Scott approved a dictum by Stuart-Smith LJ in *Hereford and Worcester County Council v Pick* [1996] 71 P & CR 231, 239. In that case the evidence was that persons were riding bicycles and motorcycles on a particularly narrow section of a footpath. The judge observed that this would be dangerous for pedestrians and he added:

> "That being so, it would constitute a nuisance and no rights could be acquired as a result of such conduct".

12. This was also the principle on which, in *Sheringham Urban District Council v Holsey* (1904) LGR 744, Joyce J refused to accept that a narrow lane used by pedestrians, being no more than four feet four inches wide at one point and enclosed by buildings, had been dedicated by usage for the use of carts. It would be "positively dangerous to allow a lane of this width to be used for wheeled traffic". The judge also observed that:

> "The user for wheeled traffic was in its inception and has all along been a public nuisance and no length of time can legalise it."

13. It is now firmly established, following *R v Rimmington* [2005] UKHL 63; [2006] AC 459 that the crime of public nuisance involves "an injury suffered by the community or a significant section of it": per Lord Bingham of Cornhill, para.37. In the context of highways a public nuisance will typically be the result of an unlawful obstruction interfering with the right of passage, but as the *Hereford and Worcester* and *Sheringham* cases show, it might also be conduct which endangers other users of the highway. The fact that cyclists or riders may without the exercise of due care be a danger to themselves, however, is not a ground for finding a public nuisance.

14. Whether an act amounts to a public nuisance is a question of fact to be determined by the Inspector: see *R v Mathias* (1861) 2 F & F 574.

The Inspector's Decision Letter.

15. The focus of this appeal is the Decision Letter of the Inspector. It provides the legal justification for the Order being made. I will briefly set out the basis of the Inspector's decision, focusing in particular on those aspects which potentially bear upon the public nuisance question.

16. For the purposes of the statutory dedication it was necessary for the Inspector to find when the status of the claimed route was brought into question and to find twenty years open and uninterrupted user thereafter. The Inspector considered at some length, under the heading of verbal challenges, barriers and signs, the evidence which was said to demonstrate that landowners had objected to the presence of cyclists and horse riders using the track. He found that barriers were constructed which were designed to prevent the use by motor vehicles but not to stop the use by cyclists. However, he also held that there was evidence that from late 1999 there were signs designed to stop cyclists using the footpath. There was therefore no uninterrupted 20 year usage from the period when use of the route had been interrupted by the construction of the M25. Moreover, there

could in any event by no statutory dedication with respect to land owned by the Ministry of Transport ("MoT"), which land had been acquired to build the M25. This was because statutory dedication cannot apply to Crown land, although that principle does not apply to common law dedication.

17. The Inspector turned to consider whether there had been dedication as a bridleway at common law. For common law dedication something less than twenty years user may suffice. The Inspector was satisfied that dedication by the relevant landowners was to be implied by the evidence of use and the conduct of the owners who, he found, had taken no steps to prevent cycling prior to putting up some no entry signs in 1999.

18. The Inspector dealt (briefly, as he explicitly stated) with the Claimant's submission that there could be no dedication because the use of the bridleway would constitute a public nuisance. Before considering his conclusions on this issue, I will summarise the principal relevant evidence bearing on that question.

19. The focus of the argument was directed to the danger to pedestrians from horses riding through the subway under the motorway. The critical point relied upon was the height of the subway, which is some 2.3 metres (although higher at the ends of the subway), coupled with the fact that it is forty one metres long. It was said that the character of the route was intrinsically dangerous to pedestrians, akin to the position in the *Sheringham* case. No authorisation could lawfully be given at any point during the period of use relied upon.

20. The appellants relied upon two principal sources of evidence in support of their public nuisance argument. First, there was evidence from individuals about the difficulties of riding a horse in the subway. Mr Wilson, a former footpath officer, had written an article in which he had stated that he would not want to ride a horse through the underpass. Mr Cresswell gave a hearsay account of his teenage daughter riding in the underpass; she said that she could ride the horse only by bending and clinging onto the horse's neck. This, submitted the appellants, inevitably affects the rider's ability to control the horse, to the potential prejudice of pedestrians. As against this, there was evidence from Mr Daniel Williams, the Council's Countryside Access officer for sixteen years, who accepted that any rider would have to take care riding through the underpass but nonetheless could do so safely. Also, riders could dismount and lead the horse if necessary.

21. The second source of evidence was certain standards relating to the structure of an underpass. First, there was guidance from the British Horse Society entitled Advice on Dimensions of Width, Area and Height, which noted that a tall rider on a large horse would be close to three metres, and asserted that the ideal height for an underpass below a road would be 3.7 metres. However, the guidance also stated that the absolute minimum was 2 metres save where there was a lower, locally agreed height, in which case riders would normally be expected to dismount.

22. The other standards relied upon were technical standards adopted by the Highways Agency relating to the "desirable subway standards" for the

construction of new roads and bridges. They stated that the where a bridleway is incorporated into a subway, the headroom should be 3.7 metres save where blocks were provided to mount and dismount, when it could be 2.7 metres. More recent advice was to the effect that if horses are to be led, the headroom may be reduced to 2.8 metres but that this should be avoided where possible because "horses can be difficult to control when led".

23. The submission before the Inspector was that the only legitimate inference from this evidence was that it was intrinsically unsafe for pedestrians when sharing the underpass with horses. The headroom gave no leeway if a horse was out of control or startled. The danger to pedestrians constituted a public nuisance.

24. The Inspector rejected this argument. He summarised his conclusions on this point in the following way (paras. 50-51):

> "The granting of higher public rights over an existing footpath might constitute a public nuisance to pedestrians using the path. Such a grant would not be lawful if it gave rise to a public nuisance. This is distinct from the allegation that the recording of the route as a bridleway would mean that it is unsafe for cyclists or horse riders, which is not relevant to my decision.
>
> There is a lack of evidence to substantiate the objectors' claim that the designation of the route as a bridleway will constitute a nuisance for pedestrians. The concerns expressed in the written submissions of the people opposed to the Order generally relate to the potential use by motorcycles. There is scope for the Council to maintain the route in a manner that would accommodate the different types of lawful user. It follows in my view that there is no merit in the objectors' submissions on this matter."

25. The Inspector had in fact referred to the design standards and the BHS guidance in the context of considering (and rejecting) an argument that the MoT did not have the authority to grant bridleway rights over the footpath in breach of its own design standards. He pointed out that the subway appeared to conform to the relevant standards in force when it was constructed. It is inherently unlikely that in these circumstances the route would be likely to amount to a public nuisance.

The hearing before the judge.

26. The matters raised before the judge ranged well beyond the issue of public nuisance which we are considering. The judge rejected a variety of arguments to the effect that there was no proper evidence to sustain the Inspector's conclusion of implied dedication and acceptance by the public. He also rejected a submission that the inherent unsuitability of the underpass for use by horses with pedestrians created such a risk of injury as to engage the principle that the Order would be incompatible with the statutory functions of Highways England.

27. The judge considered the grounds relating to public nuisance in some detail (paras. 27-55). In essence, after reviewing the material evidence before the Inspector, he concluded that the Inspector had properly approached this question and was entitled to find, on the basis of the evidence before him, that use of the route as a bridleway would not constitute a public nuisance and accordingly would not preclude the common law dedication. The use of the track by horses was limited and the Inspector was entitled to accept the evidence of Mr Williams, the Council's experienced Countryside Access Officer, that horses could be safely taken through the subway, notwithstanding its limited head room. The Inspector's conclusion on the point could not be said to be perverse:

> "On the contrary, in my view it was open to the Inspector reasonably to conclude that neither the evidence of use nor the physical character of the Order Route substantiated the Claimants' contentions on the issue of public nuisance." (para. 52).

Grounds of appeal.

28. The grounds of appeal as formulated constitute eleven separate paragraphs but I think that they can conveniently be considered under five headings.

    a. The Inspector applied the wrong test when determining whether permitting horses to use the underpass constituted a public nuisance.

    b. The Inspector failed to take into account material factors when analysing the public nuisance question.

    c. The Inspector gave too much weight to the evidence of Mr Williams when there was no basis for giving Mr Williams' views any special status.

    d. The reasons explaining the Inspector's conclusions were inadequate and were not sufficient to enable the Claimants to know why the submission had been rejected.

    e. In any event, in the light of the evidence adduced, no reasonable inspector could have found that there was no public nuisance when horses were being ridden or led in that section of the route which passed under the motorway.

29. It is said that the judge erred in law in failing to uphold each of these challenges. He effectively considered each of these matters (although not specifically formulating them in the way I have done) but was not persuaded that there was legal merit in any of them.

30. In approaching submissions of this nature, it is important to bear firmly in mind the observations of Lord Brown of Eaton under Heywood in *South Bucks County Council v Porter* [2004] UKHL 33; [2004] 1 WLR 1953, *para*.36 when he discussed the way in which judges should approach the reasoning in the decisions of planning inspectors:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

31. I turn to consider the grounds of appeal

Applying the wrong test.

32. The complaint is that the Inspector asked himself whether the dedication of the track as a bridleway gave rise to a public nuisance whereas he ought to have gone on to ask whether it was likely to give rise to a public nuisance. In asking that question, the Inspector ought to have had regard to the likely increase in the use by horses once the track has the status of a bridleway.

33. The question is whether the landowner has the authority to dedicate the land as a bridleway; and he does not have that authority if the dedication will give rise to a public nuisance. There need not be evidence that there actually has been any specific accident or incident (although the lack of such evidence is likely to be very relevant particularly where there has been extensive use); the authorities such as *Sheringham* and *Hereford and Worcester* clearly show that the character of the route itself may be such as to justify the inference that it is obvious that the route is potentially dangerous to a section of the public.

34. However, I do not accept that the Inspector was entitled, far less obliged, to speculate about future use and to consider whether that might give rise to a public nuisance. If during the period of use which justifies the inference of dedication it cannot be said that the likelihood of a public nuisance is intrinsic in the character of the highway, there would in my view be no basis for concluding that the landowner was not authorised to dedicate the land to such use because of what the future might bring. Once the right of way is established by dedication, it cannot retrospectively be held that the landowner had no authority

to grant the rights being exercised because of an alteration in the nature or degree of use. Nor do I see in this case how the increased use of horses would in itself alter the character of the highway and create a public nuisance where none existed before. It might of course increase the risk of an incident between a rider and a bicycle or pedestrian, but that would not amount to a public nuisance.

35. The Inspector did in fact recognise that there might be a change in the balance of use, in which case there was "scope for the Council to maintain the route in a manner that would accommodate the different types of lawful user". The dedication of the track as a bridleway would not cease, however.

Failing to take into account material factors.

36. It is asserted that the Inspector failed to take into account the evidence which supported the view that horse traffic in the subway would give rise to a public nuisance. There is no basis for this ground of appeal. The Appellants drew all the relevant evidence to the Inspector's attention but he was not persuaded by it; that does not mean that he did not consider it. It is true that the Inspector did not discuss the evidence in his decision but that goes to the separate question whether he gave adequate reasons for his conclusion.

Too much weight given to Mr Williams' evidence.

37. Weight is classically a matter for the decision maker. One of the fundamental principles of planning law is that whereas it is a question of law whether something is a material consideration, the weight to be given to it is entirely a matter of fact for the relevant planning authority: see *Tesco Stores Limited v Secretary of State* [1995] 1 WLR 759, 780 per Lord Hoffmann. It was in any event certainly not perverse in this case to give weight to the views of an experienced Officer who is also a member of the Institute of Public rights of Way. The fact that he is not an expert on horses does not discredit his evidence, as the appellants sought to suggest.

The reasoning was inadequate.

38. I would accept that the Inspector might have said a little more about the evidence than he did. But I am satisfied, as was the judge below, that he was not obliged to do so. It is in this context that it is important to have regard to the guidance of Lord Brown of Eaton under Heywood in *South Bucks v Porter* which I have set out above and especially the observation that decision letters are addressed to parties who are very well acquainted with the issues, and that the purpose is not to rehearse all the evidence or arguments advanced. Most of the concerns raised by objectors on the question of nuisance were, as the Inspector pointed out, directed to the use by motorcycles. The specific issue in dispute here was a narrow one: was the existence of horse traffic in the subway inherently dangerous to pedestrians? There was very little evidence going to that particular issue and the Inspector indicated in terms that there was a "lack of evidence" supporting the appellants' position. In so far as the evidence concerned the guidance as to the appropriate height of the subway for horses,

that was directed to the care and safety of horses and their riders and, as the Inspector properly noted, the question of their safety was not directly relevant to the issue of public nuisance. In any event, the guidance did not say that riding a horse through an underpass of this nature would be unsafe; rather, it required appropriate care. I do not accept, to adopt Lord Brown's words, that the Appellants can claim to be "substantially prejudiced by the failure to provide an adequately reasoned decision". In my view the reasoning is perfectly adequate.

The conclusion was perverse.

39. Again, in my view this is unsustainable, essentially for reasons already given. There was no evidence of any actual harm to pedestrians and an officer with considerable experience of rights of way considered that horses could safely use the subway without undue risk to pedestrians. Evidence that there was reluctance to ride the track, or that it was not easy to do so, fell very far short of establishing a public nuisance. The track of the subway was recorded to be some five metres wide, far wider than in the *Hereford and Worcester* case, and there was no basis for finding, as in the *Sheringham* case, that the character of the route was such that pedestrians would be forced to jump out of the way of approaching horses. Indeed, it had been used by private motor vehicles in the past.

40. Notwithstanding that I have rejected the Appellants' submissions, I would pay tribute to the careful and courteous way in which Mr Garland, appearing in person, advanced his arguments. We also permitted Mr Salaman to make some brief observations in the course of which he raised two issues which were not part of the grounds of appeal but which were obviously matters he felt about very deeply. First, Mr Salaman submitted that he could produce statements from many individuals who are unwilling to use the route if horses (and in some cases, no doubt, bicycles too) are allowed to do so. We cannot of course accept fresh evidence of this nature on appeal, but in any event this evidence would not in my view take matters further. There will always be individuals who will be unwilling to take any risk of an accident or incident with a horse or bicycle and would only feel comfortable walking on a footpath i.e. a path which is used only by pedestrians. Their reluctance to use a bridleway may be understandable but it does not objectively demonstrate that user as a bridleway constitutes a public nuisance.

41. Mr Salaman's second point was that in practice motorcycles use the route, notwithstanding that they are not entitled to do so, and that they are a menace to pedestrians. I have considerable sympathy with this complaint but the motorcycles are not lawfully there and their presence raises an issue of law enforcement. It is difficult to see how denying bicycles the right to use the route would stop motorcycles, unless the argument is that if bicycles are forbidden to use the track, there is less chance that motorcycles will do so. Even if that is true, however, it cannot possibly be justified to prevent bicycles from taking advantage of what would otherwise be a lawful use of the track in order to inhibit the unlawful use by motorcycles.

42. For these reasons, which are substantially in accordance with the reasoning of the judge below, I would dismiss the appeal.

Stuart-Smith LJ:

43. I agree.

Bean LJ:

44. I also agree.