Neutral Citation Number: [2022] EWHC 1840 (Admin)

Case No: CO/2126/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2022

Before:

LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HOLGATE
MR JUSTICE SAINI

- -

Between:

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
MIRIAM INSTONE	
PEACEFUL WARRIOR	**Respondents**

- -
- -

James Boyd (instructed by **The Crown Prosecution Service**) for **The Appellant**

Owen Greenhall (instructed by **Hodge Jones and Allen Solicitors**) for the **The Respondents**

Hearing date: 30 June 2022

- -

Approved Judgment

Mr Justice Holgate:

Introduction

1. This is an appeal by way of case stated from the decision on 5 May 2021 of the Liverpool, Knowsley and St Helens Magistrates' Court that the respondents, Miriam Instone and Peaceful Warrior, had no case to answer in respect of an alleged offence of aggravated trespass contrary to s.68(1) of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). On the evening of 4 September 2020 a group of Extinction Rebellion protestors blocked the main entrance to the premises of Newprinters Limtied ("Newsprinters") at Kitling Road, Prescot, Knowsley. It was common ground that that land was owned by Newsprinters, but the issue was whether it had, or might have, become part of the highway so that s.68 was not applicable.

2. The group positioned a boat with a trailer across the Kitling Road entrance. The group also placed a van across the rear entrance to the premises. The intention was to prevent any access to or from the site.

3. The protestors sought to make these barriers more effective by positioning themselves on or underneath the vehicles and by tethering themselves together or to the vehicles.

4. As the direct result of these actions Newsprinters were unable to conduct their lawful business of distributing newspapers from the premises that evening.

5. At the request of the site manager, Merseyside Police attended and attempted to persuade the protestors to remove themselves and the blockages from the entrances. They refused to do so. The police had to deploy specialist officers to remove each protestor safely.

6. During the protest the first respondent, Ms. Instone, attached herself to the underside of the boat at the Kitling Road entrance. She placed one of her arms through a tube linked to the second respondent, Peaceful Warrior, who was lying on the opposite side on the ground. They were in this position for about 9 hours before being removed.

7. On 26 October 2020 an information was laid by the appellant, the Director of Public Prosecutions, alleging that the respondents had trespassed on the Kitling Road entrance and prevented access to and from the land by employees and vehicles, with the intention of obstructing or disrupting a lawful activity in which persons were engaged, namely the printing and distribution of newspapers and magazines contrary to s.68 of the 1994 Act.

8. The matter was heard by Deputy District Judge Lowe on 4 and 5 May 2021.

The hearing in the Magistrates' Court

9. Evidence was given by Mr. Lee Taylor, the operations manager for the site. He had been employed by Newsprinters for 14 years. He was responsible for, amongst other things, the maintenance of the land around the perimeter fence.

10. Newsprinters' premises lie to the north of Kitling Road, an adopted highway. Mr. Taylor explained that the perimeter fence and gate were set back from Kitling Road at the entrance so that large vehicles, such as lorries and vans, would not block the road.

11. Photographs and measurements prepared by the police for the hearing in the magistrates' court show a security fence and gate located about 10m back from the edge of the tarmacked carriageway of Kitling Road. About 10m further inside the line of that fence and gate there was a barrier which could be lowered and raised.

12. A footpath ran along the northern edge of Kitling Road. On either side of the bell mouth entrance into Newsprinters' site the footpath curved in towards the perimeter fence.

13. The area of the bell mouth between the perimeter fence and the tarmacked surface of Kitling Road and between the two curved pavements was entirely paved. Mr. Taylor gave evidence that this paved area was maintained by Newsprinters. The documents of title are understood to show that this area fell within the company's leasehold ownership.

14. Mr. Taylor stated that the respondents carried on their protest at a point on the paved area located about 7.1m from the tarmacked surface of Kitling Road and 2.8m from the line of the perimeter fence, referred to as "point B".

15. The prosecution contended that at the location where the respondents carried on their protest they were trespassing on Newsprinters' land.

16. Plainly, members of the public wishing to cross the site entrance could simply walk in a straight line along the alignment of the pavement adjacent to the carriageway of Kitling Road. However, Mr. Taylor accepted in evidence "that there was nothing to prevent members of the public that crossed the entrance from deviating away from the line of the pavement onto the paved area maintained by Newsprinters". There was no physical obstruction to prevent them from doing this.

17. The respondents contended that as Newsprinters had not objected to the public having access over that part of their land and had not made it clear that such access was enjoyed only by virtue of the company's implied consent, there was a presumption that the land had become part of the highway, relying on s.31 of the Highways Act 1980. On that basis the respondents could not have been trespassers.

18. Paragraph 7 of the case stated says: -

> "Having considered the evidence put before me by the Applicant I found that
>
> (i) the land on which the respondents had placed themselves and from which they had refused to move was land owned by Newsprinters.
>
> (ii) this land had been maintained by Newsprinters for at least fourteen years.
>
> (iii) it was not enclosed by a fence or other structure.
>
> (iv) members of the public were able to enjoy free passage over the land.

> (v) there was no notice displayed by Newsprinters or other conduct on their part [to] negate the operation of s31 Highways Act 1980."

19. Paragraph 8 of the Case Stated says: -

> "I was of the opinion that as the provisions of s31 Highways Act applied to the land sufficient evidence had been placed before me to conclude that the land had become part of the highway and that consequently the Applicant was unable to prove an essential element of its case, viz that the respondents were trespassers."

20. On those findings and for that reason the judge decided that there was no case to answer. But it will be noted that the judge went further than simply applying the tests for deciding a submission of no case to answer. He made a positive finding on the evidence that the land had been dedicated as part of the highway.

The questions for the High Court

21. The Judge has stated the following questions: -

> "1. Was it open to me to conclude that as the public were able to enjoy free passage over land which in all other respects belonged to Newsprinters that land had by virtue of s31 Highways Act become part of the highway?
>
> 2. That consequently the Applicant had failed to prove that the respondents were trespassers on that land?
>
> 3. That I was correct in acceding to the submission that there was no case to answer?"

Statutory Framework

22. At the relevant time[1] sections 68 (1) and (5) of the 1994 Act provided: -

> "(1) A person commits the offence of aggravated trespass if he trespasses on land [in the open air] and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land [in the open air], does there anything which is intended by him to have the effect—
>
> (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
>
> (b) of obstructing that activity, or
>
> (c) of disrupting that activity.

[1] Prior to amendments made by the Police, Crime, Sentencing and Courts Act 2022 which do not affect this appeal.

> (5) In this section "land" does not include—
>
> (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of "land" in subsection (9) of that section; or
>
> (b) …..."

23. So far as is material, section 61(9)(b) of the 1994 Act provides: -

> " "land" does not include—
>
> (a) …
>
> (b) land forming part of—
>
> (i) a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of Part III of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part II of the Countryside and Rights of Way Act 2000 or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984; or
>
> (ii) …"

24. Section 66(1) of the Wildlife and Countryside Act 1981 defines a "footpath" as "a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road". So trespass on a highway, including a footpath running alongside the carriageway of a highway, cannot give rise to an offence under s.68 of the 1994 Act. But trespass on a footpath elsewhere may do so.

25. Section 31 of the Highways Act 1980 ("the 1980 Act") deals with the presumed dedication of land as a highway. So far as is material s. 31 provides:-

> "**Dedication of way as highway presumed after public use for 20 years**.
>
> (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
>
> (1A) ….
>
> (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,

> whether by a notice such as is mentioned in subsection (3) below or otherwise.
>
> (3) Where the owner of the land over which any such way as aforesaid passes—
>
> > (a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
> >
> > (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.
>
> (4)….
>
> (5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway."

A summary of the parties' submissions

26. On behalf of the prosecution, Mr. James Boyd submitted that there could be no implied or presumed dedication of land without actual use of a way by the public. Here there was no evidence of any actual use by the public of the paved area belonging to Newsprinters, let alone use over the requisite period of 20 years. Furthermore, the mere fact that there was nothing to prevent members of the public crossing the access from deviating away from the line of the pavement on to the privately owned paved area, could not, as a matter of law, found an inference of actual use by the public.

27. Mr Boyd also submitted that, in any event, there could be no rational basis for inferring actual use by the public over the area which happened to be occupied by the respondents during their protest. That would involve someone having to walk about 7m away from Kitling Road before crossing the entrance and then walking 7m back towards Kitling Road before carrying on with their journey. That deviation would be substantially longer than crossing the entrance along the line of the pavement. There was no evidence of any such route being taken to avoid traffic entering Newsprinters' site.

28. On behalf of the respondents, Mr. Owen Greenhall submitted that the burden of proof lies on the prosecution to establish that the respondents were trespassing on land which was not a highway, should a defendant choose not to admit that point. A defendant is not under any burden, whether legal or evidential, to raise the issue. A court is entitled to dismiss a charge of aggravated trespass on this point if it concludes that it is possible that the land in question forms part of a highway. It does not have to reach a definitive conclusion that the land is part of the highway.

29. Mr. Greenhall submitted that in this case the evidence of Mr. Taylor, together with the photographic material, were sufficient to raise a possibility that members of the public have crossed the junction at or near the perimeter fence for a sufficient period to result in the dedication of that land as a highway. There had been no need for the respondents to adduce direct evidence of actual use for that issue to arise. Mr. Greenhall relied upon the decision of HHJ Kramer in *Easteye Limited v Malhotra Property Investments Limited* [2020] EWHC 2606 (Ch) for the proposition that an inference of actual use by the public may be inferred without direct evidence of that use ([139] – [140]).

30. Mr. Greenhall submitted that the appellant was treating the evidence of Mr. Taylor too narrowly. It had to be seen in context. The entrance was used by large vehicles. It was therefore realistically possible that members of the public would have wished to remain on the pavement for as long as possible, so as to be able to cross the access at its narrowest point and to obtain the clearest view into the site.

31. Lastly, Mr. Greenhall submits that the judge was entitled to rely upon *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Retail Affairs* [2008] AC 221. That decision laid down the principle that to rebut a presumption under s.31(1) of the 1980 Act there must be evidence of some overt acts on the part of the landowner to show public users of the land that he had no intention to dedicate it as a highway. The test is objective (see e.g. [20] and [39]). There was no such evidence here.

Discussion

32. The judge decided that the prosecution were unable to prove that the respondents had trespassed on the land belonging to Newsprinters solely because in his view sufficient evidence had been placed before him to conclude that that land had become part of the highway.

33. However, the judge did not appreciate that the presumption regarding the dedication of a highway, whether under s.31(1) of the 1980 Act or at common law, can only arise if a way over land has *actually* been enjoyed by the public as of right and without interruption for a full period of 20 years. Unless that test is satisfied there is no presumption to be rebutted.

34. Parliament enacted the words "actually enjoyed by the public as of right and without interruption for a full period of 20 years" to assimilate the law on public rights of way to that of private rights of way. The words "as of right" have the same meaning in both contexts, that is the user must not be by force, or by stealth, or with the permission of the owner ("*nec vi, nec clam, nec precario*"). The principle is that there must be actual, open public user. A landowner cannot be said to have acquiesced in a user of which he did not know or could not reasonably have known, and so could not reasonably have been expected to resist (see e.g. Lord Hoffman in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, 350-53; *Godmanchester* at [52] and [57]; *R (Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] 2 AC 70 at [17]-20], [30], [66 – 67] and [91]).

35. In *Easteye* the judge also said this at [143]: -

> "The law then, which is unchanged, was that user by the public could evidence an intention to dedicate; see *Poole v Huskinson* (1843) 11 M&W 827. It has never been the law that the fact that a way is open to the public if they chose to use it, but as to which there is no evidence of use, is, without more, evidence of an intention to dedicate. The rationale for the use having to be open and as of right is that it brings home to the owner of the way that a public right is being claimed; *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 A.C. 70 per Lord Walker JSC at [36]. The reference in *Souch*, therefore, to the public being allowed to enter must refer to actual use, not the mere opportunity for the public to enter if they had so wished, and cannot be relied upon as an indication that such use was inferred in that case."

36. I entirely agree with that passage, although I would note that the judge was in fact referring to Lord Walker's judgment in *Lewis* at [30] rather than [36].

37. Applying these principles to the present case, I am unable to accept Mr. Greenhall's submissions.

38. First, there was no evidence before the court of actual user or enjoyment by the public of the paved area belonging to Newsprinters over any period of time, let alone the 20 year period as of right required for presumed dedication. The evidence went no further than to say that there was nothing to stop members of the public walking over the paved area. They were able to enjoy free (i.e. unobstructed) passage over that land (see the judge's question 1). That was simply evidence of a mere physical opportunity to cross the paved area, and not actual use asserting a right which the landowner needed to resist if it did not intend to dedicate the land as a highway. Accordingly, there was no evidence from which it would have been permissible for the court to infer that any part of the paved area had been, or even might have been, dedicated by the owner as a highway. In my judgment, for these reasons alone the appeal should succeed.

39. Second, the judge did not draw any inferences about actual use or enjoyment in his findings. Instead, he went straight to the point that Newsprinters had not displayed a notice or done anything else which would have been inconsistent with dedication under s.31(1) of the 1980 Act. That was wrong as a matter of law. Unless a court can and does properly conclude on the evidence that there has been actual enjoyment as of right of a way capable of being dedicated as a highway without interruption for at least 20 years, the presumption in s.31(1) does not arise. In such circumstances, the absence of any notice or other conduct by the landowner sufficient to indicate his intention not to dedicate the land as a highway is irrelevant. The land cannot have become a highway by presumed dedication.

40. This is an important point of principle because the respondents' argument could otherwise be repeated in a great many instances across the country where a private access road serving, for example, industrial, commercial or residential premises is connected to a vehicular highway bounded by a public pavement. Mere evidence that members of the public had an opportunity to deviate from the line of the pavement to walk over an area of private land in order to cross the access road, would suffice to raise

a presumption of dedication, without any evidence of actual use or enjoyment as of right. That approach is contrary to long-established principle.

41. Third, it follows that where, as here, there is no evidence of actual use or enjoyment of a way as of right for 20 years, the prosecution bears no burden of proving in a prosecution under s.68 of the 1994 Act that the area on which a trespass occurred was not dedicated by the owner as a highway.

42. In these circumstances, it is unnecessary to address counsels' further submissions.

43. For the reasons set out above, the judge was not entitled to conclude at the close of the prosecution's case that the area of Newsprinters' land occupied by the respondents was a highway (nor would he have been entitled to conclude that that was possibly the case). He was not entitled to conclude that the prosecution had failed to prove that the respondents had trespassed on that land.

Conclusion

44. For the above reasons I would give the answer "no" to each of the questions in the case stated.

45. Subject to the views of my Lords, I would allow the appeal, set aside the decision that there is no case to answer, and remit the case to the magistrates' court for the trial to continue.

Mr Justice Saini:

46. I agree.

Lord Burnett of Maldon CJ:

47. I also agree.