

Re:- The Trails Trust and the Creation of Highways

ADVICE – 29/8/17

1. The Trails Trust is a registered charity with an interest in the development of a network of highways (typically bridleways) across England and Wales. I am asked to advise them on creation of highways at common law, in particular in the light of reluctance on the part of some (by no means all) local authorities to recognise highways that have not been created within a statutory framework.
2. This advice is provided to the The Trails Trust. Only they may rely on its contents, but once they are in receipt of this advice it is theirs, and they can share it as widely as they wish (albeit that any recipient other than The Trails Trust may not rely on it as advice).
3. To keep costs down we have agreed that I will keep this advice within relatively tight bounds. It will be appreciated that it is possible to discuss the creation of highways, by various methods, at very great length. I focus my attention exclusively on the approach adopted by The Trails Trust which they find to be meeting resistance. They refer to that approach as “express dedication” or “express dedication at common law”.

WHAT IS A HIGHWAY?

4. A highway is not defined in statute. It is necessary to look at the common law definition which is given in Halsbury's Laws (5th Ed) 55[1] (an authoritative source) as follows:-

“A highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.”

5. A more user-friendly definition (borrowed from Stephen Sauvain QC) is that a highway is a public right to pass over a defined route. Every part of that definition matters.

- (1) The right must be for the public (not a limited class of people).
- (2) It must be a public right to pass (not merely permission/acquiescence).
- (3) Passage (I would not expect this to be a problem in relation to The Trails Trust issues, so I do not dwell on it).
- (4) Defined route (i.e. open space is not a highway, even if the public customarily pass over it).

ESSENTIAL CHARACTERISTICS OF A HIGHWAY

6. Bearing in mind the above definition of a highway, it can be observed that a highway has some essential characteristics. For our purposes the vital ones are:-

- (1) It must serve a public purpose. If it serves no public purpose, there cannot be a public right of way. So, by way of example, a path leading

to a beauty spot (or linking part of a wider network) would serve a public purpose. A path leading only to a private residence would not serve a *public* purpose and would generally not be a highway. For The Trails Trust purposes, the public must have an interest in what is at both ends of their putative highway.

- (2) The route must be defined. From what I understand that is not likely to cause a problem for The Trails Trust.

RIGHT?

7. The part of the above definition of highway (advice paragraphs 4-5) which will require most attention is the question of whether or not the public have a right of passage. In this advice I am not dealing with creation of highways by statute, order/declaration, or agreement with the highway authority, although these methods of highway creation are important (ss.25 and 38 of the Highways Act 1980 being worth particular mention). Rather for the purposes of this advice the question at issue is the circumstances in which the public acquire a right of passage at common law.
8. For the public to acquire a right over a way that has the essential characteristics of a highway (as above – paragraph 6), (a) the landowner must dedicate the route to the public; and (b) the public must accept that dedication. That, put shortly, is how a highway is created at common law. It can be conceptualised very simply as this formula:-

Assuming that the route has the essential characteristics of a highway, then

DEDICATION + ACCEPTANCE = HIGHWAY

9. As might be expected, there is rather a lot more that can be said about the parts of that formula. I will address them in turn. Before doing so note that consideration of the *type/purpose* of highway exceeds the ambit of this advice, but note in passing that a highway can be a right of passage on foot, riding/leading a horse, and/or with vehicles/cattle (I leave cycle tracks to one side). I understand The Trails Trust generally to be concerned with bridleways. Dedication+acceptance (i.e. creation of a highway) can occur in a situation where there was no highway at all before, or it can be an “upgrading” of an existing highway. For example an existing footpath (a highway for pedestrians only) can become a bridleway (i.e. for passage on foot or riding/leading a horse) by the landowner dedicating the way as a bridleway (whereas before it was only a footpath) and the public accepting that dedication (subject to the issues addressed below).

Dedication

10. The first part of the above formula is that the landowner must dedicate the way across his land to the public. That dedication can be either express (the landowner positively says (realistically writes) words to the effect of “I dedicate this way to the public use”) or implied (typically the landowner’s intentions are unknown but the evidence suggests that the landowner intended to dedicate). We are concerned with express dedication, so I leave implied dedication to one side. Note, however, that there are these two different types of dedication. Law relating to implied dedication has little to do with a situation in which dedication is express.

11. For a dedication to be considered a proper/valid dedication:-

(1) The landowner must have the capacity to dedicate. In practice that means:-

- (a) The landowner must have legal capacity (not be a child or insane).
- (b) The landowner must be able to dedicate the land forever (so a lessee cannot dedicate).
- (c) It is arguable that if the land is subject to a mortgage, then the mortgagee must consent to express dedication. [Whilst I caveat this point with “it is arguable”, for The Trails Trust purposes the safer thing to do is to ensure that a landowner mortgagor giving express dedication has the consent of the mortgagee.]
- (d) There might be circumstances in which some other third party (other than the landowner and mortgagee) would have sufficient interest in the land that their consent would be required for dedication. By way of example if a third party has a private right of way, and if dedication of a way to the public would be inconsistent with that private right of way, the third party’s consent is probably required. This is rather obscure and unlikely to arise frequently, I think.
- (e) The landowner must have power to dedicate. This is no problem with a typical landowner but problems arise if, for instance, the landowner is a public authority and the purported

dedication would run contrary to the purposes of the public authority. Again this is rather obscure.

- (2) The landowner must intend to divest himself *forever* of the right to exclude members of the public from the route (i.e. the intention must be an intention to dedicate forever).
- (3) The dedication must in fact be forever (rather than a limited period, even if a long period).
- (4) The route must be dedicated to the public (and not a limited class).
- (5) The landowner must not act inconsistently (so, for example, an express dedication coupled with a blocking of the route would probably not be considered a valid dedication).

12. Note some factors which might be thought to be impediments to dedication but which are not in fact impediments to dedication:-

- (1) The dedication can be limited to the type of public access (e.g. pedestrians only).
- (2) The dedication can reserve an entitlement to the landowner to do things which might not otherwise be permitted on a highway (e.g. creating an obstruction where necessary).
- (3) The dedication can be “bought”. That is, there is nothing wrong in principle with a landowner with appropriate capacity being paid to dedicate a highway across his land. The only circumstance in which I can see a problem arising is in the event of undue influence on the landowner (rather than a legitimate commercial transaction).

Acceptance

13. It is easier to say “the public must accept the dedication” than it is to prove that the public have accepted a dedication. Acceptance is equally important in the creation of a highway at common law. The process in Highways Act 1980 s.25 would act as a kind of statutory acceptance. Absent such procedure being followed, it would be necessary in any given situation to consider whether the degree and quality of public user was such that a court (if ultimately asked to decide the issue) were likely to conclude that the dedication had been accepted.

14. I am at something of a loss in seeking to advise The Trails Trust on what evidence will suffice to show acceptance, because whether or not evidence is sufficient would turn on the circumstances. Take two extremes as an example:-
 - (1) Suppose that following express dedication all that could be proved was that the route was used once by an individual who had secured the express dedication. I would not expect a court (if asked) to regard that as sufficient to show acceptance.
 - (2) Alternatively, suppose that following express dedication the route became a part of a ramblers’ route of choice and was widely written up in guides for tourists, walkers and the like, and evidence could be called from witnesses who say that the route is in constant use. A court (if asked) would be virtually bound to find acceptance.

15. The problem is that I would imagine that most situations fall somewhere between those extremes. All that I can do is to say that the greater the proved public use, the more likely a court (if asked) would be to find that a dedicated route was accepted. It all turns on the evidence in any given case. Whether or not the public have accepted a dedication is an issue of fact to be determined (ultimately by a court if necessary) on the balance of probabilities. A court would need to weigh the available evidence to determine whether or not the proved user shows public acceptance of the dedication. I would not expect a court to set the bar particularly high in relation to proving acceptance, but in my opinion there is a bar to be crossed (which would not be crossed, in my view, in the circumstance in paragraph 14(1) of this advice (as an example)).

APPLICATION OF THE ABOVE

16. It follows from the above that if:-

- (1) The route has the essential characteristics of a highway (particularly a defined route serving a public purpose); and
 - (2) The landowner has capacity to dedicate and does dedicate the route to the public; and
 - (3) The public accept that use (such acceptance being sufficient in quantity and quality – an issue that would turn on the facts in any situation);
- then a highway is created.

COMMON MISCONCEPTIONS

17. It might help for me to address some of the common mistakes that I see being made by people dealing with highway networks (council employees and lawyers alike).

- (1) A highway is not the same thing as a highway maintainable at public expense. Commonly local authorities use the word “highway” when what they really mean is “highway maintainable at public expense”. The two concepts are legally different. A highway maintainable at public expense is, by definition, a highway, but the same is not true in reverse. For a highway to be a highway maintainable at public expense it essentially needs to fit within s.36 of the Highways Act 1980 (which provides a list of ways by which highways can be highways maintainable at public expense – that exceeds the ambit of this advice).
- (2) Importantly (from a highway authority’s perspective), the creation of a highway (as opposed to a highway maintainable at public expense) does not impose on the highway authority the onerous maintenance obligation of Highways Act 1980 s.41. Not all local/highway authorities immediately grasp that in my experience. [Note for completeness that the creation of a highway (as against a highway maintainable at public expense) does create some obligations for the local/highway/surveying authority (who are often but not inevitably the same body):- they would be obliged to assert and protect the public right including prevention of obstructions (Highways Act 1980 s.130), and they would have to record the existence of the highway on their map/statement (and in particular the Wildlife and Countryside Act 1981 s.53 obligation of the surveying authority to keep its definitive map/statement under continuous review and update the map/statement “as soon as is reasonably practicable” after events creating highways will be of significance to The Trails Trust).

- (3) Just because a route is not on a local authority's "definitive map" or "definitive list" does not mean that the route is not a highway. If a route is on the "definitive map/list", it can be taken to be highway. If it is not on the list it means either that (a) it is not highway; or (b) the local authority have not recognised it as highway. The map/list is not, in that sense, "definitive" at all.
- (4) It is not necessary for there to have been 20 years of uninterrupted use by the public for a highway to be created. This misconception comes from operation of s.31 of the Highways Act 1980. That section says, effectively, that where a way (which has the essential characteristics of a highway) has been used by the public as of right for 20 years without interruption, the way is deemed to be dedicated unless the contrary is shown. That is a *statutory* presumption of *implied common law* dedication. The statute is essentially saying that 20 years' use leads to inference of (i.e. implied) dedication.
- (i) Such period of use has no part to play in the question of whether or not a way has been expressly dedicated by a landowner.
- (ii) For completeness (although not relevant for express dedication), 20 years' use is not required for an implied dedication either. The evidence can suggest (implied) dedication after a very much shorter period (but the *statutory* presumption would not bite).

CONCLUDING COMMENT

18. I hope that it is apparent from the above that whilst I have given an overview of the principles which lie behind creation of highways at common law by express dedication, a great deal turns on the facts of any given case. I cannot (nor could anyone) hope to cover every conceivable scenario, and I have not even tried. This advice covers the main principles. I commend the letter dated 19/11/12 written by Dave Waterman of Defra. He, like me, has considered the overarching principles and his letter is (as might be expected) rather lighter on legal principle, but heavier on practicalities. I share his view that the standard of proof of acceptance is relatively low. A court asked to declare whether or not a highway had come into existence (perhaps in the face of a recalcitrant/reluctant local authority) would in my view not require a great deal of persuasion/evidence to find acceptance. Evidence would, however, be required. I am not convinced of his view that a document (and perhaps photos) showing the route in use once would suffice. I would regard that as likely to be considered insufficient (but I doubt that anyone would seek a declaration from a court on the basis of such scant evidence in any event). Anyone wishing a slightly more practical understanding of the issues covered in this advice would do well to read that letter.

19. If I can be of any further assistance, please do not hesitate to contact me.

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