
The Charity Law & Practice Review

CHARITIES AND HIGHWAY LAW

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Can the public obtain a right of way by deemed dedication by virtue of 20 years user, if the land over which it runs is owned by a charity?

This was the question which was about to be litigated before the High Court recently in the case of *R v SoS for the Environment and Others ex parte Cole* CO/1334793. But the parties to the litigation in, as it were, "the driving seat" decided otherwise. Following a change of heart, or rather reassessment of the litigation, the Secretary of State and the representatives of the charity reached a compromise and judgment by consent ensued.

Nevertheless the issues are of importance both in the field of charity law and highway law.

Section 31 Highways Act 1980 (in this context being the successor to the Rights of Way Act 1932) provides, inter alia:

31. DEDICATION OF WAY AS HIGHWAY PRESUMED AFTER PUBLIC USE OF 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.
- (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,.....

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(3)-(6).....

- (7) For the purpose of the foregoing provisions of this section, "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land....
- (8) Nothing in the section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over the land as a highway if the existence of a highway would be incompatible with those purposes.

The relevant facts were that the Trustees of Frimley Fuel Allotments hold land at Frimley, Surrey, under a Charitable Trust which is now a scheme approved by the Charity Commission. The land was originally awarded under an Inclosure Act and was to be adequate to produce a reasonable supply of fuel for the consumption of the inhabitants of the locality.

Members of the Ramblers' Association believed that a track across the Fuel Allotments had been used by the public for a period in excess of 20 years and thus made a claim under Part III Wildlife and Countryside Act 1981 for a modification order to add the path to the definitive map of public rights of way. The application was made to the Highway Authority who decided that there was insufficient evidence to cause them to add the path to the map. The Association appealed to the Secretary of State for the Environment as provided for in paragraph 4 of Schedule 14 to the Act. The Secretary of State in practice invites known interested parties to make representations to him about the appeal and the Ramblers and the Trustees of the Fuel Allotments both made representations through solicitors on a range of issues. Eventually the Secretary of State decided to reject the appeal on the grounds that the dedication of a public right of way was tantamount to disposing of the land over which it runs and that it would therefore require the consent of the Charity Commissioners. Such consent had not been obtained and thus the Secretary of State considered that neither the owners nor their lessees were able to dedicate the route to the public during the period for which deemed dedication was claimed. He dismissed the Ramblers' appeal. Whilst not making specific reference to section 29(1) of the relevant Act, namely the Charities Act 1960, the Secretary of State clearly had in mind the provision that no property forming part of the permanent endowment of a charity should, without an order of the Court or of the Commissioners, be sold leased or otherwise disposed of.

It was common ground between the parties that the 1960 Act was the relevant legislation and that it had to be construed in accordance with Interpretation Act 1978.

The Ramblers duly asked for a judicial review of the decision of the Secretary of State. The issues intended to be agreed at the trial were to be complicated, requiring consideration of the effect upon charity land of the section 31 Highways Act 1980. Days before the hearing the Treasury Solicitor on behalf of the Secretary of State conceded that the claimed dedication did not involve the disposal of the land over which the alleged public right of way runs and further that a public right of way does not fall within the meaning of the word "land" found in section 29(1) of the Charities Act 1960 as construed in accordance with the relevant provisions of the Interpretation Act 1978.

A consent judgment involving a matter of law cannot have the influential effect of a judgment of a Court after hearing the submissions of the parties but nevertheless when the Ramblers, the Secretary of State for the Environment and the Trustees of a charity, all represented by advisers who are specialist in their various fields, achieved consensus as to the proper interpretation of the law, it is submitted that this is highly influential.

The provisions of the Wildlife and Countryside Act 1981 are such that this is not the end of the matter. Quite apart from the fact that the Secretary of State must now reconsider his decision and will probably "make" a modification order, if there are continuing objections to the order that will lead to a public inquiry under the provisions of Schedule 15 of the Act. The rights of the public are not yet secure. Neither is the charity obliged to accept that a public right of way exists over its land because of this judgment. It can make objections and representations about the facts or even other points of law which can be considered by the Inspector at a public inquiry.