RIGHTS OF WAY

What is in a deposit?

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According to the Concise Oxford English Dictionary 10th Edition (Revised) deposit, as a noun can be:

- a sum of money placed in a bank or other account;
- a sum payable as a first instalment or as a pledge;
- a layer or body of accumulated matter; or
- the action of depositing something.

In the context of public rights of way, however, it commonly refers to a deposit by the freehold landowner under s.31(6) Highways Act 1980 (the Act) of:

1 a map of land owned;
2 a statement indicating what ways (if any) over the land the landowner admits to have dedicated as highways; and
3 declarations, in valid form, made by the landowner or his successors in title and lodged with the appropriate Council at any time to the effect that no additional way over the land delineated on the deposited map (other than any specifically indicated in the declaration) has been dedicated as a highway at:
   - the date of deposit; or
   - since the date of lodgement of a previous declaration,
   - within the relevant number of years from the date of the deposit or within the relevant number of years from the date of any previous declaration lodged under that section.

The appropriate council has to keep a register with respect to maps and statements deposited and declarations lodged with that council which is available for inspection free of charge at reasonable hours.

Deemed dedication

Section 31 of the Act states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years (10 years in Wales), the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate.

The period of 20 years (10 years in Wales) is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

> “The map, statement and declaration must be in the prescribed form”

Negating intention to dedicate

A deposit, in the absence of proof of a contrary intention, is sufficient evidence to negative intention of the landowner or his successor in title to dedicate any such additional way as a highway.

The map, statement and declaration must be in the prescribed form. ‘The appropriate council’ means the council of the county or metropolitan district or London borough in which the land is situated or, where the way the land is situated in the City, the Common Council.

Section 31(3) and (4) prescribe two other methods by which a landowner can negative intention to dedicate a way as a highway. They are:

- the erection, in such manner to be visible to persons using the way, of a notice inconsistent with the dedication of the way as a highway (coupled with maintenance of the notice after 1st January 1934 or any later date on which it was erected).
- if a notice is torn down or defaced, the landowner can give to the appropriate council notice that a way is not dedicated as a highway and that is sufficient to negative the intention of the owner of the land to dedicate the way as a highway in the absence of proof of a contrary intention.

The landowner is given the right over a tenant in possession for a term of years or from year to year to maintain a notice erected under s.31(3) provided that no injury is done by the erection of the notice to the business or occupation of the tenant.

> “A landowner has the right over tenanted land to maintain a notice s.31(3) provided that no injury is done by the erection of the notice to the business or occupation of the tenant”

Where the matter bringing the right of the public to use a way into question is an application under s.53(5) Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the Definitive Map and Statement (DMS), the date when the right of the public to use the way is brought into question is to be treated as being the date on which the application is made in accordance with para.1 of sch.14 Wildlife and Countryside Act 1981.

In addition to the statutory provisions, a right of way can come into existence under common law if it can be established that a landowner can be said to have dedicated a way for public use.

The East Chiltington example

In the matter of an application to modify the DMS to upgrade a public footpath to a public bridleway in respect of East Chiltington 45a and 45b, East Sussex,[1] the Inspector was faced with:

- old maps from between the late 18th Century and the 1970s showing a route along the claimed way;
- a Book of Reference for 1st Edition OS maps dating back to 1873 describing part of the route and areas of “farmsteading” and “arable”;
- a Magistrates’ Court Order stopping up a level crossing over a way which connected to the route;
- a DMS showing the route only as a footpath;
- previous freehold ownership of the route and surrounding land by the County Council itself and documentary evidence that the County Council would not consider dedicating it;
- local equine and other interests promoting the upgrade;
- provisions in a Deed of Grant by the County Council to a tenant discouraging unauthorised use and recording the County Council’s agreement not to grant any other rights of way;
- the existence of private rights of way by horseback over the route;

- evidence that users had been challenged by the County Council's tenants and by later landowners;
- 31 completed User Evidence Forms supporting the application: 11 of these users also gave oral evidence in support at the Inquiry;
- two further supporters who gave oral evidence at the Inquiry;

Just two opponents to the application (the current landowners) campaigned against the upgrade and gave evidence at the Inquiry.

Interest groups, in this case a local bridleways group and the British Horse Society, but in many cases concerning footpaths, the Ramblers Association, can mobilise support for changes to the DMS in the interests of their members quickly and easily. Typically the numbers of those supporting decrease with the level of commitment required of these supporters. They have to fill in the detailed user forms which Rights of Way officers typically distribute to enable them to deal with such applications. Typically the number of supporters who have signed user forms, but are later willing and/or able to attend an Inquiry also diminishes.

With 19 witnesses claiming in the East Chiltington case to have used the route on horseback and only the two landowners opposing, it would be easy to form the conclusion that the supporters were bound to win.

The approach in the East Chiltington case

The points put before the Inspector and his conclusions are set out in the box opposite.

In the *East Chiltington* case the application for an upgrade failed through lack of sufficient evidence of use during entirety of the relevant 20-year period, but the deposit played a critical role in determining that period.

However the whole process took over six years to bring to a conclusion after the application was made and was not determined until after an enquiry lasting four days.

Some tips for landowners and their advisers

- Make and renew deposits, ensuring that lodgement with the local authority is properly documented, and copies are kept.
- Ensure that the maps are the correct scale and the statement and declaration are in the prescribed forms.
- Put up Notices visible to users of the route (in all directions) ensuring that the wording makes it clear that there is no intention to dedicate a route for public use – I well remember a sign from my early childhood: "Definitely, Definitely No Right Of Way".
- Document the erection of the Notices by photographing them and keeping records of the person who placed the Notices, photographed them and the dates.
- Maintain the Notices and ensure that they are regularly re-documented and photographed on an ongoing basis.
- Ensure that where any Notice has been torn down or defaced, notice is given to the appropriate authority that the route is not dedicated as a highway (other than any highway for which it is already dedicated).
- Act straight away if interest groups, parish councils or others start to try to drum up support to apply to modify the DMS. Try to nip the application in the bud by showing the Rights of Way Officer all the documentary evidence which you have to show non-intention to dedicate and any permissive use. Remember having a right of way application over it can have an adverse effect on the value of the property.

If the appropriate authority does make a Modification Order consider whether a local public Inquiry is a more appropriate alternative to written representations. Remember that if a formal Inquiry is held some users who have supported an application may not attend and, if they do, may fail to come up to proof, particularly when required to specify what use they have had and when they had it. All concerned have to agree if the Inspector is to use the written representations procedure.

The normal order is for all parties to a Hearing or Inquiry to pay their own costs, no matter what the decision on the Order is.

An application can be made for an Award of Costs against another party, but the applicant needs to show that unnecessary or wasted expense was incurred because another party acted unreasonably.

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[1] The decision in *East Chiltington 45a and 45b DMMO* (2011) is available to view at *www.planningportal.gov.uk/uploads/pins/row/documents/fps_g1440_7_28.pdf*.

Inspector's conclusions in *East Chiltington*

1 The Inspector considered the old maps, other documents and DMS to reach a conclusion whether the route was regarded as usable by horse riders and to see whether this evidence helped in determining the correct current status of the route. He found the evidence was inconclusive as the usability by horse riders was also consistent with the route having been regarded as an occupation road with or without any additional public rights over it.

2 He determined the date when public use was brought into question, working backwards in time. The Inspector looked at the evidence of the current signs and their effect. He then looked at the last deposit which described the route as a footpath and found that the deposit operated to bring the public use of the route as a bridleway into question in 2001.

3 He considered the various historic attempts by user groups to upgrade the route to bridleway status.

4 He considered the landowner's documentary evidence (in this case, the County Council) to establish whether they intended to dedicate the route as a public bridleway or not.

5 He determined the latest date on which it could be said that the dedication of the route as a public bridleway could be presumed.

6 Having established the beginning and end dates of the 20-year period, he discarded evidence in user forms and oral evidence from those witnesses whose evidence did not cover that period. In this case only three out of the 19 supporters claimed to have used the route during the early three to four years of the 20-year period and they claimed to have used it relatively infrequently, monthly in two cases and weekly/monthly in the third.

7 He weeded out those witnesses who were using the route pursuant to private rights of way rather than "as of right" by the public.

8 Having reached a conclusion as to what use was relevant during the 20 year period, he considered evidence about interruptions in use, verbal and written challenges to use and inconsistencies in the evidence given.

9 He did not find it necessary to reach a conclusion whether or not there was sufficient evidence of intention to dedicate to in view of his conclusion about evidence of continuing use.

10 He reached the conclusion that there was insufficient continuous use during the 20 year period to raise the presumption of dedication as a Public Bridleway in accordance with the 1980 Act.

11 He reached the conclusion that there could be no inference that the route had been dedicated for public use at common law.

Sideways loss relief from income tax

The law relating to sideways loss relief has caused upset to many farmers in recent years, as Carlton Collister discussed in the *ALA Bulletin* in Spring 2016. The Upper Tribunal has recently published its decision in *Scambler & Scambler v HMRC* ([2017] UKUT 0001 (TCC)) which does nothing to alleviate that condition.

The position is covered by ss.67 & 68, Income Tax Act 2007. The relief of trade losses against general income is disallowed if (a) the carrying on of the trade forms part of, and is ancillary to, a larger trading undertaking; (b) the farming or market gardening activities meet the reasonable expectation of profits test; and (c) the trade was started, or treated as started, at any time within the five tax years before the current tax year (s.67(3)).

The reasonable expectation of profits test is found in s.68(3) and requires that (a) a competent person carrying on the activities in the current tax year would reasonably expect future profits, but (b) a competent person carrying on the activities at the beginning of the prior period of loss could not reasonable have expected those activities to become profitable until after the end of the current tax year.

Bryan and Rebecca Scambler were dairy farmers who were victims of the market and had not made a profit since 2006. Sales of part of the farm were made and a new robotic milking parlour created. By 2011, things had improved but not enough to avoid losses. Having regard to their associated stress levels, they sold up.

The UT found that HMRC's decision to deny them sideways relief was correct. The starting position, it said, was that "a competent farmer seeking sideways loss relief for the current tax year must reasonably expect future profits ... but his right is restricted to the extent that he has already had five years of losses allowed but cannot now demonstrate that he could not reasonably have expected the activities as they are now carried on to become profitable by the end of the current tax year".

For losses to be relieved, "there has to be a positive belief on the part of the competent farmer that the price will remain below the level at which it is possible to make a profit for the whole of the period in question." Such a farmer, looking at the position in the current tax year, would need to show why there would be no profit generated until after the end of the year following.