London Tribunals

Environment & Traffic Adjudicators

London Tribunals

Case Ref: 2180438775

Review Heard on 23/05/19

Before
Environment & Traffic Adjudicator Timothy Thorne

Dr. PREETI PEREIRA (A)

Applicant

and

LONDON BOROUGH OF SOUTHWARK (R)

Respondent

Representation:
For the Applicant: Mr. George Laurence QC & Ms. Staddon (instructed by Myers, Fletcher & Gordon Solicitors)
For the Respondent: Mr. Sprackling

DECISION AND REASONS

Details of the Applicant and History of Appeal

1. A is the registered keeper of vehicle registration mark SPP1. There is no dispute that the said vehicle was issued with a Penalty Charge Notice (PCN) number SO38405730 at 12:32 hours on 15 July 2018. The contravention outlined in the PCN was that the vehicle was alleged to have been parked on College Road "with one or more wheels on or over a footpath or any part of a road other than a carriageway." The contravention was given a code of "624" on the PCN.

2. The contravention is derived from section 15 of the Greater London Council (General Powers) Act 1974 (as amended) which provides, so far as material, as follows: ". . . . . any person who causes or permits any vehicle to be parked in Greater London with one or more wheels on or over any part of a road other than a carriageway or on or over a footpath, shall be guilty of an offence……."

3. There is no dispute that the vehicle was parked directly outside the hedge of the front garden of A's house (No. 1 College Road London SE21 7BQ) upon a tarmacked surface. It is clear from the undisputed photographs of the location that A's house is next to a commercial bank and an estate agent's and the area in which it is situated is an urban part of south London. The sole issue in the case revolves around the legal attributes of the land upon which the vehicle was parked, i.e. the "Relevant Land." It is not disputed that A owns the Relevant Land and that it forms part of A's registered title to No 1 College Road.

4. A appealed to the Environment & Traffic Adjudicators London Tribunals (the Tribunal) against the issue of the PCN. On 26 March 2019 an Adjudicator dismissed the appeal. Subsequently A applied for a review of this decision.

5. The powers of the Tribunal to consider an application for review are set out in paragraph 12 in the Schedule to The Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007 which provides, so far as material, as follows:

   12.—(1) The adjudicator may, on the application of a party, review—

   (a)……

   (b) any decision to determine that a notice of appeal does not accord with paragraph 2 or to dismiss or allow an appeal, or any decision as to costs, on one or more of the following grounds—

   (i) the decision was wrongly made as the result of an administrative error;

   (ii) the adjudicator was wrong to reject the notice of appeal;

   (iii) a party who failed to appear or be represented at a hearing had good and sufficient reason for his failure to appear;

   (iv) where the decision was made after a hearing, new evidence has become available since the conclusion of the hearing, the existence of which could not reasonably have been known of or foreseen;

(v) where the decision was made without a hearing, new evidence has become available since the decision was made, the existence of which could not reasonably have been known of or foreseen; or

(vi) the interests of justice require such a review.

(3) The parties shall have the opportunity to be heard on any application for review under subparagraph (1).

(4) Having reviewed the decision the adjudicator may direct that it be confirmed, that it be revoked or that it be varied.

(5) If, having reviewed a decision, the adjudicator directs that it be revoked, he shall substitute a new decision or order a re-determination by himself, the original adjudicator or a different adjudicator.

The Review Hearing

6. After considering all the material before me I, concluded that the interests of justice required a review. Therefore a de novo hearing was held on 23 May 2019 with the parties represented as outlined above. I heard legal argument and there was no oral evidence. I have read all the documents produced by the applicant and respondent.

7. The documents included a witness statement of Dr Preeti Pereira dated 4 March 2019 to which was exhibited a photo showing the vehicle parked on the relevant land in front of her house. In her witness statement she said that over the years she, her husband and various visitors to the house had parked their cars on the relevant land. In addition customers of the adjacent bank and estate agents also parked their vehicles on the relevant land. She estimated that "on at least 200 days in every year there is a vehicle parked on the relevant land."

8. At the end of the hearing I heard oral submissions from both representatives. Mr. George Laurence QC relied upon his skeleton argument dated 16 May 2019 whereas Mr. Sprackling relied upon his written submissions prepared before the original Adjudicator. I have considered both documents.

Analysis & Reasons

9. Bearing in mind the definition of the contravention contained in section 15 of the Greater London Council (General Powers) Act 1974 (as amended) which creates what is now a civil contravention whenever a vehicle is parked on a part of a road other than a carriageway or on or over a footpath, I conclude that the starting point for my analysis must be with the definition of (inter alia) "road", "carriageway" and "footpath".

10. The Road Traffic Act 1988 Section 192 provides a definition of "road" as meaning "any highway and any other road to which the public have access".

11. Section 15 (12) of the Greater London Council (General Powers) Act 1974 (as amended) contains the following definitions:

(i) "carriageway" means a way of constituting or comprised in a road, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles;

(ii) "footpath" means a highway over which the public have a right of way on foot only, not being a footway;

(iii) "footway" means a way comprised in a road which also comprises a carriage way, being a way over which the public have a right of way on foot only;

12. Section 329 of the Highways Act 1980 contains the following definitions:
    (i) "carriageway" means a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles
    (ii) "footpath" means a highway over which the public have a right of way on foot only, not being a footway;
    (iii) "footway" means a way comprised in a highway which also comprises a carriageway, being a way over which the public have a right of way on foot only;
    (iv) "highway maintainable at the public expense" means a highway which by virtue of section 36 above or of any other enactment (whether contained in this Act or not) is a highway which for the purposes of this Act is a highway maintainable at the public expense

13. It can be seen that key to all of these definitions is the concept of a "highway". I will deal with this below and agree with Mr. Laurence that the first issue for me to resolve is whether the Relevant Land upon which A's vehicle was parked was part of the highway

Is the Relevant Land part of a Highway?

14. "Highway" is not defined in the 1974 Act, nor the 2000 Act. Indeed there is no statutory definition. The interpretation provisions of the Highways Act 1980 (Section 328) do not define the term: they merely provide that it includes "the whole or part of the highway". Consequently, one must look at the Common Law for the definition of "highway".

15. This area of the law was considered by Adjudicator G R Hickinbottom (now Hickinbottom LJ) in the case of David George Burnett -v- Buckinghamshire County Council (April 1998) where he stated:

> "Put simply, at Common Law, a "highway" is a way over which all members of the public have the right to pass and re-pass without hindrance (see, e.g., Suffolk County Council -v- Mason [1979] AC 705 at 710, per Lord Diplock)……The Common Law rules also have to be considered in the context of the lateral extent of a highway. There is

> no doubt that "highway" includes a footway, over which the only public right of passage is on foot (see Suffolk County Council -v- Mason, referred to above)……..The essence of a highway is that it is a way over which all members of the public are entitled to go: and, conversely, every piece of land which is subject to such public right of passage, is a highway or part of a highway (Rideout -v- Hollett (1913) DLR 293 at 295, per Barry J). Land which is not subject to such public right of passage is not part of the highway. Therefore, the carriageway and footway are both part of the highway. At the other end of the spectrum, an ornamental horticultural bed abutting the carriageway - perhaps as a traffic island - would not be part of the highway. It would be a question of fact and degree as to whether land adjacent to a carriageway or footway (e.g. a verge) was part of the highway."

16. I conclude that the burden of proving the contravention rests on R. The standard of proof is the balance of probabilities. R must therefore satisfy me on the balance of probabilities that at the material time the Relevant Land was a highway or part thereof.

17. R relied upon a document entitled "Road List Last Updated 11/09/2017" which purported to record highways maintainable at public expense as defined under section 36 (6) of the Highways Act 1980. College Road was on that list and also featured on an accompanying map. Section 36 (6) of the Act of 1980 states that "All such highways as immediately before the commencement of this Act were highways maintainable at the public expense for the purposes of the Highways Act 1959 continue to be so maintainable (subject to this section and to any order of a magistrates' court under section 47 below) for the purposes of this Act".

18. However, in my judgement this list and map does not of itself prove that the road in question is a highway because I was not supplied with any evidence as to how the original list was compiled, the evidence on which it was based, evidence of whether or when, or how, or how much of College Road itself came to be adopted as alleged by the Council and any evidence showing how the Relevant Land came to be included on the map. I also note that there is no provision in the Act of 1980 comparable to that in section 56 of the Wildlife and Countryside Act 1981 making the list conclusive of what it shows. I also take into account the contents of an article by Robin Carr (Waymark Summer 2008, p.15) which establishes that such lists can be very unreliable.

19. The fact that A in her oral evidence before the original Adjudicator said that she remembered that some time ago the Council repaired a pothole on the Relevant Land does not alter my finding in respect of this matter. In addition, in any event, the Council's own records do not reveal "any remedial works to that section of the Highway".

20. A submitted evidence, pursuant to the Finance (1909-1910) Act 1910, which showed that in 1910 the Relevant Land was not regarded as being a highway. I have read an article by David Braham QC (Rights of Way Law Review May 2002 section 9.3, p.153) which is referred to in section 11.8 of the Planning

Inspectorate's Consistency Guidelines which makes it clear that such material is persuasive evidence. The relevant Finance Act plan shows the Relevant Land is coloured whereas the adjoining highway is uncoloured. This would indicate that the Relevant Land was treated as private land together with the remainder of the hereditament of which it formed part. In the absence of contrary evidence I am satisfied that in 1910 the Relevant Land was not regarded as being part of a public highway.

21. The next question is whether the Relevant land could have acquired the status of a highway in subsequent years either through the operation of statute or under Common Law.

Statutory Dedication

22. Section 31 of the Highways Act 1980 provides for dedication of a way as a highway to be presumed after public use for 20 years. The provision provides, so far as material, as follows:

(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, 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."

23. There is no dispute that the Relevant Land is not land of such a character that use of it by the public could not give rise at common law to any presumption of dedication. There is also no dispute that A has not erected any signs seeking to prohibit the public from using the land.

24. I conclude that for the purposes of section 31 (2) of the Highways Act 1980, the period of 20 years referred to in subsection (1) above is to be calculated

retrospectively from the date when A made representations against the PCN in which she brought into question the right of the public to use the way. Such representations were made in July 2018.

25. I do not accept Mr. Laurence's submissions (at paragraph 76 of his skeleton argument) that the operation of this statutory provision depends on R specifically pleading it. First there are no pleadings as such before this Tribunal and in any event it seems to me that I must apply the law irrespective of whether a party specifically seeks to rely upon it and make submissions about it. It is clear from an analysis of the wording of section 31 (2) of the Highways Act 1980 that the time starts retrospectively from when A brings the right of the public to use the route into question and not R. R has never brought that matter into question and does not seek to do so now.

26. Looking at the photographs of the Relevant Land and the surrounding area, I note that the Relevant Land has not been fenced or roped off in any way. The Relevant Land is next to a carriageway in an urban street next to a bank and estate agents. The photographs show members of the public walking close to the vicinity of the Relevant Land where A's car is parked. There are no signs seeking to prohibit or limit the public access to the land.

27. Adopting the reasoning in the case of Robert White -v- City of Westminster (PATAS 201008881A) I infer that members of the public have walked freely over the Relevant Land on a regular basis for at least 20 years prior to July 2018. I do not accept Mr. Laurence's submissions that I should not adopt the reasoning contained in that authority. The real question for me is whether R has proved on the balance of probabilities that a way over the Relevant Land has been actually enjoyed by the public as of right ***and without interruption*** for a full period of 20 years prior to July 2018.

28. Mr. Lawrence prayed in aid the contents of A's witness statement in which she said that that over the years she, her husband and various visitors to the house had parked their cars on the relevant land. She estimated that "on at least 200 days in every year there is a vehicle parked on the relevant land."

29. What this evidence establishes is that for some unspecified period of hours during each of 200 days in every year during A's ownership of the property, there was a single car parked on the Relevant Land. Sometimes the vehicle in question belonged to A and sometimes it belonged to A's visitors or sometimes to customers of the bank and estate agents. There is inadequate evidence to establish that when a vehicle was parked on the Relevant Land on one of the 200 days that it was there for the full 24 hours of each of the specified days. Therefore it appears that a vehicle may have been parked for some hours in a day on the Relevant Land for 200 days a year and that no vehicle was parked on the Relevant Land for all of 165 days a year during the period of A's ownership of the property.

30. It is also clear that at all times during the period of A's ownership of the property there was no other impediment to members of the public being able

to freely walk across the Relevant Land. There were no signs prohibiting such passage and no physical impediments such as gates, chains, ropes or fences.

31. Moreover, according to Mr. Laurence's skeleton argument at para. 29, A "accepts that at the date of the alleged contravention and indeed for as long as [A] and her husband have owned 1 College Road they have been willing to tolerate use of the Relevant Land in that way. In other words save when they or their licensees have used the Relevant Land to park on they have been happy to tolerate its use by the public…."

32. The only possible impediment prayed in aid by A therefore is the presence of a parked vehicle on part of the Relevant Land for some but not all the time over the last 13 years of A's ownership. The question for me therefore is whether the frequent (but not continuous) presence of a parked vehicle on part of the Relevant Land constitutes an interruption of the use by the public over the relevant period.

33. I note that I have not been provided with evidence of the dimensions of the Relevant Land or the vehicle or vehicles in question. I conclude that it is highly unlikely that the width of a vehicle is exactly the same width as the Relevant Land. Indeed a study of the photographic evidence shows that the width of a vehicle is less than the width of the Relevant Land. Therefore I conclude that it has been established on the balance of probabilities that a parked vehicle on the Relevant Land might inconvenience a member of the public walking on foot through the Relevant Land (by making such a person step to one side of the vehicle to remain on course over the Relevant Land) but would not stop him walking on or over it.

34. The case of Mertham Manor Ltd -v- Coulsdon & Purley UDC [1936] 2KB 77 states that in relation to the statutory predecessor of Section 31 of the Highways Act 1980 the dedication can be established if the public have actually had the amenity or advantage of using the way openly and not secretly or by force or with permission given from time to time and without interruption, in the sense of actual or physical stopping of their enjoyment of the way and the actual suffering of the exercise of that right by the landowner for a full period of 20 years.

35. In the case of Lewis -v- Thomas [1950] 1 KB 438 the Court of Appeal had to consider in relation to the question of statutory dedication of a highway whether the locking of a gate from time to time across a way constituted an "interruption". It was held that on the evidence as a whole it was open to a county court judge to find that there had been no interruption in fact of the user of the way by the public since the locking of the gate had been done at such times and in such circumstances as not to be likely to interrupt and not in fact to have interrupted the use of the way.

36. In my judgement (adopting the reasoning set out in the authorities above) and in light of my findings at paragraph 33 of my decision above, I conclude that the parking of a vehicle on the Relevant Land approximately 200 times a year did not in fact interrupt the use of the way over the Relevant Land as I

am satisfied that members of the public could easily walk to the side of a parked vehicle and still maintain a course of passage across the Relevant Land. I therefore conclude that it has been established that as at the time of the issue of the PCN the Relevant Land was a highway as it had been dedicated by virtue of section 31 (2) of the Highways Act 1980.

37. Having concluded that the Relevant Land was a highway as the result of statutory dedication I do not need to consider the (now academic) question as to whether it had been dedicated under Common Law. I note in passing that Mr. Laurence in his skeleton argument at paragraph 77 makes it clear that under Common Law R would have had to prove an additional element, i.e. that A had an actual intention to dedicate. A long period of uninterrupted public use as of right is not enough under the common law. However, a 20 year period of uninterrupted public use is adequate for a dedication under statute.

Conclusion

38. At paragraphs 88 to 92 of his skeleton argument Mr. Laurence makes it clear that I should adopt a two-stage test when considering this matter. Stage 1 is whether I am satisfied on the balance of probabilities that the Relevant Land is a highway. The second stage only applies if I am not satisfied that the Relevant Land is a highway. If that was the case it is only then that I would have to consider (a) whether the Relevant Land is as a matter of fact itself a road (or comprises part of the width of a wider way which as a matter of fact is a road); (b) whether it is land to which "the public has access"; and (c) whether the Relevant Land is land to which the public has lawful access. This 2-stage test was adopted by the House of Lords in Clarke -v- Kato [1998] 1WLR 1647.

39. For reasons given above I am satisfied that stage 1 is met and that the Relevant Land is a highway. Therefore any consideration of stage 2 is otiose and I have not applied my mind to it.

40. It therefore follows that I am satisfied on the balance of probabilities that on 15 July 2018, A's vehicle (registration mark SPP1) was parked on College Road with one or more wheels on or over a footpath or any part of a road other than a carriageway. For reasons given above I am satisfied that the vehicle was parked on the Relevant Land which is a highway (or part thereof) which is either a footpath or any part of a road other than a carriageway. I therefore conclude that the contravention occurred.

DECISION

- In the circumstances, having reviewed this case, I confirm the original Adjudicator's decision of 26 March 2019, to dismiss the appeal.
- I note that in the circumstances of this case the Authority do not intend to seek the penalty charge of £130.00.

Timothy Thorne
Environment & Traffic Adjudicator

Dated
10/06/19