
Appeal Decisions

by **Alan Beckett BA MSc MIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 4 August 2015

Appeal Ref: **FPS/Q2371/14A/13 ('Appeal A')**

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Lancashire County Council not to make an Order under section 53 (2) of that Act.
- The Application dated 23 January 2014 was refused by Lancashire County Council (the Council) on 28 January 2015.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath (shown by a dotted line A - H - B - C - G) on the plan attached to this decision as Appendix A.

Summary of Decision: The Appeal is allowed.

Appeal Ref: **FPS/Q2371/14A/12 ('Appeal B')**

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Lancashire County Council not to make an Order under section 53 (2) of that Act.
- The Application dated 11 February 2014 was refused by the Council on 28 January 2015.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath (shown by a dotted line A - H - B - C - D - E - F - A) on the plan attached to this decision as Appendix B.

Summary of Decision: The Appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine these appeals under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. These appeals have been determined on the basis of the papers submitted.

Main Issues

3. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

Reasons

4. In arriving at my conclusions I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of the High Court in the *Bagshaw and Norton*¹ case.
5. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

6. Both appeals relate to the same parcel of land known as Laund Hey. The land crossed by the two claimed footpaths comprises two fields which since 1921 have been in the ownership of the local authority, currently Rossendale Borough Council. Research undertaken by the Council as part of its investigation into the applications revealed that the land has been used for recreational activities since at least the mid-nineteenth century. The land has been used in the past for playing cricket and prior to the land being enclosed for cultivation it had been a venue for horse racing. In the 1960s and 1970s the land had been used for motor cycle scrambling and is currently used by the Rossendale and Hyndburn Model Aircraft Club (HMAC) for the flying of radio controlled model aeroplanes.

Documentary evidence

7. The documentary evidence consulted by the Council in the form of inclosure, tithe and Ordnance Survey ('OS') records does not assist in the determination of these Appeals. The claimed footpaths are not recorded as physical features on any of the maps consulted. The 6-inch to 1 mile Ordnance Survey map of 1849 shows a dotted line circulating Laund Hey but not on the same alignment as the appeal routes; this feature is likely to be the course of the horse racing track as opposed to a footpath as the land is marked 'Old Race Course'.
8. Annotations on the OS 25-inch to 1 mile maps published between 1893 and 1911 show that Laund Hey was being used as a rifle range. Such use appears to have ceased by the time the 1930 edition of the map was published as other than parcel numbers and acreage, the land is not annotated by OS. The land is recorded as the Laund Hey Playing Fields in the 1934 Map Directory of South Lancashire, but the Appeal routes are not shown.

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

9. The Appeal routes were not claimed as public rights of way as part of the process which led to the compilation and publication of the definitive map and statement, nor were they shown on the revised definitive map published in 1975.
10. An aerial photograph dated by the Council as having been taken in the 1940s shows a worn line in the ground along the A – H – B – C – G alignment; there is no worn line visible along C – D – E – F – H although the line of footpath 109 is visible. The aerial photograph taken in 1960 shows a visible worn line in the ground on the approximate alignment of A – H – B – C – G; a faint wear line is visible on the alignment C – D – E – F – H. The aerial photograph taken in 1989 shows the existence of a motor cycle scramble course in the easternmost of the two fields that make up Laund Hey. The course is shown to be to the east of points B and E and in the vicinity of points C, D and G and appears to cross the north-south alignment of public footpath 109 at two points. A worn line is visible around point B as is a worn line equivalent to E – F – H. It is difficult to determine from this photograph whether the scramble course would have run over the claimed footpaths to the east of B and E or whether there would have been sufficient room between the course and the field boundary walls for pedestrians to have made their way along the Appeal routes when the land was used for scrambling.
11. The aerial photograph taken in 2000 suggests that use of the scramble course had declined and may have ceased as the course is only faintly visible in the landscape. A worn path which corresponds with B – C – G and D – E – F – H can be seen. A Google earth view from January 2005 clearly shows a worn line on the alignment of both Appeal routes along with a mown area in the westernmost field used by HMAc as a take-off and landing strip. This photograph clearly shows that the former scramble course had crossed the line of footpath 109 in two places. An aerial photograph taken in 2010 shows similar features to those shown by Google earth five years earlier.
12. While the map evidence is of little assistance, the aerial photographs provide some evidence of worn lines in the ground on the general alignment of the Appeal routes. Although the aerial photographs cannot demonstrate how those worn lines came into existence, they suggest that it may have been possible to walk from Laund Lane to footpath 109 along the Appeal A route since the 1940s and that it may have been possible to walk from footpath 109 to Laund Lane via the Appeal B route since the 1960s.

User evidence

13. I understand that 10 user evidence forms were submitted to the Council in support of the application to add the Appeal A route to the definitive map and statement and that 19 user evidence forms were submitted in support of adding the Appeal B route to the definitive map and statement.
14. Although copies of the UEFs were not forwarded as part of the papers submitted by either party, I understand from the summary of those UEFs set out in the report made to the Council's Regulatory Committee on 17 December 2014 that claimed use of the Appeal A route commenced in the 1950s. Use was for recreational purposes; as part of a longer walk in the immediate area or as a means of access to Cribden Hill. The frequency of use of the Appeal A route varied between 2 or 3 times per year to four times per week.

15. With regard to the use of the Appeal B route, claimed use commenced in the late 1940s and had continued until the route was blocked by fencing in 2013. The claimed path was used for recreational walking, to exercise a dog and to watch model aeroplanes being flown from the field. The frequency of use ranged from 5 times per year to four times per week.
16. None of the users recalled any prohibitory notices being present on Laund Hey and none of users recalled being challenged as to their right to walk over the land or were turned back. None of the users recalled seeking or being granted permission to walk the Appeal routes.
17. Access to Laund Hey at point A has been through a stone built squeeze stile which provides access to the field. Up to 2013 when new fencing was erected by Rossendale Borough Council's grazing tenant², there is no evidence of access to the land being restricted in any way. It was the action of the tenant in erecting a fence across the line of the two claimed paths which prompted the applications.
18. The Council submit that although the user evidence appears to have taken place during the 20-year period which ended in August 2013 when the grazing tenant's fence was erected, that use is likely to have been interrupted by the activities of the model aircraft flying club. The Council submits that the flying of model aircraft is a dangerous activity and that the use of the land for such purposes is incompatible with use of the land as a public footpath. The Council submits that Rossendale Borough Council's granting of a licence to use Laund Hey for the flying of model aircraft indicates that there was no intention on behalf of the landowner to dedicate a public right of way over the land. The Council also considers that the use of the land for motor cycle scrambling would also have been incompatible with use of the land as a public footpath.
19. Rossendale Borough Council submits that the land has been subject to a number of tenancies and licenses since 1972. The earliest agricultural tenancy had been subject to the right of the Borough Council to use the land for organised recreational activities up to 65 times per year. The first licence granted to the HMAc was subject to the recreational use made of the land by the Accrington & District Motorcycle Club and the Rossendale Rugby Union Football Club. The grazing tenancy granted in August 2013 is subject to the use of the land by the HMAc. In Rossendale Borough Council's view, the licences and tenancy agreements demonstrate that use of the land for recreational purposes was with the permission of the landowner and that use of the Appeal routes could not have been 'as of right'.
20. The Appellants submit that there is no fundamental incompatibility between use of the land for the flying of model aircraft and use of linear routes over the same land for recreational walking. Furthermore, there had been no 'interruption' of use in practical terms; pedestrians would wait until the model aeroplanes had taken off or had landed before making their way along the footpath. This was part of the normal 'give and take' of shared use of the same land. Although it is accepted that the land has been subject to tenancies and agreements, neither the beneficiaries of those tenancies and agreements have attempted to prevent pedestrian access to the land, whether by the erection of appropriately worded notices or by personal challenge. As the provisions of the agreements between landlord and tenant would not have been brought to the

² A tenancy which was commenced in August 2013

attention of the public, those agreements do not provide evidence of a lack of intention to dedicate a public right of way on foot.

21. I agree with the Appellants that the terms on which the landowner has granted licences to third parties for the use of its land are unlikely to have been brought to the attention of those pedestrians who habitually used the Appeal routes during the 20-years prior to 2013. As an agreement between landlord and tenant is essentially a private matter there would be no reason for the general public to be made aware of the provisions under which the licence was granted. If the landowner's intention in granting the licences was not to dedicate a public right of way, it is unlikely that the public would have been made aware of that intention.
22. The Council's conclusion that the flying of model aeroplanes is a dangerous activity and the use of the land by pedestrians was incompatible with the activities of HMAAC does not appear to have any evidential basis. The Borough Council only provided evidence of one complaint regarding a near miss when a model aeroplane crash-landed close to the Appeal A route. That complaint was made in 2012 and indicates that pedestrians were able to use the Appeal route when model aircraft were being flown. It is the only recorded incident during the relevant 20-year period during which the Appeal routes were being used. On the face of it, the dual use of the land does not appear to be incompatible.
23. The Council's conclusion that use of the Appeal routes would have been interrupted by the activities of HMAAC appears to be little more than an assertion and is in direct contrast to and conflict with the evidence of those who claim to have walked the Appeal routes in the 20 years prior to 2013. With regard to Section 31 of the 1980 Act an interruption in use must be some physical and actual interruption which prevents enjoyment of the path or way and not merely some action which challenges that use but allows it to continue. For any action taken to qualify as an interruption of use there must be some interference with the right of passage. Whether any action can be regarded as an interruption is also dependant upon the circumstances of that action; temporary obstructions of a minor nature such as the parking of vehicles on a road³ or the storage of building materials on a path⁴ have been held not to amount to relevant interruptions.
24. With regard to the use of Laund Hey by HMAAC, the terms of the first licence granted were that flying could take place between defined hours on Tuesdays, Thursdays, Sundays and Bank Holiday Mondays. The current licence restricts flying to defined hours on Sundays and Bank Holiday Mondays. It is likely that outside of the authorised hours members of the public would have been able to pass and re-pass unhindered along the claimed routes. If use of the claimed paths had been restricted by the activities of HMAAC, then such a restriction would have been temporary and for the duration of the authorised flying hours. However, there is no evidence before me that the flying of model aircraft during the authorised hours prevented use of the Appeal routes by the public. On the basis of the evidence presented I do not consider that public use of the Appeal routes was effectively interrupted by the flying of model aircraft.

³ Lewis v Thomas [1950] 1KB 438

⁴ Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360

Conclusions

25. There is a body of user evidence which supports the claim that the Appeal routes are public footpaths. The conclusion reached by the Council regarding use being interrupted by the flying of model aircraft is in direct conflict with the evidence of use. The landowner claims that the granting of licences for specific purposes demonstrates that recreational use of the land would have been with permission and / or demonstrates a lack of intention to dedicate. There are therefore conflicts within the available evidence and as a result the Appeals fail against Test A set out in paragraph 5 above.
26. Although there are conflicting interpretations of the evidence as to whether use had been interrupted or was with or without permission, I have not read or seen any evidence which would inevitably defeat the Appellants' claims. Consequently, I conclude that the Appeals succeeds against Test B set out in paragraph 5 above as the evidence adduced is such that it is reasonable for the Appellants to allege that public rights of way subsist over the Appeal routes.
27. Having regard to these and all other matters raised in the written representations I conclude that the Appeals should be allowed.

Formal Decision – Appeal A

28. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Lancashire County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the definitive map and statement for Lancashire County Council to add a public footpath as proposed in the application dated 23 January 2014. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

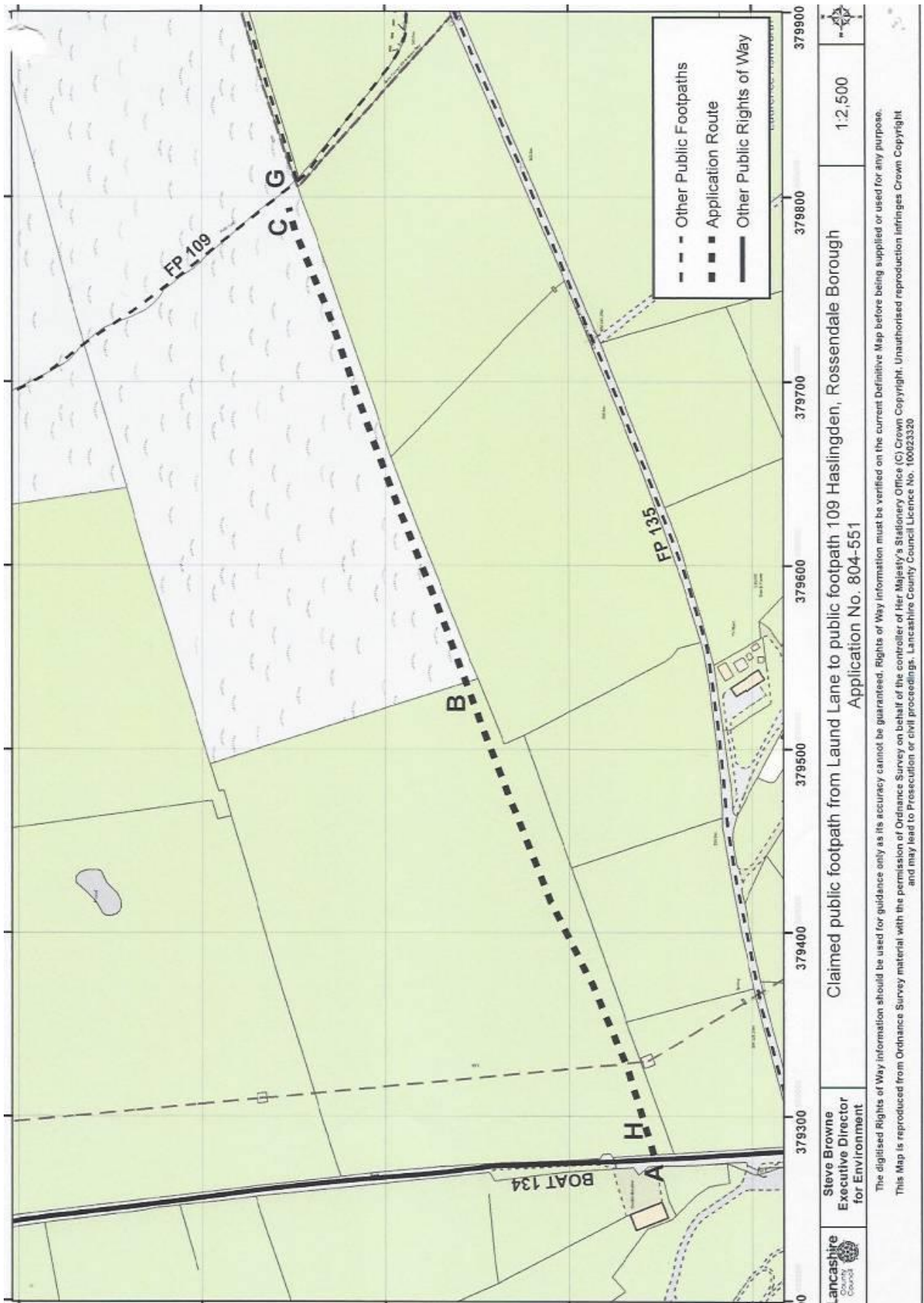
Formal Decision – Appeal B

29. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Lancashire County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the definitive map and statement for Lancashire County Council to add a public footpath as proposed in the application dated 11 February 2014. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector

APPENDIX A



APPENDIX B

