



Appeal Decision

by Martin Elliott BSc FIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 30 March 2016

Appeal Ref: FPS/G1440/14A/3

- 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 East Sussex County Council not to make an Order under section 53(2) of that Act.
- The Application dated 4 April 2011 was refused by East Sussex County Council on 10 November 2015.
- The Appellant, Mr P G Cole, claims that the appeal route, Anchor Passage, St Leonards, should be added to the definitive map and statement for the area as a public footpath.

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 an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. The notice of the application dated 4 April 2011 refers to the addition of a footpath from Mews Road to East Ascent. The Council's report to the Senior Solicitor identifies that it is considering the status of a route from Mews Road to East Ascent via Saddlers Court and Anchor Passage, St Leonards. However, the appeal form dated 1 December 2015 describes the way subject to the appeal as Anchor Passage as shown shaded on a plan supplied to the appellant by East Sussex County Council¹ and included in the appeal at the tab identified 'gamma'. All subsequent documents submitted by the appellant are identified as relating to Anchor Passage. Although the application related to a route between Mews Road and Anchor Passage the appeal appears to relate solely to Anchor Passage. It is on this basis that I have considered the appeal.

Main issues

4. Section 53(3)(c)(i) of the 1981 Act provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

¹ Map titled 'Claimed Footpath at Anchor Passage, St Leonards' dated 11-01-11, Map No: 1 at a scale of 1:605.

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

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

5. Section 32 of the Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced. Section 32 is declaratory of the common law.
6. The Council has examined a number of maps and documents from the early County maps to modern Ordnance Survey maps and has concluded that there is nothing to indicate a footpath along the claimed route. The Council has also considered the statutory dedication under section 31 of the Highways Act 1980 and has concluded that the statutory tests have not been met. As such the Council concludes that a public right of way is not reasonably alleged to subsist.
7. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
8. The main issue is whether the evidence indicates that a right of way subsists, or is reasonably alleged to subsist, such that an order should be made to add the appeal route to the definitive map and statement for the area. I shall firstly consider the statutory dedication of the claimed route and then, if necessary consider the documentary evidence.

Reasons

Statutory Dedication – Section 31 of the Highways Act 1980

9. The Council state that in 2002 two gates were installed at each end of Anchor Passage. They have taken this event to have brought the right to use the way into question. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it.
10. There are three evidence of use forms which have been submitted with the application. The form of Ms Cheese states that 'a gate suddenly appeared then

a padlock'. She used the route from 2005 to 2010 but the form provides no evidence as to when the gate and padlock appeared. Mr I M Cole refers to the gating of the way, the introduction of a padlock and a recently erected gate at the south end of the route, his form being completed in 2011. Subsequent correspondence to the Council indicates that the gate was erected around August 2010. The form of Mrs R Fleet provides no dates as to when she used the way although she refers to limited knowledge of use of the route back in the 1960s. There is no reference to her being prevented from using the route. A further undated evidence of use form of Mr and Mrs P Cole indicates that their use was challenged with 'locks and dogs' since July 2010, although the form states that the use of the way was from 1999 to 2000. There is a clear conflict in the evidence contained in the form although challenges in 2010 would be consistent with the evidence of Mr I Cole that gates were erected in 2010, this is also when Ms Cheese stopped using the route.

11. Although I note the assertions of the Council, the evidence as to when any gates were erected across the route, and subsequently locked, is very limited. The evidence of Ms Cheese suggests that any gate was erected between 2005 and 2010. Mr I Cole refers to a gate in 2010 but it would appear that a second gate had been erected previously. In the absence of further information as to when any gate or gates were erected and locked it is difficult to reach any conclusions as to when the right to use the way was brought into question.
12. Notwithstanding the above, even if the right to use the way was brought into question in 2002, or later and possibly in 2010, the evidence of use is extremely limited. As noted above Ms Cheese only used the route between 2005 and 2010. Mr Cole used the way periodically, between 1997 to 2011, when carrying out maintenance to 1 Maze Hill. Whilst these individuals saw others using the route no information is provided as to their use of the way and whether such use was as of right. The use by Mrs Fleet was in the 1960s, outside any potential twenty year period and the use by Mr and Mrs Cole is limited to just a few years. In my view the evidence is insufficient to raise any presumption that the way has been dedicated as a public footpath such that a right of way can be reasonably alleged to subsist. In view of these findings it is necessary to consider the documentary evidence.

Documentary Evidence

Map evidence

13. The appellant claims that a series of plans and drawings show the appeal route has been in use from about 1846 to 2009. This is said to exceed the minimum of twenty years required for a right of way.
14. I have carefully examined the plans submitted by the appellant and the Council. The appeal route is shown on a number of maps from the plan of St Leonards on Sea of 1846. The Council has considered several maps prior to this date but indicate that the claimed route is not shown. Given the scale of these earlier plans, the absence of the route is not unexpected. These plans do not assist in determining the appeal but the absence of any route does not preclude the existence of a public right of way.
15. Some of the plans are Ordnance Survey maps of varying dates. It should be noted that Ordnance Survey maps were produced to record topographical features and were not compiled with a view to recording public rights. The Ordnance Survey maps therefore show the physical existence of the claimed

route but provide no evidence as to public rights. In terms of the other plans, there is nothing to indicate that these were compiled to record public rights.

16. Whilst the maps show the physical existence of the claimed route they provide no evidence as to status. Although it is quite possible that the route was used, it cannot be inferred from the plans that the use was by the public such that public rights have been acquired. For me to reach such a conclusion I would require evidence of public use. As noted above at paragraph 12 the evidence of use is very limited and insufficient to raise an inference of a statutory dedication. There is also insufficient evidence of use from which a dedication at common law can be inferred. I note that some maps name Anchor Passage and Victoria Mews. However, the naming of the routes does not evidence public rights.

Improvement Commissioners

17. The appellant has submitted extracts of letters from a William J Grant who was the surveyor to the St Leonards' Improvement Commissioners who handed over highways to Hastings Borough Council circa 1871. It is suggested that the reports demonstrate repairs to a public highway known as Anchor Passage and Victoria Mews. The extracts are undated.
18. One extract records a complaint that the steps from East Ascent to the Anchor Inn were in a dangerous condition. It is recommended that the steps are repaired at a cost of £10.11.6. A further extract records that the pavements are all in a satisfactory condition although the '*brick pavement on the east side leading to the Victoria Mews*' had become dangerous and in need of repair. Another report refers to the need to obtain a tender for repairs to the middle flight of steps leading to the Anchor Inn and repairing the '*landing at top*'. A further extract records the need to carry out improvements in Mews Road to prevent damage by water, reference is made to the placing of a gully grating at the top of the East Ascent steps. The final extract informs that the '*pavement to footpath leading to The Anchor Inn requires repair*'.
19. The reports indicate that the St Leonards' Improvement Commissioners were responsible for the maintenance of highways. Reference is made to repairs of the steps on Anchor Passage leading to the former Anchor Inn. The records are supportive of the fact that the Anchor Passage was considered to be public. However, I do not accept that the extracts demonstrate that Victoria Mews was a public highway; the records make no reference to Victoria Mews.

Rights of Way Act 1932 (the 1932 Act)

20. The appellant contends that the appeal route is identified by the annotated plans lodged in accordance with the 1932 Act. I have not been provided with any copy of the 1932 Act plans but the Council state that the route is not shown on that map. The absence of any recording of the way on the 1932 Act plans does not support the existence of a public right of way, neither does it preclude such rights. It may well be the case that the route is shown on the base map used to compile the 1932 Act map. However, the map will be an edition of the Ordnance Survey map and would not demonstrate the existence of any public right. I revert to my comments at paragraph 15 above.

Definitive map

21. The appellant acknowledges that the route is not recorded on the definitive map but points out that the appeal route does feature on the map. I refer to

my previous comments at paragraph 20 above which are equally applicable. It may also be the case that there are other routes in daily use which are also not recorded on the definitive map. However, this does not assist in determining the appeal which must be determined on the evidence relating to the claimed route.

Land Registry records

22. The appellant states that examination of the Land Registry records shows that the properties having access to Anchor Passage do not have ownership of the passage, only rights of access.
23. The Land Registry title records do not record Anchor Passage to be in the ownership of any individual. However, this does not mean that the Anchor Passage is not in any particular ownership. It is a possibility that the land has not been registered with the Land Registry and therefore will not be identified in their records.
24. Amicus Horizon who own land over which part of the appeal route passes indicate, in correspondence dated 20 August 2012, that Anchor Passage is within the ownership of 5a East Ascent and that the land has not been correctly registered.
25. A Deed of Grant from 1987 grants a right of way over the land owned at that time by Hastings Borough Council for pedestrian and vehicular access for the benefit of 5a East Ascent. The land over which the right of way was granted is now in the ownership of Amicus Horizon. The Grantees are identified as the registered proprietors of land hatched red in the deed which includes Anchor Passage and forms the property identified as 5a East Ascent.
26. Whilst the Deed of Grant is not conclusive as to ownership, some weight should be given to an agreement which has been signed, sealed and delivered by the owners of 5a East Ascent. In any event, the ownership of the land would not preclude the existence of a public right of way. Nevertheless, the Deed of Grant does not support the existence of a public right of way on foot. If the way had been a public right of way on foot then it would not have been necessary to grant a right of way on foot to the property. Further, the fact that Hastings Borough Council granted a right of way on foot does not suggest that the Council, the owner at the time, regarded the route to be a public right of way. However, this does not preclude the existence of a public right of way.
27. I note the point that the grant may not relate to the Anchor Passage but it is clear that the right of way is granted over the land owned by the Borough Council. I am also aware that the appellant questions the veracity of the coloured plan but there is nothing to indicate that the copies provided are not a true reflection of the original plans. In any event, having regard to my previous observations at paragraph 26, I do not consider that this has any bearing on the appeal.
28. I note the assertion of the appellant that the Land Registry search certificate (13 July 2010) shows that Anchor Passage is unregistered but that does not mean it does not fall to any particular ownership. The fact that it is unregistered also does not indicate that the land is subject to a public right of way. It may also be the case that the certificate refers to Anchor Passage but again this does not evidence the existence of public rights.

29. The appellant refers to a letter dated October 2004 from Menneers solicitors relating to 6 East Ascent. Whilst the letter does refer to *'the footpath'* the correspondence provides no information as to whether the *'footpath'* was considered public or private and does not assist with the appeal.
30. The appellant notes that Hastings Borough Council, under the Saddlers Court Title HT212386², is responsible for *'Accessways'* namely Anchor Passage and other *'Accessways'* in the curtilage. Whilst paragraph 1 of Clause 6 of Schedule E refers to *'Accessways'* being *'the forecourts carriageways roads highways paths ways and passages affording access to or egress from the property ... situate on the Retained Land...'* it does not necessarily follow that Anchor Passage is regarded as one of those *'Accessways'*. Access to the retained land could be achieved without the need for access from Anchor Passage. In my view the clause does not assist in establishing whether the Anchor Passage is public. Although the appellant contends that the accessways are shown on planning applications and permissions I have not been provided with copies of the same and I can therefore draw no conclusions.

Correspondence

31. The appellant has commented on correspondence from the owners of 5a East Ascent (Addenda-two submitted by the appellant). The correspondence provides background information relating to the claimed route including information relating to the gates and their padlocking. The correspondents express a view that the claimed route is not public. Whilst I note the correspondence and the appellant's comments thereon, it does provide evidence to disprove the existence of a public right of way.

Other evidence

32. The appellant asserts that the physical evidence is that the claimed route is a highway within the meaning of the Rights of Way Act 1932 and the *'Countryside Act of 1949'*³ and subsequent enactments. The physical evidence is said to include street furniture to maintain access. The appellant claims that the highway has been protected from development by various handrails, paving and lighting etc.
33. Although Anchor Passage has been provided with handrails and paving. There is no evidence before me to indicate that this was for the benefit of a public highway. The land is subject to a right of way for the benefit of the owners of 5a East Ascent. This would need to be protected from the development of Saddlers Court and, as such, the works carried out on the claimed route could reasonably be seen as to have been carried out in the protection of that right. It may be the case that the surfacing materials used bear a resemblance to materials which might be used by a local authority but that does not mean that the route is regarded as a public right of way.
34. As regards the provision of lighting, the appellant asserts that this has been installed by Hastings Borough Council who, in so doing, clearly accepted responsibility for Anchor passage. The appellant refers to discussions with an officer from the East Sussex County Council lighting department in 2010. The lighting engineer is said to have stated that the lamp was unserviceable and that the lamp was not on adopted land or a right of way.

² I understand this to be HT21386.

³ I take this to be the National Parks and Access to the Countryside Act 1949.

35. The evidence as to who erected the lamp is unclear. However, the Council do say that the lamp may have been installed by Hastings Borough Council for the benefit of those with private rights. This is a possibility although it is noted that the lamp is not on land owned by Hastings Borough Council which lends support to the existence of public rights. However, in the absence of further information it is difficult to attach any weight to the existence of the lamp in support of public rights.
36. Correspondence from a Mrs Sumshion of 5a East Ascent, dated 12 August 1947, was received by the Borough Engineers Office on 14 August 1947. A transcript of the correspondence identifies the correspondent bringing to the attention of the Borough Engineer *'... the sweeping and lighting on steps which lead off East Ascent to 1 Maze Hill... and 5a East Ascent known as Anchor Passage which has no cul de sac,'*. A footnote, in a different handwriting, refers to a notice at the steps stating *'warns users No Throughfare to Victoria Hotel Garage only. Do not deface walls, Victoria Hotel Co.'* and *'There is an E.L.Lamp at top of steps They are not swept by this dept.'* The reply from the Borough and Water Engineer, 16 August 1947, states that the route is a private passage over which the public have a right of way and that the corporation are not responsible for maintenance.
37. Although there is nothing to indicate the source of the information in the reply some weight should be given to the view of the Borough and Water Engineer that the way was regarded as a public right of way. The fact that the occupier of 5a East Ascent was writing to the Borough Engineers office might also lend some support to the view that the route was public. Had Mrs Sumshion regarded the route to be private then it would seem unlikely that she would have raised the issues with the Borough Council. However, in the absence of further information it is difficult to give this any weight.
38. Whilst the appeal route forms part of a route from Mews Road to East Ascent in the same way as other 'twittens' in the area this does not evidence the existence of public rights. Any determination as to status must be determined on the individual merits of the evidence.
39. The appellant refers to a number of projects of Hastings Borough Council and in particular the use of the land which now forms Saddlers Court for a car park for students at Hastings College of Art. It is suggested that users of the car park would logically follow the appeal route to the college. Whilst it is possible that car park users would use the appeal route I have been provided with no evidence of use other than that identified at paragraph 10 above. In the absence of evidence of actual use it is difficult to attribute any weight to this assertion.
40. The appellant has submitted an extract of a book which is considered to describe Anchor Passage as a thoroughfare; no details are provided of the book. Although the extract is not particularly clear the extract describes Anchor Passage as a 'twitten' which is described as a narrow passage or alleyway. Whilst the route is described as a 'twitten' this does not necessarily mean that the route is public. I do not agree that the extract describes Anchor Passage as a thoroughfare. The extract refers to the 'twitten' providing access to the Anchor Inn; access to a public house does not support the existence of a public right of way.

Conclusions on the documentary evidence

41. Having regard to all of the above, the map evidence shows the physical existence of the appeal route. However, the map evidence does not support the existence of public rights or any inference that the claimed route has been used by the public. Nevertheless the maps do not preclude the existence of public rights. The evidence of expenditure on Anchor Passage from the Improvement Commissioners is supportive of public rights. However, whilst it may be the case that the Improvement Commissioners transferred roads and other infrastructure to Hastings Borough Council, and the Improvement Commissioners records suggest that Anchor Passage was public, it does not necessarily follow that Victoria Mews was also regarded as public and transferred to the Borough Council.
42. The correspondence from the Borough and Water Engineer is also indicative that Anchor Passage was considered to be a public right of way. Some weight should be given to the assertions of a public officer that the way was a public right of way. However, this does conflict with the evidence of the East Sussex County Council lighting engineer that advised that the route was not adopted or a public right of way. There is also a conflict of evidence in that Hastings Borough Council granted a right of way for the owners of 5a East Ascent.
43. Although the evidence in support of public rights is limited it is just sufficient, in the absence of any incontrovertible evidence that public rights cannot subsist, to raise a reasonable allegation that public rights exist on Anchor Passage. Consequently an Order should be made so as to enable the evidence to be tested at a public inquiry if necessary.

Other Matters

44. The appellant raises concerns as to the need for an escape route in the event of a fire at 1 Maze Hill. Issues relating to suitability, desirability and need are not matters which can be taken into account under the 1981 Act. The issue in this appeal is whether the evidence demonstrates that a public right of way subsists or is reasonably alleged to subsist.
45. The appellant makes the point that whether the claimed route is a public or private highway is of no consequence. However, an application under section 53(5) and Schedule 14 of the 1981 Act is to seek the recording of a public right of way. The existence or acquisition of private rights is not a matter for my consideration.

Conclusion

46. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

47. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act East Sussex County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a

public footpath along Anchor Passage, St Leonards. 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.

Martin Elliott

Inspector