

Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 01 February 2017

Appeal Ref: FPS/J1155/14A/20

- 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 Devon County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 28 April 2008 was refused by the Council on 22 July 2016.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath (shown by Q - R on the plan attached to this decision as Appendix A).

Summary of Decision: The Appeal is dismissed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. This appeal has 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.
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:

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

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. No evidence of use of the appeal route was submitted with the application to modify the definitive map and statement, and the Appellant relies wholly on the documentary evidence adduced in support of the claim that the route is a public right of way. I am satisfied that evidence which had not been considered when the definitive map and statement was first produced, namely the Finance Act 1910 documents, has been discovered and that this evidence should be considered with all other relevant evidence.

Reasons

Documentary evidence

Tithe Map and Apportionment

7. The Luppitt tithe map of 1842 shows the northern end of the claimed route in the vicinity of Greenway Farm as part of that property. The track carries the number 876 which was described in the apportionment as a "droveway". The southern enclosed section of the Appeal route is shown to be separate from adjacent landholdings and is shown in the same way that the roads leading to and from Higher Shelvin are shown. In contrast to the northern enclosed section, the southern enclosed section is not separately identified in the apportionment. The remainder of the Appeal route is not shown in the tithe map.
8. The primary purpose of the tithe maps was not to record the existence of public rights of way. The Appellant submits that despite the Appeal route not being recorded, the tithe documents are not inconsistent with the existence of a public right of way on foot over it. The objector submits that the absence of the majority of the Appeal route from the map shows that the surveyors found no physical presence of the route apart from the enclosed sections which suggests that it was unlikely to be a route which was in use in the middle of the nineteenth century. The Council submits that there is no indication in the tithe documents that the Appeal route was considered to be public at the time of the survey.
9. The northern enclosed section of the Appeal route is shown by the tithe survey to have formed part of Greenway Farm. The description of this enclosed section in the apportionment as a 'droveway' as part of a private landholding is more likely to be a description of the use to which the land was put as part of the farm than a public right of way as the droveway gave access to the farm buildings and to the fields immediately to the south. There is no indication within the tithe documents that the Appeal route was considered to carry a public right of way. The tithe evidence does not, of itself, demonstrate that the Appeal route was considered to be a public route in 1842.

Ordnance Survey plans

10. Small scale maps published between 1809 and 1937 show the northern and southern ends of the Appeal route between defined boundaries and which at its northern end gave access to fields to the south of Greenway and at the southern end gave access to Little Shelvin. None of the small-scale maps give any indication of the existence of a path between these two extremities. The depiction of the appeal route on these small scale Ordnance Survey maps does not demonstrate the existence of a through route between Greenways and Little Shelvin and no conclusions can be drawn as to the status of the Appeal route from these maps.
11. The whole of the Appeal route is shown on the first and second edition 25-inch to 1-mile map and is annotated "F.P." on the second edition map. The 1937 fifth edition of the one-inch map and the 1946 new Popular edition show the enclosed sections of the route and a link between the two which is identified by the key as a "*footpath or bridlepath*". These maps show the continued existence of a through route between Greenway and Little Shelvin during the first half of the twentieth century although they are silent as to the status of the route shown. The depiction of a route on Ordnance Survey maps as a track or way does not indicate that public rights subsist along it.

Parish minutes 1908

12. The parish minutes of 1908 contain two references to a footpath in the vicinity of Greenway. The first of these minutes, dated 30 September 1908 reads "*Complaints having been received of an obstruction across the footpath in the first field after passing Greenway House towards Shelvin by branches of trees being thrown across, it was unanimously agreed that the clerk write to Mr Buckingham, who had caused the obstruction requesting him to remove the said branches at once.*" The second entry dated 17 December 1908, reads "*E. M. Greenway Esq. wrote complaining of footpaths across fields near his house being blocked by branches of trees which had been cut down. As this in the meantime had been remedied, no steps were taken*".
13. The Appellant submits that the parish minutes demonstrate that the Appeal route was regarded as a public footpath by the parish council as it had considered itself responsible for ensuring that action was taken to clear the obstruction complained of; if the path had not been a public right of way, there would have been no need for the parish council to take any action. The objector submits that there was nothing in the minutes which suggests that the complaints had been made to the parish council because the path was considered to be public or that the occupier of Greenways considered the path to be public. Furthermore, the objector submits that as Mr Buckingham was not recorded in the Finance Act records as the owner or occupier of Greenway there was doubt as to whether the minute was referring to the appeal route or some other route which crossed the land.
14. The Finance Act records post-date the 1908 minutes and it is not impossible for Mr Buckingham to have been the occupier of land adjacent to Greenway prior to the date at which the survey under the 1910 Act was undertaken; I attach little weight to the fact that in 1910 Mr Buckingham's name did not appear in the Finance Act records.

15. The only path shown by Ordnance Survey to run "*in the first field after passing Greenway House towards Shelvin*" on the contemporaneous second edition Ordnance Survey map is the Appeal route. Although in 1908 there may have been other routes within the vicinity of Greenway which ran towards Shelvin none were considered by the Ordnance Survey to be of sufficient prominence to warrant depiction on the map. On a balance of probabilities therefore, the obstruction complained of in 1908 is more likely to have been found on the Appeal route than any other route in the vicinity of Greenway.
16. The minutes of 1908 are brief and open to interpretation and far from conclusive as to the status of the Appeal route. I do not attach significant weight to the minutes but they provide some evidence in support of the Appellant's case regarding the reputation of the Appeal route as being public.

Finance Act 1910 records

17. The Finance Act plans used the Ordnance survey second edition 25-inch to 1-mile map as a base. On that map, the appeal route is shown by means of a double peck line where it crosses open fields and by a single peck line where the route runs adjacent to a field boundary. The path is annotated "F.P." at one point.
18. The Appeal route is shown to cross two hereditaments, number 19 Greenway and number 124 Sansoms. The enclosed track running north from Higher Shelvin towards Little Shelvin which forms the southern enclosed part of the Appeal route appears to be included within hereditament 124 which is identified by a red boundary line.
19. The appeal route passes through OS parcels 1096, 1099 and 1101 which formed part of hereditament 124 and through parcels 1074 and 1070 which formed part of hereditament 19. The field book entry for hereditament 124 included a reference to "*Rt of Way Ord Nos 1096, 1099, 1101*" but did not specify whether the "*Rt of Way*" identified was public or private. No reduction in site value was granted under the headings for 'Public Right of Way or User' or 'Easements'.
20. With regard to hereditament 19, the field book entry included a reference to "*Rt of Way nos. 1074, 1070, 964, 922, 949, 953, 961*" but did not specify whether the "*Rt of Way*" was public or private. In the field book, a reduction in site value of £50 was allowed for "Public Right of Way or User", however this was not carried forward into the entry made in the Valuation Book produced at the conclusion of the survey.
21. The Appellant considers that the Finance Act records to be more supportive of the existence of public rights than private rights over the Appeal route, whereas the Council and the objector contends that these records do not provide evidence of the existence of a public right of way.
22. Although the land parcels crossed by the Appeal route (1096, 1099, 1101, 1074 and 1070) are those which the valuer identified as being crossed by a "*Rt of Way*", the Finance Act evidence is either silent as to the status of the way or is contradictory as to its perceived public status. Given that no reduction in site value was made for hereditament 124 and the entry in the valuation book for hereditament 19 shows that no reduction in site value was granted, the

Finance Act records do not provide evidence that the Appeal route was considered to be a public right of way in 1910.

Parish survey under the 1949 Act

23. The Appeal route was shown as footpath 47 on the map prepared by the parish council as part of the survey of public rights of way conducted in February 1951 under the provisions of the National Parks and Access to the Countryside Act 1949. The survey notes are brief with the path being described as "*F.P. 47 to Greenway. Very wet in one field*". There was no record of the path having been repaired in the past nor was any information provided regarding the extent or duration of use of the path by the public.
24. The grounds given for believing the footpath was public were "*Markings on old survey maps*". What was meant by "old survey maps" is a matter of debate as that point is not clarified by the survey notes. Whilst the Appellant suggests that it could be a reference to the map produced under the provisions of the Rights of Way Act 1932, equally it could refer to old Ordnance Survey maps, which do not provide evidence as to the status of any track shown.
25. Under the heading "*For use by the Rural District Council*" it was noted "*This footpath is shown on a map prepared under the Rights of Way Act 1932 as a public right of way. It is suggested that it should be retained as a public right of way.*" The Appellant's evidence shows that in January 1934 the parish clerk had purchased the relevant Ordnance Survey map for the purpose of recording public rights of way within the parish in accordance with the Rights of Way Act 1932. The parish council also resolved to hand over the map to the rural district council once the survey was completed, although if this was done the map has not survived.
26. The path shown in the parish survey was not recorded in the definitive map and statement when it was published. Copies of the draft and provisional maps have not been submitted and it may be that these documents are no longer available. The Appellant submits that the evidence from the 1950s survey indicates that the parish and rural district councils considered the Appeal route to be public and that significant evidential weight should be attached to the views of both councils.
27. As noted above, the draft and provisional maps have not been submitted and they may have been lost or destroyed along with the documents and other evidence generated through all three stages of the mapping process. In such circumstances, the presumption of regularity has to apply; that is, in the absence of evidence to the contrary, it has to be presumed that the surveying authority followed the procedures set out in the 1949 Act in the production of the definitive map and that the omission of the Appeal route from the definitive map was based upon the best evidence then available to the Council and which may now be lost.
28. Although the parish council in 1951 considered the appeal route to be a public right of way and marked it on its survey map and although it is claimed that the Appeal route had been included in a 1930s map of public rights of way, I place considerable weight upon the fact that the route was not shown on the definitive map and statement when those documents were first published. In omitting the path from the definitive map, the Council must have been in

possession of evidence which demonstrated that there were no public rights over the Appeal route.

Conclusions

29. The appeal fails against Test A set out in paragraph 5 above as there is no clear evidence that a public right of way subsists over the Appeal route.
30. The tithe and Ordnance Survey documents do not provide evidence of the existence of public rights along the Appeal route. The 1908 parish minutes are ambiguous as to whether the path at issue was considered to be public and are in any case contradicted by the Finance Act documents which show that the Appeal route was not considered to be a public right of way at the time of the survey as no reduction in site value was allowed for either hereditament crossed by the Appeal route. The Appeal route was not recorded in the definitive map and statement which suggests that public rights did not exist over it at the time of the survey. No evidence of use by the public before or since the 1950s has been adduced by the Appellant; consequently it could not be concluded that public rights had been acquired post-1951.
31. In short, there is insufficient evidence in favour of the Appeal route being a public right of way for a conflict between the evidence to arise which would satisfy Test B as set out in paragraph 5 above.
32. Accordingly, it follows that I conclude that the Appeal should be dismissed.

Formal Decision

33. I dismiss the appeal.

Alan Beckett

Inspector

Appendix A

