The Planning Inspectorate

Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 06 August 2018

Appeal Ref: FPS/G1440/14A/6

- This Appeal, dated 21 December 2017, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of East Sussex County Council ('the Council') not to make an Order under 53(2) of that Act.
- The Application dated 17 March 20015 was refused by the Council and the applicant was notified by letter dated 19 December 2017.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the Appeal route as a Public Footpath.

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 to the 1981 Act.

2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

3. Submissions have been made by the Appellant (Mr Christopher Ranson), East Sussex County Council, and by Adams and Remers LLP on behalf of the landowner, Lady Elizabeth Noel Collum.

4. The validity of the Appeal was questioned by Adams and Remers LLP, given that the Appeal Form itself is dated 10 February 2018. Paragraph 4(1) of Schedule 14 to the 1981 Act states that an appeal may be made at any time within 28 days after the service of the notice by the Council refusing the application.

5. Mr Ransom contacted the Planning Inspectorate on 21 December 2017 seeking advice and later that same day submitted a letter by email giving notice that he wished to appeal. Due to the intervening Christmas and New Year period, Mr Ranson was given an extension until 14 February 2018 to provide the completed Appeal Form and the associated documents. Mr Ranson certifies on the completed Appeal Form that he served notice of his Appeal on the surveying authority (i.e. the Council) on 21 December 2017, the same day that he contacted the Planning Inspectorate.

6. I am therefore satisfied that the requirements of Schedule 14 have been met and that the Appeal is valid.

The Main Issues

7. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the County Council) to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events, cited in Section 53(3).

8. Section 53(3)(b) of the 1981 Act provides that one of those events is the expiration of a period of time during which there has been enjoyment of the route by the public sufficient to raise a presumption that the way has been dedicated as a public path.

9. Another event is set out in Section 53(3)(c)(i) of the 1981 Act, which provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] 68 P & CR 402, and upheld in R v. Secretary of State for Wales ex parte Gordon Michael Emery [1997] EWCA Civ 2064:

    - Test A: Does a right of way subsist on the balance of probabilities?
    - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

    For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

10. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to so dedicate during that period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

11. It is also open to me to consider whether dedication of the way as a highway has taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.

12. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, 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.

13. Mr Ranson submitted user evidence with his original application, but subsequently relied on documentary evidence to support his claim. However, since the decision maker must consider all the relevant evidence available it is appropriate to examine the user evidence in addition to assessing the historical documents.

Reasons

Background

14. The Appeal route commences at the junction of the public highways known as High Street and Church Street opposite the church in the village of Fletching and runs in a westerly direction through a gateway set into a stone arch. It continues in a west-north westerly direction for total distance of approximately 625 metres to the boundary of the land owned by the National Trust at Sheffield Park. It is bounded on either side by a variety of fence panels, shrubs and trees and has a varying width of between 3 and 8 metres.[1]

15. Mr Ranson (the Appellant) explains that the route continues beyond that point on the ground, but he has only claimed it to that location since the National Trust operates a policy of open access to Sheffield Park and it is therefore not necessary, in his opinion, to claim the public right of way any further. This point is important, particularly in the light of the emphasis by the Appellant on the historical evidence on which he relies.

User Evidence

Statutory Dedication: Section 31 of the 1980 Act

Date on which the use of the path was brought into question

16. The application was made in May 2015 and appears to have been made in response to challenges made to the use of the path by the present tenant, who took on the tenancy of East Park Farm in 2013. No clear date has been given for any identifiable event, and so it would be possible to take the date of the application as the date on which the use of the path was brought into question.

17. There is also evidence of a long-standing sign having been in position at the eastern end of the track, on the arched gateway. This sign, erected under the provisions of the Rights of Way Act 1932, states thus:

SHEFFIELD PARK ESTATE

RIGHTS OF WAY ACT 1932

Notice is hereby given that

This is a PRIVATE ROAD

and no Public Right of

Way exists.

The photographs of this sign suggest that some text may have been obliterated in the lower right hand corner.

[1] Taken from the Council's description

18. The notice is a clear indication that there was no intention on the part of the landowner at that time to dedicate a public right of way. Sheffield Park Estate sold the land in 1953 but the notice has allegedly remained in place. On that basis I accept that it has had continuing effect and that no amount of public user since at least 1953 can be relied upon to support a dedication of a public right of way over the claimed route because of an effective demonstration of a lack of intention to do so.

19. The sign could, of course, have been erected at any point between 1932 and 1953, but in the absence of any other evidence on that point, I agree with the Council's assessment that the erection of the notice was an overt action, and the relevant date in this regard can therefore be taken as 1953, that being the latest date on which the sign was likely to have been erected. The period of use to be considered with respect to a statutory dedication of the route must therefore be 1933-1953.

Whether there has been use of the way by the public during that period

20. Only two witnesses are able to provide personal evidence of user prior to 1953: Mr Padgham and Mr A A Johnson. Mr Padgham (who lives at Sheffield Park) also provides anecdotal evidence of user by his parents and grandparents, but it is not clear to me whether they would have been tenants of the Sheffield Park estate owner, or whether they would have been owner occupiers. Mr Johnson (who lives at Fletching) used the path in his childhood to access the woods to play and to visit his father working in the sawmills.

21. There is no definition in the 1980 Act of the term 'public' but it is usually taken to mean that use must be by a group of people which represents either the public as a whole or the local community. Whilst I accept that both these witnesses and their families live, or lived, locally, the evidence is very sparse. Nevertheless I consider that, for statutory dedication purposes, they are representative of the local community and are therefore representative of the public at the time of their use prior to 1953. The community would have been significantly smaller then than it is now, and probably much more intimate.

Whether there has been uninterrupted use as of right throughout the relevant period

22. Neither of the witnesses is able to provide personal evidence of use for the whole of the relevant 20 year period, due principally to the time-frame.

23. The anecdotal evidence of use supplied by Mr Padgham is insufficient to establish whether or not the use was uninterrupted throughout that period. Furthermore, without additional information about the nature of that anecdotal use, it is not possible to rely on it as user as of right. Use as of right must be shown to be exercised openly, without force and without permission. Whilst I doubt if Mr Padgham's parents or grandparents used the path secretly or with the use of force, no information has been supplied to show whether their use was by right (perhaps as tenants or as a result of some other permission).

24. There is simply insufficient user evidence to satisfy deemed dedication under the statutory provisions.

Common Law dedication

25. Dedication at common law requires either that there be evidence of an express intention to dedicate a way as a highway, together with the acceptance of that dedication by the public; or alternatively, sufficient evidence from which it is possible to infer that a dedication must have taken place. Whilst user can be evidence that supports a dedication, it does not raise a presumption as such. The onus is on the person asserting that the right exists to show that the facts overall show that an inference can be drawn that there was an intention to dedicate a highway.

26. Given the low level of user prior to 1953, it is necessary to examine the historical evidence to see whether there is any basis for inferring that it was the intention of the landowner at any time to the dedicate the Appeal route as a public highway.

Historical Evidence

Commercial and Ordnance Survey Mapping

27. There appears to be no dispute between the parties that the application route appears on a variety of maps, to a greater or lesser extent, dating back to 1795, when it appears on a map referred to by the Council as the Garden and Gream map. I have not been provided with a copy of that map but the Council describes it in their historical analysis as being shown in the same way as other surrounding routes, and this finding has not been challenged.

28. The route has continued to be shown on Ordnance Survey ('OS') maps, and is clearly visible on the ground over the length which is the subject of this Appeal. The OS specifically includes a disclaimer on its maps, and has done so since the latter part of the 19th century, to the effect that the representation of any road, track or path does not, and did not, constitute evidence of the existence of a public right of way.

29. There is no disagreement that the route physically exists, but I agree with the Council's assessment that these maps are not determinative of the status of the route in terms of highways.

Tithe Map and Apportionment

30. Copies and reproductions of a Tithe Map, apparently dating from 1843, have been submitted by all parties, but there is little information from the associated Tithe Apportionment. The Council sought an expert opinion on this evidence from Mr Robin Carr[2] who makes reference to both documents, but it is not clear to me whether he had actually had sight of the Apportionment.

31. Nevertheless, it has been long established that it was not the purpose of the Tithe Commutation process to identify highways, but rather to establish which land was, and was not, subject to the payment of a tithe. Very occasionally such documentation offers more of an insight into the status of tracks or ways shown on them, but normally it is only possible to infer that the route existed on the ground, and so to determine whether or not it was considered productive in terms of a tithe.

[2] A Fellow of the Institute of Public Rights of Way and Access Management and a Registered Expert Witness

32. In this case the route does not appear to have a number on the map, and the inference must therefore be that no tithes were due in respect of it. If it had a stoned or gravelled surface it would not have been productive, whether it was a private drive or a public highway. Notation on the map (the letter 'L' or 'T' at the eastern end of the route) has not been explained, despite speculation. I agree with the assessment made by Mr Carr and relied upon by the Council that the information provided by the Tithe Map is limited to supporting its physical existence in 1843. It provides no evidence of its status in terms of highway.

Property documents

33. The property documents submitted indicate that the claimed route was sold as part of one of the lots, with various rights of access over it being given or retained by the owners or purchasers of other properties to which it gave access.

34. It is argued on behalf of the landowner that this demonstrates that there cannot have been any public rights over the claimed route because otherwise such provisions would have been nugatory.

35. It is not an unusual occurrence for private rights to be secured in this way, and I agree with the Appellant that it does not necessarily negate the existence of public rights over the same route. The provision of private rights protects against the possible extinguishment of any public rights at some point in the future, and may provide additional rights over and above the ones existing for the public.

36. I accept that, on purchase of the gardens, the National Trust were specifically denied private rights of access over the subject track (and others) but this merely reinforces the intention of the sign I have referred to in paragraph 17 above. If a public right of way can now be shown to have been dedicated prior to the erection of that sign then the removal of private rights would only affect those particular rights (which may in any case have included higher rights than any public rights which existed).

37. I therefore place little weight on this evidence in showing that no public right of way could subsist over the claimed route.

The Definitive Map Process

38. The Council has provided documentation regarding the process by which the DMS was produced in the 1950s, and there is no evidence that any routes across Sheffield Park were claimed as rights of way by the parish at that time, or that routes were claimed and subsequently challenged. This was a legal process with the appropriate checks and balances and should therefore carry significant weight. However, the DMS is only definitive in what it actually shows, and the non-appearance of a route on the map is not evidence that a public right of way does not or cannot exist.

Finance Act 1910 Documentation

39. This information was not available in the early 1950s and the Appellant places significant reliance upon it in this case. The process at the time was lengthy and appears to have been executed with varying degrees of thoroughness around the country. A number of different land taxes were collected on the

basis of the information collected during the process, some of which took into account reductions in site value due to the existence of features like public rights of way. Properties were divided up into hereditaments for the purposes of recording the relevant information in a variety of forms and documents, including maps, field books and valuation books. The initial exercise involved landowners completing a form (Form 4) on which they entered the details of their property. This information was then transferred to documents used by the Inland Revenue and site visits were made to enable the valuations to be assessed.

40. The Appellant places great emphasis on the fact that the base map used for the exercise was the OS 2nd edition County Map series on which a number of paths (both in general and also specifically across the Sheffield Park hereditament) were marked with the letters *'FP'*. He has concluded that almost all of these routes now appear on the Council's DMS, except for the ones shown crossing Sheffield Park. However, I have already remarked (paragraph 28 above) that the OS did not make any claim to indicate the nature of public rights. I agree with the comments made on behalf of the landowner that it is clear from instructions issued to field staff at the OS that they were to indicate routes which were not available to vehicles but not to enquire into what public rights existed. The letters *'FP'* were simply descriptive of a route's characteristics, and not its legal status.

41. Nevertheless, the Finance Act 1910 documentation relating to Sheffield Park is detailed and indicates a significant reduction for public rights of way. Much argument has been made by the parties about whether this refers to public rights of way, or public rights of user, and about whether the amount is unusually large, or not. Whilst the legal representatives of the landowner have been able to show a significant deduction on another nearby property, I agree with Mr Carr's assessment that, in general, the amount of the reduction for the Sheffield Park hereditament is considerably larger than usual. I have insufficient information to explain the larger deduction highlighted nearby, but it clearly included an area of common land which is likely to have had a bearing on it. There is no evidence that there is or was any common land at Sheffield Park.

42. The difficulty for the Appellant in pursuing this claim on the basis of the historical evidence is that the National Trust did not acquire ownership of their part of the land until 1953/4. Therefore by restricting his claim to that part of the route which now ends at their boundary, and relying on evidence which pre-dates their ownership he is, in effect, claiming a cul-de-sac route which seemingly serves no purpose.

43. I accept that in 1910 part of the grounds of Sheffield Park were described as 'pleasure grounds' in the Finance Act documents, but I have been provided with no evidence to show what that term means in relation to public access. All the parties appear to have assumed that the public had access to the grounds in some way, but disagree as to whether that was by invitation, or simply unrestricted.

44. It is my understanding that in formal English Garden design 'pleasure grounds' could refer simply to the style of a particular part of the landscaped grounds, and not necessarily imply that they were open to the public; as opposed to

public pleasure grounds which may have been laid out on land developed by a local authority, or some other party, specifically for public use.

45. Whilst I accept that there is evidence that the grounds were used for events which might today be called 'public' (e.g. an international cricket match) I do not consider that it is safe to interpret that by reference to modern custom and practice. In any case no evidence has been submitted to show how, when, why, or even if, the public in general made use of the grounds of Sheffield Park prior to 1910 and on what basis. The lack of evidence has led to much speculation on the part of the parties involved in this case, which is not helpful. I consider that the entry in the documentation should be taken at face value, and that it must therefore relate to public rights of way.

46. Notwithstanding all the possible explanations, the fact of the matter is that the Finance Act documentation does not identify the location or status of the rights of way for which the deduction was being claimed, and the Appellant's claimed route does not form a through route, as it stands. A highway normally runs from a highway to another highway, unless it leads to a place to which the public has a right to go. No evidence has been submitted to show that the public had a right to go to the landscaped grounds of Sheffield Park prior to the purchase of the gardens by the National Trust; nor, specifically, prior to 1910. The claimed route would therefore have be a cul-de-sac route without a destination and unlikely to be capable of dedication as a highway.

47. Therefore I agree with Mr Carr's view that whilst the Finance Act 1910 documentation *may* constitute a reasonable allegation that public rights of way exist across the Sheffield Park land, it does not allow a reasonable allegation that the claimed route itself is a public right of way. My view is strengthened because the Appeal route is not a way which, on the evidence presented, is likely to have been capable of giving rise to a presumption of dedication at common law.

48. I am only able to deal with the Appeal in relation to the route claimed and cannot make a direction on routes which have not been subject to an application under Section 53 of the 1981 Act.

Other Matters

49. Much of the submitted material merely repeats or ornaments the very basic information contained in the historical documents provided. So much of it is pure speculation that I have not commented on it, but focussed on the crux of the matter. The speculation for the most part is not supported by any relevant evidence. That is not to say that I disagree with some of the potential explanations, but merely that they do not assist me in coming to a decision on the route which is the subject of this Appeal.

Conclusions

50. Having regard to these, and to all other relevant matters raised in the written representations I conclude that the Appeal should be dismissed.

Formal Decision

51. The Appeal is dismissed.

Helen Slade

Inspector