



Appeal Decision

by Paul Freer BA(Hons) LLM PhD MRTPI

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

Decision date: 26 September 2019

Appeal Ref: FPS/J1155/14A/22

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Devon County Council not to make an order under Section 53(2) of that Act.
- By application dated 5 September 2018 the applicant, Rosemary Kimbell (on behalf of the Ramblers' Association), claimed that a footpath at Hayne Farm, Gittisham, linking Hayne Lane to Parsonage Lane at Goldcombe Farm, should be added to the definitive map and statement for the area as a public footpath.
- The application was refused by Devon County Council on 11 September 2018.

Summary of Decision: The appeal is allowed.

Preliminary matters

1. The background to this appeal is that the claimed route was one of several routes considered under a parish-by-parish review of the Definitive Map and Statement started by Devon County Council (DCC) in 2016. In March 2018, the County Council resolved that no modification be made in respect of the claimed route.
2. The evidence submitted with the application subject to this appeal was exactly the same as that considered by DCC in the review of the Definitive Map and Statement. Although not expressly stated as such in the application, it has subsequently been accepted that the application is based solely on the event in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act). The application was refused on the basis that there existed no additional evidence from the time of the parish-by-parish review.
3. This leads an interested party who objects to the application to consider that it should not be entertained because it does not amount to the 'discovery' of new evidence as required by Section 53(3)(c)(i) the 1981 Act. In support of that position, the objector refers to various court judgments that, in summary, confirm that it is not permissible to simply re-examine the same evidence that had been previously considered when the definitive map was drawn up¹. These judgments indicate that the evidence discovered must be fresh in the sense that it was not available at the date of the existing definitive map.
4. The first point I note from this is that DCC did not immediately 'turn away' the application as invalid, vexatious or frivolous but in fact considered it sufficiently

¹ *R. v Secretary of State for the Environment Ex p. Riley* [1990] 59 P. & C.R.1; *Fowler v Secretary of State for the Environment* [1992] 64 P. & C.R.16; *Burrows v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC Admin;

in order to reach the conclusion that it should be refused (with no order to be made) and served notice on the applicant to that effect. Schedule 14 rights to appeal were then triggered and it would, in my view, be unjust at this late stage to take the objectors points about 'events' and 'discovery' in order to thwart the appeal.

5. Furthermore, although the caselaw referred to by the objector is a useful background to the issues raised, it seems to me that those cases arose from appeals which had 'run their course'. In that context, this application has not yet to run its full course and can therefore be distinguished from the cases referred to by the objector. In addition, on the legal points raised by the cases referred to by the objector, the courts generally concluded that what was really important was to maintain a definitive map and statement of the highest attainable accuracy rather than quibble about the characterisation of what amounts to 'new evidence'.
6. Having regard to all the above, I consider that the applicant was entitled to have the application considered and determined, and that I must therefore also consider and determine this appeal. Similarly, and for the same reasons, I do not consider that the appeal should be barred on the principles of *Res Judicata*, meaning 'a matter judged', being the principle in common law that a party should not be allowed to litigate issues which have already been decided by a court or tribunal of competent jurisdiction.

Main issue

7. The main issue in this case is whether the available evidence shows that, at some time in the past, a public right of way was established along the full length of the appeal route and still exists today. In considering this issue, the test to be applied is whether a right of way has been shown to subsist on the balance of probability or a right of way has been reasonably alleged to subsist²

Reasons

8. The application was made entirely on the basis of documentary evidence, with no user evidence being provided. The documentary evidence relied upon by the applicant is from a variety of sources, and it is therefore convenient to consider each source of evidence in turn before then assessing the evidence in the round.

Presentations to the Court of Leet

9. The applicant points to three presentations to the Gittisham Court Leet that, in her view, can only relate to the claimed route between Hayne farm and Goldcombe Farm. The first of these presentations concerns the repair of a bridge at Ten Acres that, in 1803, was said to be out of repair. The second presentation relates to a bridge between the Closes at Ten Acres and Jarvis Park, and which by 1811 was said to be out of repair and dangerous. The third presentation, in 1819, concerned the need for a rail at the bottom of Long Meadow in the footpath towards Honiton.
10. On first reading, the presentations to the Court of Leet would appear to indicate the presence at that time of a footpath that corresponded, at least in

² Sub-section 53(3)(c)(i) of the 1981 Act.

part, to the claimed route. I note in particular the reference to the 'footpath towards Honiton' in the presentation in 1819.

11. Nevertheless, in my view this evidence must be treated with some caution. In particular, the presentations relate to only one part of the claimed route. Furthermore, the applicant makes the assumption that the presentations require repairs to public rights of way but that does not necessarily follow. Whilst I cannot discount the possibility that these presentations might have related to a public right of way, they could equally have concerned other matters or disputes that came before the Court of Leet, including other rights of access. Finally, and perhaps most importantly, I do not accept that applicant's contention that these presentations must necessarily have related to the claimed route. As DCC point out, there is a possibility that the route to Honiton may have been via Hodges Lane. That too would be consistent with the reference to 'footpath towards Honiton' in the presentation of 1819.

Tithe Maps

12. The Buckerell Tithe Map of 1845 (which covers land now in the Parish of Gittisham) shows only a short entrance track into Haynes Farm and shows no path or track that might equate to the claimed route. The Apportionment, which I understand dated to 1842, makes specific reference to the aforementioned Ten Acres that would have been crossed by the claimed route but there is no indication in the Apportionment of any path across that field.
13. Similarly, the Tithe Map for Gittisham shows fields that would have been crossed by the claimed route, including fields known as Jarvis Park and Long Mead respectively. However, there is no indication on the Tithe Map of any path that might correspond with the claimed route.
14. I am mindful that the primary purpose of Tithe Maps to record the tithable value of the land and that it was not unusual for Tithe Maps to not record footpaths. Nevertheless, the absence of a route from a Tithe Map does not necessarily mean that no highway existed. The absence of any record of footpaths in the Buckerell and Gittisham Tithe Maps that might equate to the claimed route therefore adds nothing to the weight of evidence in support of the applicant's claim.

Ordnance Survey mapping

15. The 1887 First Edition of the O.S. map shows a route starting at Hayne Farm and initially heading west. The route is annotated as 'F.P.' on the O.S. Map, suggesting a route that could be used on foot but which was not suitable for horse or wheeled traffic. The route then splits, with one section heading in a north-westerly direction to link with Hodges Lane. The other section then continues in a westerly direction before turning south across the field previously referred to as Jarvis Park and then continuing broadly southwards until linking with Parsonage Lane at Goldscombe Farm. It therefore follows the claimed route almost exactly, the only difference being where the route joins with Parsonage Lane, shown on the O.S. map as entering Goldscombe Farm but as claimed skirting around the farm buildings. The 1903 Second Edition of the O.S. map also shows a route similarly annotated as 'F.P.' that follows the same route as that shown on 1887 First Edition.
16. The 'A' Edition of the 1958-60 O.S. map shows the first part of the claimed route as a 'track' to approximately the point where the route splits. Beyond

that point, the claimed route (and the route linking with Hodges lane) are both shown with the annotation 'F.P.'

17. I am mindful that O.S. maps do not indicate whether a footpath is public or private. I am also mindful that the later 1958-60 map refers to the first part of the claimed route as a track rather than a footpath. I have taken both of those factors into account. Nevertheless, in my view the inclusion of the claimed route (or nearly all of it) as a route carrying the annotation 'F.P.' on these O.S. maps is evidence of the presence of a footpath along that route.

Finance Act 1910

18. The later O.S. maps were used for the 1910 Finance Act survey. The latter shows three defined and numbered hereditaments that include parts of the claimed route. Specifically, these were Hayne Farm (25); Glebe land (88); and Goldcombe Farm (84). I accept entirely that the depiction of the route as a faint grey line on that map would, in isolation, afford this plan only limited evidential value. However, the fact that a surveyor or the District Valuer deemed it necessary to draw that line and that one landowner subsequently sought a deduction is positive evidence of the existence of a route available for use by the public.
19. The attendant Field Book entry for Hayne Farm (25) records a deduction of £50 under Public Rights of Way or User. There is no equivalent deduction recorded for Glebe land (88); and Goldcombe Farm (84). It is noteworthy that in relation to each of these hereditaments the landowner had completed the form in relation to "Fixed Charges, Easements, Common Rights and Restrictions" with the answer of "not known".
20. I take the objector's point that, had the landowner been aware of a footpath across these hereditaments, it is likely that he would have indicated as much in order to secure a deduction. Equally, though, the landowner might not have wanted to draw attention to the presence of a footpath given all the potential problems that might then be caused. I note that the landowner of the hereditament numbered 88 Glebe land did in fact indicate "(II) Yes a footpath" in response to "Fixed Charges, Easements, Common Rights and Restrictions", albeit this did not secure a deduction. It is also significant that the Field Book entry refers to a number of fields with O.S. numbers of 151, 189 and 191 respectively only one of which (plot 189, Jarvis Park) is on the claimed route. These same fields are also indicated on the form for Goldscombe Farm but, for reasons that are not apparent, are shown crossed through.
21. The evidence in relation to the Finance Act 1910 is somewhat patchy and inconsistent insofar as it pertains to the claimed route. The evidence certainly cannot be said to relate to the whole of the claimed route and, in particular, I am mindful that there are no deductions relating to land next to or through Hayne Farm. Nonetheless, there is clear reference to one deduction on the grounds of a right of way and a second reference to a footpath that did not result in a deduction. Given that the Field Book entries in this case appear to be based upon the survey plan that was itself based upon the (then) latest O.S. map, it is not an unreasonable assumption that the references in the Field Book entries could relate to the footpath annotated as 'F.P.' on the O.S. map. Given, then, that the claimed route closely follows the route annotated as 'F.P.' on the O.S. map, it is again not an unreasonable assumption that the Field Book entries could potentially relate to the claimed route, at least in part.

The Definitive Map process

22. The claimed route was not included as one of the six paths put forward on behalf of Gittisham Parish Council for recording as public rights of way on the Definitive Map in October 1950. There is, however, a partly completed survey sheet for a further route, numbered 7. The survey sheet is annotated with a note from the Chairman of Gittisham Parish Council stating that:
- "this path is required and was omitted due to an oversight. The RDC³ confirm this. The path has been pencilled in on the map."*
23. The path that was pencilled in on that map corresponds closely with the claimed route. The map is annotated, in pen, with the position of gates and fences. Although path number 7 was not put forward for recording on the Definitive map, DCC indicate that the annotation of the map in pen is consistent with the treatment of the six routes that were put forward.
24. DCC explain that, unlike the survey sheets for the six routes that were put forward for recording on the Definitive map, there were no accompanying other notes or comments from Honiton Rural District Council. There is, however, a comment from Devon County Council dated 24 November 1953 that includes a description of a right of way that again corresponds closely with the claimed route. The comments, which are signed by the Divisional Surveyor, indicate that DCC considered the route to be public even though the route was ultimately not recorded on the definitive map.
25. I accept entirely that the survey sheet and plan submitted by Gittisham Parish Council and the comments made by Devon County Council represent only the start of the process for recording rights of way on the Definitive Map. It is also apparent that, for reasons which are now lost in time, that process was not pursued to completion in relation to this route. Nevertheless, these documents are evidence that a public route did exist at that time.
26. In 1992, DCC undertook a review of the Definitive map in the light of proposed changes to the route of the A30. The claimed route was not affected by those proposed changes but was referred to in the context of another route (route B) considered as part of report to the Public Rights of Way Sub-Committee dated 15 September 1992. In that report, it was stated that the claim for the connecting route running between Hayne and Goldcombe Farms appeared 'prima facie' to be a valid proposal. In that respect, reference was made in the report to the claim made by the parish in the 1950s and the claim that the route was omitted from the Definitive Map due to an oversight. I note that both of those same considerations are before me now.

Aerial photographs

27. DCC has provided a number of aerial photographs taken between 1946 and 2007. Little can be discerned from the earliest of these photographs. The later photographs show some evidence of a route that broadly corresponds to the claimed route albeit it is not possible to learn from these photographs whether the track(s) shown are public or private. I also note that the photographs from 1999 onwards show the track following a route that varies (quite considerably in places) from the claimed route.

³ Presumably Rural District Council

Assessment of the available evidence

28. For the reasons set out above, I attach only limited weight to the evidence provided by the Presentations to the Court of Leet between 1803 and 1819. The evidence relating to the Tithe Maps adds nothing in support of the applicant's claim whereas the aerial photographs show, if anything, that the track or path may have followed a different route to that claimed.
29. Nevertheless, the reference to a footpath on the O.S. maps is evidence of the presence of a footpath along the claimed route. Given that some of the 1910 Finance Act Field Book entries can be linked with the route annotated as 'F.P.' on the O.S. map, it is not an unreasonable assumption that these field entries could potentially relate to the claimed route, if not in its entirety, then at least in part.
30. I attach weight to the note from Gittisham Parish Council to the effect that the route referred to as number 7, and which correlates closely with the claimed route, was required but was omitted due to an oversight. I also attach weight to the description of the route by Devon County Council which, if nothing else, confirms that the route did exist in or around 1953. It then appears that in 1992 DCC took the path running between Hayne and Goldcombe Farms as 'prima facie' evidence of a valid claim for that route and, whilst DCC took it no further at that time, it appears to me that nothing has emerged in the interim to cast doubt on that initial assessment.
31. Assessing this evidence in its entirety and in the round, I conclude that the evidence falls short of the standard of proof required to show that, on a balance of probability, a public right of way on foot subsists along the appeal route. However, I find no incontrovertible evidence that the claimed right could not have existed and some evidence to show that a footpath did in fact exist along the claimed route. Nonetheless, I consider that the evidence is sufficient to show that the existence of the public right of way claimed can be reasonably alleged.

Conclusion

32. Having regard to these and all matters raised in the written representations, I conclude that a public right of way can be reasonably alleged to subsist along the full length of the appeal route. Accordingly, the appeal should be allowed and DCC required to make an Order.

Formal Decision

33. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Devon 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 footpath at Hayne Farm, Gittisham, linking Hayne Lane to Parsonage Lane at Goldcombe Farm. 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.

Paul Freer

INSPECTOR