



# Appeal Decision

by Helen Heward BSc (Hons), MRTPI

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

Decision date: 12 February 2020

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## Appeal Ref: FPS/L3055/14A/17

- 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 Nottinghamshire County Council not to make an Order under Section 53(2) of that Act (the 1981 Act).
- The application dated 8 December 2008 was refused by way of a decision notice dated 22 May 2019.
- The Appellant, Stephen Parkhouse, claims that a route should be recorded as a public footpath on the Definitive Map and Statement for the area.

**Summary of Decision: The appeal is allowed in part and dismissed in part.**

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## Preliminary Matters and Main Issues

### *The Appellant*

1. The application and appeal were both made by Mr Parkhouse. A statement by the Appellant that he acts for Nottinghamshire Area Ramblers as their Rights of Way Secretary for DMMO applications has had no bearing on this decision.

### *Legislative background*

2. The Council determined the matter by reference to section 53(3)(b) of the 1981 Act. Section 53(3)(b) relates to the situation where there has been "*the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path...*".
3. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

*"(i) 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, being a right of way to which this Part applies".*

4. *R v the Secretary of State for the Environment ex parte Norton and Bagshaw, 1994<sup>1</sup>*, sets out that there are two tests in relation to such applications:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

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<sup>1</sup> [1994] 68 P & C.R. 402

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5. It was also held in *Norton & Bagshaw* that an Order should be made where either of the tests is met. The evidence to establish Test B will be less than that necessary to establish Test A.

#### *Dedication*

6. The required expiration of the period of use can be shown at common law with express or implied dedication by the owner and acceptance by the public creating a highway. The question of dedication is one of fact to be determined from the evidence. Use by the public provides evidence, but it is not conclusive evidence from which dedication can be inferred. There is no defined minimum period of use at common law and the legal burden of proving the owner's intentions remains with the claimant.
7. Dedication of a public right of way may also be shown by statutory deemed dedication under section 31 of the Highways Act 1980 ("the 1980 Act"). Section 31 of the 1980 Act states that where a way has been enjoyed by the public without interruption for a full period of 20 years, the way is presumed to have been dedicated as a highway, unless there is sufficient evidence that there was no intention to dedicate it during that period.
8. Most of the land to the north of CW is held under lease by the Forestry Commission (FC) and is regarded as Crown land. Consequently, the possibility of dedication of a public right of way arising under the terms prescribed in s31 of the 1980 Act is ruled out in respect of the area held under this lease. In that area, dedication could only be established under common law principles. The sections of the claimed route over land not within the area of the lease can be considered under s31 of the 1980 Act.
9. I must be satisfied that the relevant tests have been met on the balance of probabilities.

#### *When the routes were called into question*

10. *R (on the application of Godmanchester and Drain) v SSEFRA, 2007*<sup>2</sup>, ("*Godmanchester*") addresses the meaning of s31 (2) of the 1981 Act with regard to what acts constitute 'bringing into question' by reference to earlier case law: "*Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway*".
11. A public highway "Cavendish Way" (CW) was constructed across sections 1a and 1b of the claimed routes in 2001/2002. The Appellant submits that it was always possible to follow the routes except when construction works were taking place. CW is a main road and evidence from at least one user refers to the 'road scheme' taking 'several months'. The construction of CW would have interrupted use of Routes 1a and 1b.
12. The Appellant states that a gate at Cavendish Lodge at the northern end of Route 1, where it meets an existing public bridleway was unlocked until a 'step over' was installed. The occasional locking of this gate would be sufficient to make it likely that some users were made aware that their right to use the way as a public footpath was being challenged the Council, but I am unclear as to when that was.

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<sup>2</sup> [2007] UKHL 28

Nonetheless there appears to be sufficient use over a number of decades which isn't disputed.

13. Therefore, the routes were called into question in 2008 when the application was made, and the routes may have been called into question in 2001. Although the Council considered the routes as a whole, sections 1a and 1b are quite distinct and I have addressed them separately.

*User evidence and the alignment of the claimed routes*

14. Support for the claimed routes rests on over 40 user evidence forms (UEFs) completed by people claiming use over a significant period of years up to 2008. Each UEF attaches a plan showing the routes used and is signed by the claimant. One or two forms are signed to say that someone else took the statement for them, and one plan was drawn on behalf of the user. But the majority of plans appear to have been drawn by the users themselves.
15. Most users live or lived in Clipstone and many provide evidence of use dating from the 1950's and 1960's until 2008 when the application was submitted to the Council. The main purposes given for using the claimed routes are walking for recreational pleasure and dog walking. Users attest to using the routes daily, weekly, monthly or a few times a year. Many refer to frequently seeing other people walking at the same time.
16. In order to record a public right of way the use must be 'as of right'. In the case of *R(Lewis) v Redcar and Cleveland (No 2), 2010*<sup>3</sup> ("Redcar") it was held that for use to be 'as of right' it must be without force, without secrecy and without permission.
17. Many UEFs refer to the construction of CW. Some users refer to gates and fencing erected at the time CW was constructed but maintain that a way through on foot was always possible. Users overwhelmingly state that use was never interrupted.
18. Together the written information provided on the UEFs create a plausible and compelling collective body of evidence of the locality of the claimed routes being used continuously and frequently for walking from at least the 1960's to 2008.
19. The Council does not dispute that there is a substantial body of evidence demonstrating that people walked in the woods through which the claimed routes run. Rather, they consider that the evidence indicates that users may have used similar routes, but that the evidence does not demonstrate that the whole of the routes shown on the application plan have been used by the public.
20. The Council accept that the ways depicted by the application have partially been in use by the public but found the evidence inadequate for establishing the specific alignment of the claimed routes. The Council found no visible traces of the claimed routes and significant differences between the claimed routes and trodden paths that they observed on the ground.

**Reasons**

21. The application plan and the base plan used by users are at a large scale and the information not very detailed. The application was made in 2008 and determined in 2019. Changes could have occurred since the application was made. The routes

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<sup>3</sup> [2010] UKSC 11

were called into question in 2008, and potentially 2001. It is necessary to be cautious about the significance attached to the exact route of paths found recently.

### **Route 1**

22. The lease for the land held by the FC is dated 1952. Route 1 is coloured brown on the lease plan which is denoted as being roads or tracks which are the private roads of the lessor. Clause 1 of the lease explains that it relates to all that property described in Schedule A and more particularly edged green and pink on an attached plan. Route 1 does not fall within the parcels listed in Schedule A and is not within land edged pink or green.
23. From the north, Route 1 commences at a gate located at a clear turn along an existing public bridleway (Point A) and follows a straight and direct route to a point just within the edge of Intake Wood (Point B). Route 1 is short, direct and appears reasonably clear. There does not appear to be any dispute about its location or the existence of a trod path here. I find both the application plan and plans provided with the UEFs clearly identify Route 1.
24. From the UEFs there is some evidence of use of Route 1 as part of a wider network beyond the claimed routes. For example, UEF 30 refers to going beyond Point A and onto the public bridleway. But the majority of users create a collective picture of Route 1 being used together with the other claimed routes in a circuitous manner, or to walk out from Clipstone and back.
25. On such walks Route 1 would be the furthest away section for people walking out from Clipstone where most users reside(d) and some users have annotated plans to indicate that they used Route 1 less than Routes 1a and 1b. For example, some indicate that they used Route 1 weekly compared to daily use of Routes 1a and 1b. Another indicates that they used Route 1 as a child but not now.
26. Prior to the claim there is no evidence of users being challenged, turned back or of this way being blocked or barred, or that users used the route in secret or with express permission. The evidence of use of Route 1 is plausible and credible and I find no lack of clarity about the alignment of this section. It is sufficient to raise a presumption of dedication for Route 1 within the claimed period 1988-2008 and the potential period 1981-2001 under s31(1) of the 1980 Act.
27. Aside from the installation of the step over and locking of the gate at the time the way was called into question there is no credible evidence from the landowner that they did not intend to dedicate a right of way within the claimed period 1988-2008 or the potential earlier period 1981-2001. The FC lodged an objection but provided no evidence regarding Route 1. I conclude that the allegation that a right of way subsists in respect of Route 1 is reasonable.

### **Route 1a**

28. Route 1a north of CW is within the area of the FC lease where dedication could only be established under common law principles.
29. In that area the application plan indicates the alignment in a broad shallow arc through the middle of Intake Wood. Not all UEFs indicate use of a route along the alignment claimed. Some indicate walking to the west, or to the east, the deviation could be as much as 60m. Nonetheless there are probably 20 or

thereabouts broadly indicating taking a route through the northern part of the woodland from Point B to CW in a manner suggested by the application plan.

30. However, the Council point out that there are no tracks along this exact alignment. The application plan and UEF plans are at a large scale and in the middle of the wood north of CW the route does not appear to follow any identifiable features.
31. Although the application plan formed the basis of the application, the application was also accompanied by a document "*Submission (2008) Highfield Road, Clipstone to Clipstone Drive (Clipstone bridleway 6 and footpath 11) via Intake Wood*". The first page of this document states that there are a number of interlinked paths, but the claim is made in respect of [only] two routes. The document includes a plan extract: "*OS map extract circa 1920 shows tracks through the wood and along the north-east side*" (the 1920 plan).
32. The 1920 plan is annotated with two pink arrows. One points to a double row of broken lines, which look like a track through the wood. This track appears to leave the north eastern boundary of the wood at Point B in a south-easterly direction before following a roughly straight line south through Intake Wood, but it does not cover all of the length of Route 1a, and in particular the southernmost section is missing. The appellant seeks to rely on this plan.
33. The Council produced a number of more detailed plans and overlays in an attempt to clarify the evidence. A 1:2500 plan of Intake Wood north of CW produced by the Council shows a ride or way through Intake Wood broadly comparable with the 1920 plan and aerial photograph images of the woodland. It has two forks toward the northern end. One runs north-westerly to meet Point B and the other goes to the north-eastern edge of the wood.
34. The application plan does not directly overlay with this track and either fork. But I find it quite plausible that in the middle of the woodland north of CW, where there are no other tracks and few other identifiable features and changes in topography that it would be quite hard for a user to understand, and be able to replicate, the exact alignment. Application Photograph 4a looking north from CW shows an unbarred pedestrian access to the side of a five-bar gate. It also shows the wide track disappearing into the woodland. Some users refer to a gate at CW but state that it was possible to get around.
35. Comparing the UEF plans with the 1920 plan, some users appear to indicate that at the northern end of the track they may have used the more westerly fork, direct to Point B, and some suggest that they might have taken the more easterly fork to the north east boundary of the wood, east of Point B.
36. In an attempt to clarify the claimed route the Council sent copies of the 1:2500 plans of the woodland to people who had completed the UEFs and asked them to clearly indicate the routes used. Although only five users returned completed forms, all indicated use of the main track north of CW, and three out of five indicate using the north-westerly fork to Point B.
37. However, in the area south of CW the evidence about the alignment of route 1a becomes more ambiguous and conflicting. The application plan indicates that it continues directly without any significant stops or turns in a broad shallow arc. From the documentary evidence, including the Council's overlay plan, route 1a does not appear to follow any marked track in this area either. But the application plan does clearly show it going through an electricity pylon before it reaches the

edge of the wood. The pylon is a relatively large, tall feature, which would be noticeable in the landscape, even with the trees.

38. If the alignment of the track indicated on the 1920 plan is followed in the area which is now south of CW, the route continues in a roughly straight alignment for some distance along the western boundary of "Forest Field Plantation". This would broadly correspond with a wide track shown on a 1:2500 plan of this area produced by the Council and a route seen on the aerial photograph. But this alignment is some distance west of the pylon.
39. There is little reference to the pylon on the UEFs, and on the attached plans users show a variety of routes, to either side or through the pylon. I think it likely that most users would probably have been clear in their minds how they walked in relation to the pylon. Errors may have occurred due to the scale of the plans. Four out of five of the users who returned completed copies of the 1:2500 plans of this area indicated use of at least some of the track which would be on the 1920 plan alignment. All indicate walking additional routes. The plans attached to the UEFs and documentary evidence also point to the existence of other plausible routes.
40. In conclusion, a lack of alternatives and discernible features make a plausible argument that the appellants and sufficient users had intended to indicate the track in the area north of CW. In contrast, in the area south of CW, the application plan and the 1920 plan indicate clearly conflicting routes in relation to the pylon. The UEFs indicate a great variety of routes and documentary evidence indicates the existence of more tracks and more than one possible route. Overall and on a balance of probabilities there is insufficient clarity to determine what is applied for and what is demonstrated in relation to route 1a.
41. I have considered if I could approve the northern section of route 1a south to CW based on the 1920 plan. Aside from procedural issues raised by the Council, this would not be consistent with the clear indication of the situation of the pylon in relation to the whole of Route 1a on the application plan. Therefore, I am not persuaded that the evidence for the alignment and use of Route 1a in part or whole is sufficiently robust to raise a presumption of dedication.

### **Route 1b**

42. Route 1b south of CW meanders and does not clearly follow either an edge or a wood. There are barriers at the end, but the photographs indicate, and the Council accepts, that they do not prevent walkers. The Appellant provides more detail to describe the route. But the UEFs provide noticeable variations in the routes that they claim to have used in this area. Not all users might be able to relate their experience of the route they walk to a line on a map. These difficulties would not account for the great variations I find on the UEF plans for this section. The evidence for the alignment and use of Route 1b south of CW is not sufficient to raise a presumption of dedication.
43. In the area which is now north of CW, the application plan shows Route 1b some distance east of 1a and running broadly south, southeast from Point B close to a field boundary until it reaches a point where it takes a few sharp turns and CW has now been built.
44. The Council agrees that a worn path exists along the edge of the wood. The plan accompanying the application and other evidence, including the Council's appeal plans Document A2 and A3, are all sufficiently clear in indicating that the section of

claimed Route 1b from Point B to CW follows the eastern edge of the wood. UEF plans are consistent with this section of claimed Route 1b.

45. The evidence regarding the alignment and use for recreational walking the section of Route 1b north of CW is sufficient to support the existence of an unrecorded public footpath that corresponds to this section of Route 1b.

*Capacity to dedicate*

46. There is no evidence to suggest that users of Routes 1a and 1b north of CW were ever challenged whilst using the paths, by notice or otherwise, or that they used the routes in secret or with express permission. Consequently, it seems their use was 'as of right' and is capable of establishing a right of way.
47. The substantial level of the public's long-term use may constitute evidence that the landowner was quite content it should continue and contribute to a justifiable conclusion that dedication of the way could quite reasonably be implied. However, under common law principles the focus needs to be the landowner.
48. Under common law principles I now examine the evidence of the actions of the landowners in relation to the public to determine whether dedication of public rights of way might be presumed from what they expressly said, did or failed to do.
49. Dedication may sometimes be inferred from use by the public where this has occurred openly, for no fixed period of time but to such an extent that it must have come to the attention of the owner who failed to do anything to stop it.
50. The first task is to establish landownership and the capacity of the owner(s) to dedicate a public right of way.
51. The land is in the ownership of members of the Shaw-Browne family of (or formerly of) Cavendish Lodge, Clipstone. Since 4 November 1952, the northern section of land has been occupied by the FC for forestry purposes under the terms of a 999-year lease between Edmund Shaw-Browne and the Minister of Agriculture and Fisheries.
52. The Council allege that the Appellant has failed to provide evidence of an intention to dedicate of all members of the Shaw-Browne family who have/are landowners. Notice was served on three members of the family and the Council has not produced evidence to say which other landowners there may have been.
53. The FC submitted a plan confirming that the lease still pertains to Intake Wood north of CW. The Council considers that the landowner has no interest in the management of the wood, but the FC advise that the freeholder had, and continues to have, an interest in ensuring that the lease is adhered to.
54. In a previous case involving the same lease<sup>4</sup>, the Inspector found that the lease is silent about public access. Whilst the FC is obliged to maintain stock proof fences along boundaries with adjoining agricultural land owned by the lessor, there was no mention of an obligation to fence the woodland to protect against trespassers or to take steps to prevent any form of illegal use or user.
55. In previous appeals it has been held that this lease restricts the lessee's use of the land to forestry purposes only with (limited) rights reserved to the lessor and that

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<sup>4</sup> ROW/3168409, Nottinghamshire County Council (Mansfield Woodhouse Footpath No.58) Modification Order 2016

the FC does not have power to grant a right of access to the public. Although it was not expressly reserved, the freeholders, the Shaw-Browne family, retained the capacity to dedicate a public right of way over the leased land unless this adversely affected FC's forestry use of the land.

*The intentions of the landowner*

56. The absence of mention of public access in the lease would not preclude the possibility that public access was envisaged within the leased land, nor is it evidence of an intention to provide.
57. There is no evidence to suggest that users were challenged whilst using the paths, by notice or otherwise, or that they used the route in secret or with express permission. Consequently it seems their use was 'as of right' and is therefore capable of establishing a right of way.
58. FC Byelaws made in 1982 (through Statutory Instrument No. 648) prohibit cycling and riding horses after 1 June 1982. However pedestrian use was not expressly prohibited by the byelaws.
59. The byelaws apply to "lands of the Commissioners" being "lands which are under the management or control of the Commissioners and to which the public have, or may be permitted to have, access". This implies an acceptance that the public may go onto the land one way or another. It would seem reasonable that the existence of these byelaws would have been known to the landowners.
60. The owners lived locally and within a short distance of these routes. Given the length of time, the frequency and number of people that the evidence indicates were using the routes, it is most likely that the landowners were aware of the substantial use by the public that was taking place along the routes. Yet at no time prior to the claim were steps taken to prevent this use or to position notices either denying or granting permission for access.
61. There is no evidence directly from the landowners in response to this appeal. The Appellant refers to acts and statements by the landowner with reference to several historical documents to seek to demonstrate the intentions of the landowner. For example, the Appellant submitted a copy of a letter dated 6 November 1990. Responding to a claimed bridleway elsewhere on the Clipstone Park Estate, Mr A Shaw-Browne referred to the sensitive management of public access within the woodland in the Spa Ponds area as an example of good practice. Areas coloured yellow on a plan indicate intended public access. But the letter and plan are very old now and do not relate to the area of the claimed routes.
62. There is no evidence in relation to the landowners' intentions for the area covered by the claimed routes. Aside from indicating that the landowner family has historically had a reasonable approach to considering public access, I attach little weight to this evidence.
63. The Appellant highlighted notices along paths elsewhere in the wider locality. There is no evidence that signs were located along the claimed footpaths. I find the fact that the landowners did put signs up elsewhere is notable and could imply that they were not worried about access here.
64. Even if acceptance had been "under sufferance" there is no evidence that the landowners' permission was communicated to path users in any way and therefore



any intention to authorise use was never made known to the public. The evidence of local people demonstrates a frequency and quantity of use such that a reasonable landowner would have been aware of it, especially one living in the locality, yet no action was taken to stop it.

*Conclusion for Route 1b north of CW*

65. There is sufficient evidence to demonstrate the alignment of Route 1b along the edge of the woodland north of CW. There is reasonable evidence that sufficient number of users used these routes for up to 40 years before the application was made to record the routes as public path. Whilst there may not have been any overt acknowledgement of dedication of either route as a right of way for use by the public, the acquiescence of the owners to this use over such a long period of time is sufficient to infer that dedication was intended. The evidence of use is sufficient to show acceptance of the right of way by the public.

**Other Matters**

66. The Council may consider making a DMMO of its own volition and this could consider the many additional paths south of CW. But that does not alter my duty to consider the appeal before me.

**Conclusions**

67. In respect of Route 1 I found evidence regarding the alignment to be clear and there is sufficient user evidence to raise a presumption of dedication. I conclude that the allegation that a public right of way subsists along this section is reasonable.
68. For Route 1b north of CW, I found evidence regarding alignment of the routes along a track through the wood and along the edge to be reasonable. Under Common Law principles I found that despite the FC lease, the landowners retained the capacity to dedicate a public right of way; that during the 40 years or more that the public walked Routes 1a and 1b north of CW the landowners must have become aware that this was happening but took no steps to prevent it, and that the public duly accepted the offer such that dedication of a public right of way on foot can be implied for both Routes 1a and 1b north of CW.
69. However, evidence for the alignment and use of Routes 1a and Route 1b south of CW is not sufficient to raise a presumption of dedication.

**Formal Decision**

70. The appeal is allowed in respect of Route 1 and Route 1b north of CW.
71. The appeal is dismissed in respect of Route 1a and Route 1b south of CW.

*Helen Heward*

**Inspector**