The Planning Inspectorate

Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 13 FEBRUARY 2020

Appeal Ref: FPS/W2275/14A/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 Kent County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 1 May 2015 was refused by the Council on 11 July 2019.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by upgrading footpath SR96 in the parish of Kemsing and footpath MR227 in the parish of Wrotham to bridleways (shown by bold broken line on the plan attached to this decision).

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 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 papers submitted.

Procedural Matters

3. Both the Council and the Appellant refer to the cases of R v Secretary of State for the Environment *ex parte* Bagshaw and Norton [1994] 68 P & CR 402 and R v Secretary of State for Wales *ex parte* Emery [1997] QBCOF 96/0872/D in argument as to whether a reasonable person could reasonably allege that a public right of way subsisted over the route at issue.

4. The *Bagshaw & Norton* and *Emery* cases concerned applications which had been made to add a public right of way to the definitive map and statement under the provisions of section 53 (3) (c) (i) of the 1981 Act. Section 53 (3) (c) (i) provides that the definitive map and statement should be modified on the discovery of evidence which 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*". Test B (whether a public right of way is reasonably alleged to subsist) is therefore applicable in those cases where no public right of way is currently shown over the route in dispute, as was the case in both *Bagshaw & Norton* and *Emery*.

5. In the current case, however, the route at issue is already recorded in the definitive map and statement as a public right of way on foot and the application seeks to record that route as a public bridleway. The upgrading (or

downgrading) of the status of a public right of way is provided for by section 53 (3) (c) (ii) of the 1981 Act. Section 53 (3) (c) (ii) provides that the definitive map and statement should be modified on the discovery of evidence which shows "*that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description".* Under the provisions of section 53 (3) (c) (ii) there is no "reasonably alleged to subsist" test as is found in subsection (i). Therefore, the test by which the available evidence is to be considered is the civil standard of proof; that is, the balance of probabilities.

Legislative framework

6. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is already shown in the definitive map is subject to additional public rights is dealt with under section 53 of the 1981 Act. Section 53 (3) (c) (ii) 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 highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.

7. Where it is claimed that a public right of way has come into existence through long use as is the case here, the provisions of section 31 of the Highways Act 1980 ('the 1980 Act') are relevant. Section 31 (1) of the 1980 Act provides that where a way has been actually enjoyed 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 during that period to dedicate it. Section 31 (2) provides that he 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, either by a notice or otherwise.

Main issues

8. The main issue between the parties is the date on which the right of the public to use the claimed route as a public bridleway was brought into question. This issue arises from the differing interpretations given by the Council and the appellant to the effect of a deposit made in 2007 by the landowner under the provisions of section 31 (6) of the 1980 Act.

Landowner evidence

9. The route at issue crosses land owned by the St Clere Estate Trustees ('the Estate'). The Estate's evidence is that the extent of bicycle use is not recognised or accepted; where a cyclist has been seen these were family members of employees or tenants of the Estate. It is acknowledged that use by cyclists had increased since 2010 but the level of use has not been to the extent claimed in the UEFs.

10. The Estate submits that there has been a gate at the eastern end of the claimed route since at least 1990 with a means of pedestrian access to one side. In 2007 a deposit was made under section 31 (6) of the 1980 Act which stated that the route was dedicated as a public footpath. In 2010 the Estate erected a 5-bar electric gate at the eastern end of the route which blocked the roadway; pedestrian users had to walk around the gate as it could only be

unlocked by a security code. At the same time as the new gate had been installed, new signs which read "St Clere Estate – Private Road" and "No Through Road" were erected at the ends of the route.

11. In 2015 a wooden gate was installed adjacent to the 5-bar gate to prevent cyclists from using the pedestrian access as there had been an increase in bicycle use following the Olympic Games. Verbal challenges to unauthorised cyclists were given, and with the assistance of the Council, footpath waymarker and "No cyclists" signs were erected at the eastern end of the route with a public footpath waymarker being erected at the western end.

12. A system of riding permits has been operated on the estate so that certain individuals have permission to ride on specified routes, including the claimed route; any equestrian use of the route has been by licenced permission. In summary, consistent attempts have been made to prevent unauthorised bicycle use of the route and there has been no intention to allow any use of the route by the public other than on foot.

User evidence

13. The application to record footpaths SR96 and MR227 as bridleways was accompanied by 73 user evidence forms with all respondents stating that they had used the route as a bridleway. Twenty-four of those respondents made specific mention of use of the claimed route with a bicycle.

14. In terms of the nature of the use of the claimed route, at question 3 the Council's user evidence form (UEF) seeks clarification of the nature of the use of the claimed route in the following terms "*Please specify whether you used the way on foot, as a footpath, on horse of bicycle, as a bridleway, in a horse and cart, as a restricted Byway or in a vehicle, as a byway*". The respondent is then presented with four boxes showing the four possible options as to the status of the way being claimed, along with the instruction to "*please tick as appropriate*". All 73 respondents ticked the 'bridleway' box to indicate that they had used the route as such, although none of the respondents indicated that they had used the route on horseback.

15. Estimates of the date of commencement of use varied between individuals with some respondents having started use in the 1950s, 1960s or 1970s; the tabular representation of the user evidence as drawn up by the Council showed that 24 respondents were using the claimed route as a bridleway by 1980, with that use continuing until the date the application was made. Of the 73 UEFs submitted, 44 respondents claimed use of the route for over 20 years with 17 respondents claiming to have used the route at least weekly, with the frequency of use of other ranging from fortnightly to occasionally.

16. Fifty-eight respondents noted that there had been a locked gate at the eastern end of the claimed route for many years and that a latched gate had been erected around 2015 in the gap which had been present at the side of the locked gate. Forty-two users mentioned that they had seen Council signs at the eastern end of the route restricting entry to horses and cyclists. None of the respondents recalled being challenged as to their use of the claimed route.

17. There is no dispute between the Council and the Appellant with regard to the evidence of use which has been submitted in support of the application, and it appears to be common ground that the user evidence which has been

submitted demonstrates (on paper at least) that there has been use of the claimed route by the public with bicycles for at least 35 years prior to the application being made.

Deposits under section 31 (6) of the 1980 Act

18. On 4th July 2007, the Estate had deposited with the Council a statement and plan under the provisions of section 31 (6) of the 1980 Act which showed those routes crossing the estate which were acknowledged as public rights of way. The claimed route is shown in these documents as a public footpath.

19. This deposit was not followed by a statutory declaration within the required time period[1] although the Estate deposited a further statement and plan on 26th January 2015 which was followed by a statutory declaration made on 26th March 2015 that no additional rights of way had been dedicated. The 2015 deposit shows the claimed route to be a public footpath.

Date of bringing into question – the effect of the 2007 section 31 (6) deposit

20. The Council's case is that the gates erected by the Estate in 2010 and 2015 did not physically prevent users from accessing the claimed route with bicycles. The Council's view was that those respondents who had not provided an end date as to their use suggested that use of the route was continuing and the gates and prohibitory notices had had no physical impact.

21. The erection in 2015 of prohibitory notices supplied by the Council appears to have triggered the application to add the route to the definitive map and statement. The Council considers that it was these actions, either singly or collectively, which brought into question the right of the public to use the route with a bicycle. The Council therefore considers that the date of bringing into question for the purposes of section 31 (2) of the 1980 Act is 2015 and that the relevant 20-year period of use to be considered under section 31 (1) of the 1980 Act is 1995 to 2015.

22. The Council's view is that as there was no requirement for the 2007 deposit to have been publicised, those members of the public using the claimed route on bicycles would have been unaware of the deposit and therefore it would not have been a matter which brought use of the route into question.

23. The Council submits that it does not appear that any users of the way treated the 2007 section 31 (6) deposit as a challenge to their use of the way as a highway and did not take the opportunity to meet it. The 2007 deposit had been available for inspection at the Council's offices, and from October 2007 all such deposits had been made available electronically and made available on the Council's website in accordance with the requirements of the *Dedicated Highways (Registers of Section 31A Highways Act 1980) (England) Regulations 2007* [SI 2007/2334].

24. Despite this publicity, the Council contends that not a single user who completed a UEF referred to the 2007 deposit or stopped using the route or questioned their use in 2007. Use of the route continued with users not

[1] Within 10 years of the deposit in 2007; this period is now 20 years following amendment by section 13 (2) (c) of the Growth and Infrastructure Act 2013

considering the 2007 deposit as a challenge to such use; users may have been oblivious to the deposit having been made.

25. Whilst no declaration was made in respect of the 2007 deposit, the Council considers that the 2015 statutory declaration was made within the required timeframe for a declaration to be made in relation to the 2007 deposit, such that the 2007 deposit can be said to have been duly made. The Council's view is that that the route at issue will have been subject to a section 31 (6) deposit since 2007.

26. The Appellant contends that the correct date of bringing into question is 2007 when the landowner initially deposited the statement and plan under section 31 (6) of the 1980 Act. The Appellant places great weight upon the observations of the House of Lords on whether such deposits brought use in to question as well as being evidence of a lack of intention to dedicate.

27. In the case of *R (oao Godmanchester and Drain) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Hoffmann LJ held: "*I do not say that all acts which count as negativing an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we need not decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts. Thus section 31(3) provides that an appropriate notice will be sufficient evidence to negative the intention to dedicate and section 31(2) provides that the right may be brought into question "by a notice such as is mentioned in subsection (3) below or otherwise". The notice will therefore both negative intention to dedicate and bring the right into question, while the words "or otherwise" contemplate other ways of bringing the right into question (like barring the way, permanently or once a year) which would also in my view be sufficient to negative an intention to dedicate.*

28. The Appellant considers that although Hoffmann LJs comments on this point were not one which the House was required to determine in order to reach a judgement on the case, nonetheless, they provide a steer of the strongest kind as to the likely dual effect of a section 31 (6) deposit. In the Appellant's view, if the date of bringing into question is 2007, then there is more than enough evidence of use between 1986 and 2007 to raise a presumption of dedication, and little evidence of a contrary intention during that earlier period.

29. Although the Council acknowledges that there may be a symmetry between an action which evidences a lack of intention to dedicate and that which brings public use into question, the Council does not consider that such symmetry exists in this case as the 2007 deposit was not widely advertised or publicised on site in the way that a notice under section 31 (3) or (5) would have been.

30. In *Godmanchester*, although the question of whether a deposit under section 31 (6) would also bring use into question was not a central point which had to be determined, Hoffmann LJ nonetheless considered that such deposits would have that effect. In paragraph 36 of his judgement he said "*Then there is the*

problem of the interruption of continuous user before the commencement of proceedings which, as we saw, the 1832 Act for private rights of way solved by providing a year's grace in which to bring the proceedings. The 1932 Act dispensed with a grace period by calculating the 20 years back from the date on which the right was called into question. The scheme contemplated by Parliament was that once users of the way were made aware that their right to use the way was challenged, they should not be able to gain an advantage from subsequent use of the way and the landowner should not be able to gain an advantage by subsequent prevention of use. What happened after the way was called into question was irrelevant to the operation of the Act. On the Court of Appeal's construction, however, the well-advised landowner, facing the possibility of a claim to a right of way based on many years' enjoyment, will make a private declaration that he has no intention to dedicate and will lodge it in a safe place. Only afterwards will he close the way or otherwise call the right into question. The effect will be to make it impossible for the claimants to prove the full 20 years user ending when the way was closed, because the owner will be able to satisfy the proviso in respect of the final period after he made his declaration".

31. Hoffmann LJ continued: *"My Lords, I think it is most unlikely that Parliament intended that the 1932 Act[2] could be capable of being defeated by so simple a device, leaving the claimants to the arbitrary and illogical rules of common law, preserved by section 31(9)"*

32. The Council's approach to this question is an example of the '*so simple a device*' identified by Hoffmann LJ; that is, the Council does not consider that the 2007 deposit brought use of the claimed route into question, whereas the notices erected in 2015 did. The effect of adopting that position would be to negate the 20-year period of use counted retrospectively from 2015. This is the approach which Hoffmann LJ rejected in *Godmanchester.*

33. I concur with the Appellant that although Hoffmann LJs comments were *obiter dicta*, they are nonetheless highly persuasive as to how such matters should be considered.

34. A section 31 (6) deposit, supported by the required statutory declaration, is a means by which the landowner can declare that he does not recognise the existence of public rights other than the ones identified in the statement and plan. By its very nature, the section 31 (6) deposit provides a challenge to the public who may consider that other, additional, rights have come into existence or are in the process of being acquired through long use. If no publicity is given to that deposit it may be some time before the public becomes aware of its existence, but that does not nullify its effect of challenging public use or from stopping time running on such use.

35. Whilst the Council consider that the 2007 deposit should be considered solely in terms of section 31 (6) and thereby demonstrate a negative intention to dedicate and thereby take advantage of the proviso to section 31 (1), Hoffmann saw no issue in considering the deposit as a means of bringing use into question: *"I am not particularly troubled by the thought that this would leave little scope for the operation of the proviso. It is true that acts negativing an intention to dedicate would also, by calling the right into question, throw the inquiry back into an earlier period. If there was no rebutting evidence during*

[2] The Rights of Way Act 1932

that period, the right would be established….. and the proviso would not apply".

Conclusion on the available evidence

36. The effect of the 2007 deposited statement and plan was to bring into question public use of the claimed route at the date the deposit was made. The relevant 20-year period of use is therefore 1987 – 2007 and not as the Council contended. On the paper evidence before me, it appears that there has been use of the claimed route by the public with bicycles throughout the 20-year period which ended in 2007. The landowner states that verbal challenges have been given to those found cycling along the claimed route although none of the user respondents recall having been challenged.

37. On paper at least, there appears to be sufficient evidence of use to raise a presumption of dedication, and insufficient evidence to rebut that presumption. Testing the available evidence from the parties at a public local inquiry may confirm or refute this initial conclusion.

38. I consider that evidence has been discovered which suggests that footpaths SR56 Kemsing and MR 227 Wrotham currently shown in the definitive map and statement ought to be there shown as highways of a different description, namely as public bridleways.

Conclusion

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

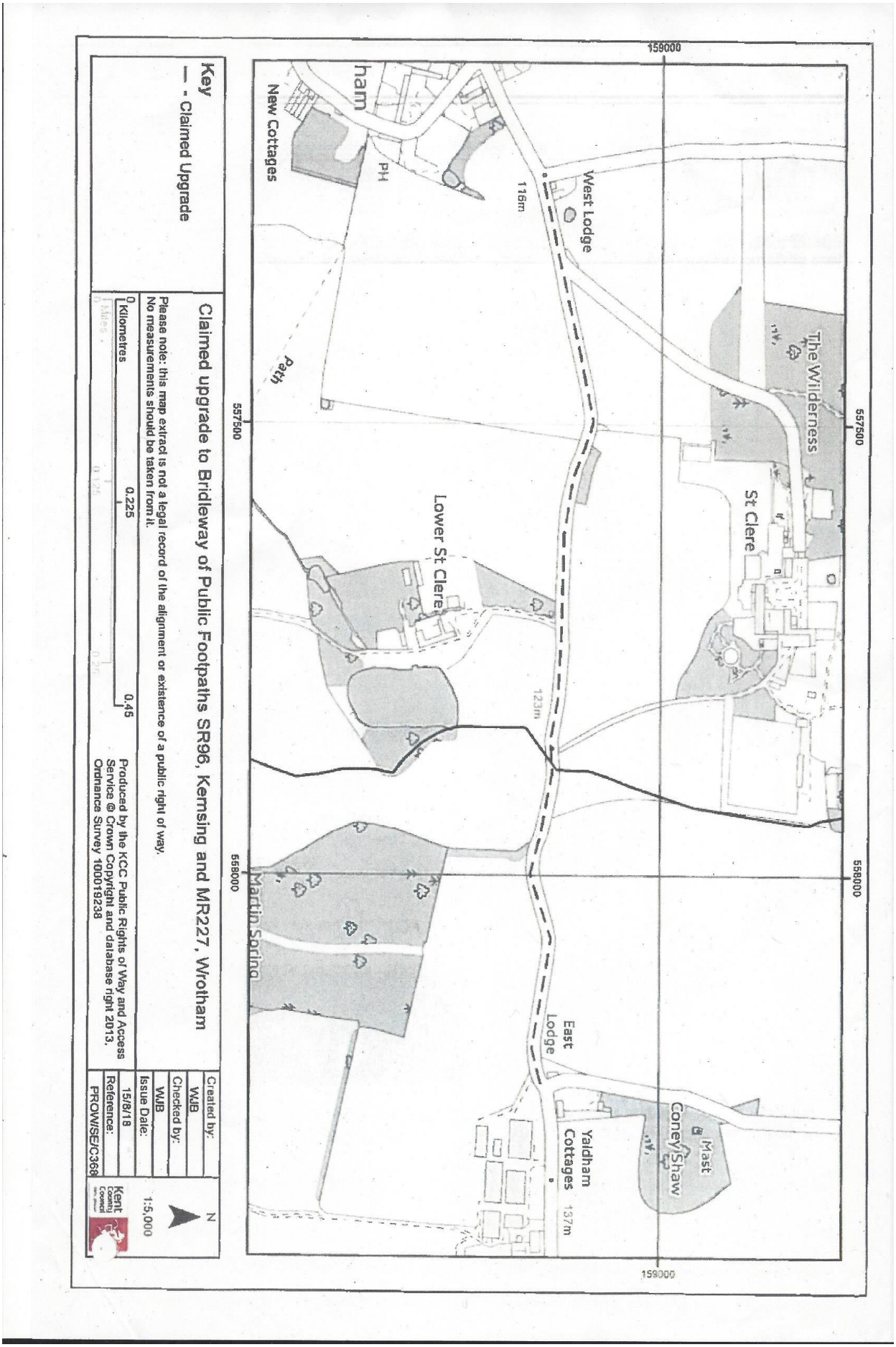
Formal Decision

40. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the Kent County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within three months of the date of this decision to modify the definitive map and statement for the area to record Public Footpaths SR56 Kemsing and MR 227 Wrotham as Public Bridleways.

41. This decision is without prejudice to any decision that may be issued by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector


Claimed upgrade to Bridleway of Public Footpaths SR96, Kemsing and MR227, Wrotham
Key
- - Claimed Upgrade
Please note: this map extract is not a legal record of the alignment or existence of a public right of way.
No measurements should be taken from it.
0 Kilometres 0.225 0.45
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Kent County Council
159000
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New Cottages
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West Lodge
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The Wilderness
St Clere
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East Lodge
Yaldham Cottages
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Mast
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