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# Appeal Decision

by **K R Saward Solicitor**

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

**Decision date: 20 OCTOBER 2020**

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## Appeal Ref: **FPS/W2275/14A/22**

- The 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 Kent County Council not to make an Order under Section 53 of that Act.
- The application dated 2 November 2015 was refused by Kent County Council on 19 December 2019.
- The appellant claims that the definitive map and statement for the area should be modified by adding a footpath between The Street and the Village Green, Bearsted, Maidstone, Kent.

**Summary of Decision: The appeal is allowed.**

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## 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 Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not visited the site, but I am satisfied in the circumstances of this case that I can make my decision without doing so.
2. The application for a Definitive Map Modification Order ('DMMO') was made by Bearsted Parish Council ('BPC'). BPC confirms that it seeks the addition of a public footpath and not a bridleway as erroneously stated in the original application. The determination by Kent County Council ('KCC') considered the possibility of both a footpath and bridleway. Due to the error, I have utilised the description in the heading above as it appears in the Appeal Form.
3. A copy of a map prepared by the Council of the claimed route is attached for reference purposes. It may be seen that the route runs between the residential property at No 1 Smarts Cottages and the neighbouring dwelling known as 'Betsworth' in The Street. It extends for about 30m onto a track providing access to Bearsted Village Green and its cricket pavilion.
4. It is not known who owns the claimed route although BPC owns the Village Green. BPC had assumed the claimed path formed part of the Village Green until it was found in 2014 that the land title has not been registered. The land affected is not part of the registered Village Green and was not included in the scheme of management made in 1902 under the Commons Act 1899.
5. I gather there is a point of contention between BPC and the adjoining landowner of the cottage at No 1 Smarts Cottages over whether a private right to park along the claimed route has been acquired. This follows an unsuccessful application made to the local planning authority in 2014 for a Lawful Development Certificate<sup>1</sup> for the use of the land as a driveway in connection with

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<sup>1</sup> Made under section 191 of the Town and Country Planning Act 1990.

the use of the cottage as a dwelling. Whilst noting that none of this can influence whether there is a public right of way, KCC seeks direction on how a right to park ought to be accommodated in the DMMO should the appeal succeed.

6. Public and private rights are capable of sitting alongside each other. KCC presumes that private rights to park would need to be recorded in the Definitive Statement as a limitation on the width but as things stand there is only an alleged private right. An entry added on the Land Registry Title for No 1 Smarts Cottages in 2011 notes that the registered proprietor claims that the land benefits from a right of way with or without vehicles and a right to park thereon but the right is not included in the registration. As KCC correctly points out it is not a matter for the Secretary of State in this appeal to adjudicate on whether or not private rights exist. That is ultimately a matter for the Courts. A DMMO would simply be subject to any private rights that might exist, but I see no reason for this to be expressed at this juncture.
7. BPC raises several “procedural errors” by KCC. There was no requirement for KCC to provide copies of submissions received in response to the original application. It was incumbent upon BPC to inspect the copies available for public inspection. The documents have clearly now been seen by BPC with opportunity to provide comment in the course of the appeal.
8. There is disagreement between the two councils over the nature and extent of surface treatment along parts of the claimed route, but that has little bearing on the claim given the issues that arise.

### **Legal Framework**

9. For an addition to be made to the Definitive Map and Statement, section 53(3)(c)(i) of the 1981 Act provides that a DMMO shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
10. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*<sup>2</sup> a DMMO to add a route should be made if either of two tests is met:

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.

### **Main Issues**

11. Therefore, the main issue is whether the evidence is sufficient to show, on the balance of probabilities, that a public footpath subsists along the claimed route or is reasonably alleged to subsist.
12. From the evidence, there are two matters in particular requiring resolution. One point of contention concerns the weight to be given to the historical evidence. The principal reason for KCC’s refusal concerns the interpretation and application of section 31(1) of the Highways Act 1980.

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<sup>2</sup> [1994] 68 P & CR 402

## Reasons

### **Documentary evidence**

13. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or other tribunal to take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, giving it such weight as is justified by the circumstances.
14. KCC does not dispute that the claimed route existed as a physical feature for over 170 years as depicted on the Tithe Map for Bearsted of 1842 passing between the two cottages. It is shown connecting with other paths criss-crossing the Village Green which is numbered and described in the apportionment as 'cricketing ground' occupied by 'the public'. The route itself is unnumbered and excluded from the neighbouring plots.
15. The 1<sup>st</sup> edition 25" Ordnance Survey Map c1860 shows the route by solid parallel lines between the adjacent landholdings. It is similarly shown on the 3<sup>rd</sup> edition County Series Map for Kent c1907 but braced and a single pecked line appears at each end. The paths crossing the Village Green are shown by double pecked lines and annotated F.P. These maps record the existence of a physical gap between the properties but they do not provide evidence of a public path.
16. The BPC minutes from March 1950 refer to "*the alleyway between Codling Tree Cott and Smarts Cott's be considered as being part of the green which had been submitted to the County Council.*" The minutes suggest that the alleyway could be covered by the byelaw dealing with cycling on footpaths. The matter was deferred to the next meeting in April 1950 when "*the Council affirmed its decision that the riding of bicycles along the alleyway on the Green be prohibited, in order, that protection be afforded to very young children and the elderly from careless + reckless riding...*". This indicates that the alleyway was in use by the public on foot and bicycle at that time for there to be a need to protect pedestrians from collisions with cyclists.
17. Unlike the plots on either side, the claimed route is not numbered on the Finance Act 1910 map nor is it coloured. This indicates it was excluded from valuation in the same way as paths crossing the Village Green. KCC suggests it might have been excluded because the land was thought to be part of the Village Green, but that is speculation. Together with the Tithe Map and Parish Council minutes there is some, albeit limited, documentary evidence of a public path. It is arguable whether the combined material suffices to reasonably allege public rights.

### **User evidence**

18. Section 31(1) of the Highways Act 1980 is relevant to the claim arising from use of the route. It provides: "*Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*"
19. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question. The application followed complaints made around September 2014 by local residents that the route had been paved, gated and fenced by the adjoining landowner at No 1 who was

parking cars on it. Whilst these features may have given the impression that the land formed part of the garden to No 1 and deterred users in consequence, it seems that the gates were kept unlocked. There is no suggestion the landowner prevented public use from that time onwards. Accordingly, the time of challenge may be taken as the date the application was made, being 2 November 2015, giving a relevant period of 1995-2015. This was the period applied by KCC.

20. The application was supported by 12 user evidence forms from 10 households in the village. The earliest use started in the 1940's and all but one user claims well in excess of 20 years either up until the gates were erected in September 2014 or continuing after. Most used the route to access the Village Green or as a convenient shortcut to other roads including the shops. Users suggest that it was not until the gates/fencing were erected that vehicles were regularly parked along what some call the 'alley'. The current owner since 2014 of No 1 Smarts Cottages acknowledges that members of the public utilise the route as also confirmed in the witness statements from other neighbours and visitors. Those documents along with statutory declarations from previous owners of No 1 have been produced in an attempt to demonstrate there has also been use of the claimed route as a private driveway since 1987. If private rights exist it is plain that they have not prevented the public use of the land as a footpath along the entirety of its length. Indeed, the amount of consistent user evidence far in excess of 20 years appears to support the existence of public rights over the route, subject to fulfilment of the other requirements of section 31.
21. The main crux of dispute between the councils is whether the way is '*of such character that use of it by the public could not give rise at common law to any presumption of dedication*' within the meaning of section 31.
22. KCC points out that in most cases a claimed path would link two highways. In this case the route commences along the highway in The Street but ends at an unadopted access track. KCC says there are no general public rights of access over the track but confirms that it forms part of the Village Green. The conclusion reached by KCC is that the path is effectively a cul-de-sac route as it does not link two highways. However, there is no requirement for a public right of way to lead from one public highway to another. This is not a scenario where the public has no right of entry at either end of the path for it to be isolated and prevent dedication at common law.
23. KCC went on to consider how the Courts have found in favour of recording cul-de-sac paths where the path leads to a place of popular resort, such as a beauty spot or foreshore. In this case, it is undisputed that the Village Green is a well-used local amenity. Examples of its use include cricket matches, junior football plus regular monthly farmer's markets and annual events such as a car show, music festival, carnival and fayre, all attracting visitors from further afield.
24. By definition<sup>3</sup>, the Village Green became allotted for the exercise or recreation of the inhabitants of the locality or the customary right to indulge in lawful sports or pastimes. As the legal right to use the Village Green was limited to the residents of a particular locality, KCC concluded that only local residents could use the route so that it cannot give rights for the public at large or only (in theory) up to the edge of the Village Green to avoid a trespass. On this basis, KCC deduced that the route cannot be considered a 'way of such character' and is not therefore

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<sup>3</sup> Under section 22 of the Commons Registration Act 1965, as originally enacted.

capable of being recorded on the Definitive Map because it does not lead to a place of *public* resort.

25. On the wording of section 31 the key point is whether there is any reason why the use of the route by the public could not give rise at common law to any presumption of dedication. The test is not concerned with the extent of public rights beyond the claimed route i.e. the Village Green and limitations on its use.
26. If the route is only used by local residents to access the Village Green and beyond KCC argues that one of the essential requirements of a public highway is not met. In particular, the usage is not '*common to all the King's people*' i.e. used by the public at large rather than a defined section, such as parishioners.
27. Historically, 'the King's highway' was defined as a public passage for the use of the sovereign and all his or her subjects. However, that does not mean it must be shown there has been usage by everyone far and wide. Very often user evidence will be limited to those living in the neighbourhood. That does not make those residents anything other than members of the public.
28. In my view there is no incapacity to dedicate the route at common law simply because those who completed user evidence forms were local residents using the route as a means of access to adjoining land over which they were entitled to exercise rights. That privilege did not extend along the route even if the users at the time held a mistaken belief that it did. As it was, their use was 'as of right', meaning without secrecy, force or consent. None of the witnesses appear to have any connection with the land crossed by the claimed path, either in terms of ownership, tenancy or a business relationship with the owner of the land. Furthermore, there is nothing to indicate that whoever owns the land affected does not have capacity to dedicate it as a public right of way.
29. As set out above, there is no rule of law that there cannot be a public right of way which is a cul-de-sac. At the end of the cul-de-sac lies the access onto the Village Green which I consider to be a place of popular resort enjoyed by members of the public for lawful recreation, sports and pastimes.
30. I see nothing from the character of the land affected by the claimed route to prevent the presumption of dedication arising at common law. Putting aside the 'character' issue, KCC accepts that "*it is clear that there has been unchallenged use of the claimed route by local residents for some considerable time (and indeed well beyond the required twenty-year period) such that a reasonable allegation of its subsistence could otherwise be said to arise.*"

## **Conclusion**

31. Having regard to the above and all other matters raised in the written representations, I conclude that the user evidence available does show that on the balance of probabilities that a footpath subsists or can be reasonably alleged to subsist for statutory dedication under section 31 of the 1980 Act.

## **Formal Decision**

32. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Kent County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act not later than 12<sup>4</sup> months from the date of this decision to modify the

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<sup>4</sup> A longer period has been given than would otherwise have been afforded due to the exceptional circumstances arising from the ongoing global coronavirus pandemic

definitive map and statement to add a footpath as set out in the application dated 2 November 2015. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

*KR Seward*

INSPECTOR