
Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 4 May 2016

Appeal Ref: FPS/U3935/14A/1

- 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 Swindon Borough Council ('the Council') not to make an Order under section 53 (2) of that Act.
- The application dated 2 March 2015 was refused by the Council on 10 December 2015.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a public footpath to the definitive map and statement running between Footpath 30 Haydon Wick and Bridleway 18 Haydon Wick (shown by A - B on the plan appended 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 basis of the papers submitted.

Main Issues

3. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all 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.

Reasons

4. In arriving at my conclusions I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of (a) the High Court in the *Bagshaw and Norton*¹ case; (b) the Court of Appeal in the *Emery*² case; and (c) the High Court in the *Applegarth*³ case.
5. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

² *R (ex parte Emery) v the Secretary of State for Wales* [1997] QBCOF 96/0872/D

³ *R (Applegarth) v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 487

Act. Section 53 (3) (c) (i) 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 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. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

6. The findings of the Court in *Bagshaw and Norton* were considered and approved by the Court of Appeal in *Emery*. In *Emery*, Roche LJ held that where there is credible evidence of actual enjoyment over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one or other of the issues which arises under s31, then the allegation is reasonable unless there is any documentary evidence⁴ which must inevitably defeat the claim.
7. The appeal relates to a path which crosses land in the ownership of Swindon Borough Council. Footpath 30 commences on Whitworth Road and runs in a north-north-westerly direction before turning west to Kennet Avenue; the claimed footpath commences at the point where footpath 30 turns to the west. The claimed footpath runs between the rear gardens of Nos. 20 – 58 Kennet Avenue and the boundary fence of the Whitworth Road Cemetery before turning to run in a generally northerly direction over land which comprises part of the Seven Fields public open space and nature reserve. The section of the claimed footpath which is at the heart of this dispute is that section which runs to the rear of 20 – 58 Kennet Avenue.

User evidence

8. The right of the public to use the claimed path was brought into question in December 2014 when the Council erected fencing at the ends of the path adjacent to 20 and 58 Kennet Avenue. The erection of security fencing at these points effectively obstructed the path and rendered it unusable. For the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period of use is December 1994 to December 2014.
9. Seventeen user evidence forms were submitted in support of the application to add the path to the definitive map and statement, together with one letter which set out the author's evidence of use. Of these users, 16 claim to have used the path for periods in excess of 20 years prior to December 2014, with two respondents claiming to have first used the path in 1956. The frequency of claimed use varied from daily to less than monthly, with the path being used for access to Seven Fields and for recreation and exercise.
10. None of the users recalled being challenged in their use and a number recalled the existence of kissing gates and barriers on Blackthorn Lane to prevent use

⁴ Roche LJ considered this to include evidence that the provisions of section 31 (3), 31 (5) or 31 (6) had been engaged

of the path by pedal and motorcycles. None of the users recalled seeking or being given permission to walk along the claimed path. Two users recalled the existence of notices on the path; both notices had been erected by the Council or its predecessor. One notice prohibited motorcycling on the land whilst the other was an enforcement notice which required the removal of a fence which had been erected over the path blocking it. The user who reported the enforcement notice had been part of the Council's work team that removed the fence; he stated that this had occurred in the late 1980s⁵.

11. The claimed evidence of use is not disputed. It is the Council's case that the evidence placed before its Planning Committee was that the path had not been in continuous use for the whole of the 20 years prior to 2014; evidence had been provided to the committee on behalf of the residents of Kennet Avenue that the path had been obstructed by a fence in 1998.
12. The submissions made on behalf of the Kennet Avenue residents state that in 1998 they took it upon themselves to close the footpath by erecting a fence at each end of the path where it runs past their properties. It is said that at that time the residents had been petitioning the Council over anti-social behaviour occurring at the rear of their properties and were in dispute with the Council over the ownership of the land crossed by the path. It is acknowledged by the residents that the Council required removal of the fence and took action to remove it when the residents failed to do so. The residents submit that the fence blocked the path for 72 hours and effectively interrupted use during the relevant 20-year period.
13. With the exception of the user who was part of the Council team that removed the fence erected by the residents, none of the users recalled the existence of this fence. Although the path may have blocked for a period of time, that period appears to have been of such short duration that it went unnoticed by those using the path. An action which seeks to challenge or prevent public access along a path must be present for a sufficiently long period for at least some of those using the path to have become aware of it.
14. The Council submits that the Planning Committee believed that on a balance of probabilities the applicant had not been able to prove uninterrupted use for 20 years prior to 2014 and therefore refused the application. However, the claim that the path was blocked in 1998 by the erection of a fence is in conflict with the testimony of the user who was part of the work team which undertook the removal of the fence in response to enforcement action being taken by the Council; that person dates the event to being in the late 1980s and would place this event outside the relevant 20 year period.
15. I am aware that the residents of Kennet Avenue claim ownership of the land crossed by the path, but no evidence has been submitted from which it could be concluded that the Council is not the owner of the land. In such circumstances, I do not consider that the erection of the fence by the residents to be evidence of a demonstration of a lack of intention to dedicate by the owner of the land, but it may have brought use into question. The Applegarth case demonstrates that an action which brings use into question does not have to be performed by the landowner.

⁵ The user evidence of Mr Richard Beale

16. Even if I am wrong in this and the resident's fence was evidence of a lack of intention to dedicate, it is likely that the erection of the fence would, in any event, bring use of the path into question. There is nothing in the Council's submissions to suggest that the Planning Committee gave consideration to whether the fence brought public use of the path into question, and if so whether there was sufficient evidence of use over a 20-year period prior to the erection of the fence.
17. Irrespective of whether the fence brought the right of the public to use the path into question in 1998 (if the residents are correct about the date) or in the late 1980s (if Mr Beale's recollection is correct), there is a body of evidence which demonstrates use of the path as of right extending back to 1956 sufficient to satisfy section 31 (1) of the 1980 Act for either 1978 to 1998 or the late 1960s until the late 1980s.
18. Although ownership of the land crossed by the path is disputed, there is no evidence to suggest that either the Council or the residents had taken steps to disabuse users that the path was not a public right of way, other than by the erection of the fence. The report to the Planning Committee states that the Council has not erected prohibitive notices (of the kind envisaged by section 31 (3) of the 1980 Act) or made a statutory declaration as to the extent of public rights over the land (under section 31 (6) of the 1980 Act); similarly there is no evidence of the residents having taken any such action.
19. The principal concern of the Kennet Avenue residents appears to relate to crime or the fear of crime or to anti-social behaviour which might arise from the presence of the path; there is no challenge to the extent or duration of the claimed public use of the path. Whilst criminal activity and anti-social behaviour is an understandable cause for concern, these are not matters which can be taken into account when determining whether a public right of way has come into existence through long use and I have not taken these matters into consideration in my determination of this appeal.

Conclusions

20. There does not appear to be any dispute about the duration or extent of the use of the path, nor that the claimed use was use 'as of right'. The only matter of contention is the date at which the Kennet Avenue residents erected their fence and whether the fence interrupted use or called that use into question. There are therefore conflicts within the interpretation of the available evidence and as a result the appeal fails against Test A set out in paragraph 5 above.
21. Although there are conflicting interpretations of the evidence as to whether use had been interrupted, I have not read or seen any evidence which would inevitably defeat the appellant's claim. Consequently, I conclude that the appeal succeeds against Test B set out in paragraph 5 above as the evidence adduced is such that it is reasonable for the appellant to allege that a public right of way subsists over the appeal route.
22. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

23. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Swindon Borough Council is directed to make an order under section 53 (2) and

Schedule 15 of the 1981 Act to modify the definitive map and statement its area to add a public footpath as proposed in the application dated 2 March 2015. 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.

Alan Beckett

Inspector

APPENDIX – location plan (not to original scale)

