The Planning Inspectorate

Costs Decision

Inquiry opened on 15 March 2016

by Alan Beckett BA MSc MIPROW

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

Decision date: 20 MAY 2016

Costs application in relation to FPS/H0900/7/69

- The application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, section 250 (5).
- The application is made by Dallam Tower Estate ('the Objector') for a full award of costs against Cumbria County Council ('the Council').
- The inquiry was held in connection with the Cumbria County Council (Parish of Beetham: District of South Lakeland) Definitive Map Modification Order (No 1) 2014.

Decision: The application is dismissed.

The submissions on behalf of Dallam Tower Estate

1. The Council placed the Objector in the position of having to defend themselves at a 3 day inquiry which ought never to have been necessary. The Council's analysis of the user evidence originally submitted in support of the application is notable for its shortcomings and it misrepresented the evidence contained in the user evidence forms.

2. Of the 8 user evidence forms which the Council had before it and which were reported to its Committee, Claire Simpson considered the paths to be private; Raymond Gardner and Ian Duckworth stated that their use had been with permission; and three members of the Wagstaff family had commenced use of the paths in November 1998 and could not demonstrate 20 years use prior to public use having been brought into question in February 2008. In addition, Andrew Gardner had used the paths since 1975 but had been absent from the country between 1999 and 2002.

3. The appendix to the Council's report to its Committee portrayed Raymond Gardner and Ian Duckworth's use as being as of right; the entry in the column '*been given permission*' records simply and wrongly 'No'. With regard to the evidence forms completed by members of the Wagstaff family, the appendix purports to show them as having 23 years use (1988-2011) despite the report noting that a section 31 (6) deposit had been made in 2008 which had the effect of stopping time running for the purposes of section 31 of the 1980 Act. It was not made clear in the report that the section 31 (6) deposit had been made in February 2008, leaving the Wagstaffs' with only 19 years and 3 months of qualifying use, not the 23 years as set out in the report.

4. The Council's report treated Andrew Gardner as having used the paths for 36 years twice per week without making any allowance for his absence from the country except for two home visits each year. On a proper analysis of the user

evidence it had been presented with, only five claimants had made use of the paths between February and November 1988, and of those two did so with permission and one thought the paths were private. Consequently, the objectors ask how could the evidence of two users have caused a reasonable landowner to think that during that 9 month period public rights of way were being asserted?

5. Paragraph 7.3 of the Committee Report stated that "*The burden of proof imposed on the County Council at this stage of the procedure is to consider whether or not sufficient evidence is available for an Order to be made based on whether or not the evidence as produced shows a reasonable allegation that such a right of way exists...This is a lesser burden of proof than is required if the Order were to be made and a public inquiry held into its provisions. At that stage the burden of proof is based on the higher 'balance of probabilities' test*".

6. It is acknowledged that *Bagshaw*[1] and *Emery*[2] established that where there was a material conflict of fact which the Council could not resolve without cross-examination, and the allegation of a right of way would be reasonable if the public were right, then an order should be made. Nether case is authority for the proposition that an order should be made where the evidence (properly analysed) adduced in support would be insufficient to support the confirmation of the order on the balance of probabilities. It is acknowledged that the proposition advanced is not supported by any known authority. The proposition is one of principle; it is not reasonable to allege that a public right of way subsists on the basis of evidence (even if accepted as true) which would be insufficient to support a conclusion that the claimed right subsists.

7. The Council made an error in law in not addressing that further issue as part of its deliberations as to whether an order should have been made. In the *Dorset*[3] case, there were 32 people who had filled in user evidence forms of whom 5 claimed use for the full 20 years use as of right. Although the evidence of those 5 was accepted as truthful, it was considered insufficient to support the confirmation of the order.

8. Although the Objector had been given an opportunity to comment on the application before the report was presented to the Committee, the Council would have had no way of foreseeing whether the objection would be sustained if an Order was made. Central to the proposition is that the evidence may never be tested by cross-examination if an objection is not made. The Council should therefore have asked itself whether the evidence was sufficient to justify confirming the order if no objection was made.

9. The answer to that question is 'No'. The Committee Report makes it clear that the evidence of use by 8 people was only just regarded as sufficient to justify the making of the Order. By inference, the Council were saying that if the conflict of fact were resolved in the public's favour, then 8 people each attesting to 20 years use as of right would be just sufficient to justify confirmation of the Order. Plainly the use by 2 people for a full period of 20 years would have been insufficient. Had the Council asked itself the supplementary question as submitted the Order would not have been made.

[1] R (ex parte Bagshaw and Norton v Secretary of State for the Environment [1994]
[2] R (ex parte Emery) v Secretary of State for Wales [1998]
[3] R 9ex parte Dorset CC) v Secretary of State for Environment, Transport and the Regions [1998]

10. The Council acted unreasonably because it failed to analyse the user evidence properly and misrepresented it to the Committee. Had the Council analysed the evidence properly it would have reported to the Committee that Claire Simpson, Raymond Garner and Ian Duckworth appeared not to be claiming that the routes were public routes, and that during the first nine months of the 20-year period only 2 people were claiming use as of right and that the remaining three (Simpson, Gardner and Duckworth) considered the routes private or used with permission.

11. Had the Council analysed the user evidence properly and presented those findings fairly to the Committee it would not have recommended the making of the Order. The user evidence was insufficient to support the confirmation of the Order and therefore insufficient for a reasonable allegation to be made that public rights subsisted over the paths.

12. To approach an analysis of the evidence in the way contended for would not impose an unreasonable burden on local authorities as the Council suggest. It would require the Council to carefully and properly analyse the user evidence presented to it to ensure that it is not misrepresented and that legitimate doubts, if any, as to whether the evidence can be relied upon to support an order are fully and frankly acknowledged.

13. The evidence the Council considered was manifestly insufficient to justify the confirmation of the Order and the Order ought not to have been made. In having to defend itself against an Oder that should not have been made, the Objector has incurred unnecessary costs which should be paid by the Council.

The response by Cumbria County Council

14. The Objector's submissions fall into error in seeking to impose too high a burden on the Council in their evaluation of the evidence at the order making stage. In picking over the user evidence in the way it has done, the Objector adopts an overly legalistic approach and seeks to import to the content of the Committee Report an interpretation which supports the Objector's case but which distorts the case being put to members of the Committee.

15. The advice given to the Committee both in writing and orally must be considered as a whole; the officers were not engaged in writing a legal treatise but were giving advice to members which had to be of practical assistance to them in the real word (see *Oxton Farms v Selby District Council* [1977]).

16. It is acknowledged that the 20-year period ended with the lodgement of the section 31 (6) deposit and the Objector makes the point that whilst this occurred in February 2008 this fact was not made clear in the Committee Report. The Objector also goes on to assert that as (a) the Wagstaff family's use had only commenced in November 1988 and (b) Andrew Gardner's evidence had a 3 year gap in it, the Council had been wrong to imply that each of the 8 forms received were probative of 20 years use.

17. The Report sets out the tests which the Committee had to address as clarified by the *Bagshaw* and *Emery* cases which established that where there was a material conflict of fact which could not be resolved without cross-examination at the order making stage and the allegation would be reasonable if the public were right, then an order should be made.

18. Although the Objector asserts that the Council should have considered whether the evidence was sufficient to support confirmation of an Order if no objection were to be made, the Objector does not advance any authority for the proposition that the 'further issue' should be considered. It is submitted that there is no requirement for the Council to address the 'further issue' raised by the Objector at the Order-making stage nor was it in a position to do so. Even if consideration had been given to the 'further issue' it is not accepted that the outcome would have been as suggested by the objector.

19. The conclusions reached by the Objector regarding the description of the routes as 'private' by Claire Simpson and of permissive use by Raymond Gardner and Ian Duckworth calls for speculation and assumption. The Objector speculates and assumes that the words written in the user evidence forms support its case and not the claim. Errors are often made in user evidence forms and it would be easy to pick fault in them and thereby disregard evidence which would otherwise support the claim.

20. It is not for the Council to interpret evidence in the way a landowner would and to give the landowner the benefit of the doubt or to dismiss evidence because aspects of it are unclear or may need to be explored further. It is noted that the Objector did not assert that Raymond Gardner and Ian Duckworth had been given permission, nor is it for the Council to dismiss evidence on anything other than a hunch.

21. The proper place for the detailed and forensic scrutiny of the evidence of the kind advanced by the Objector is at the confirmation stage where all the evidence can be tested by cross-examination. It is submitted that the benefit of any doubt at the Order-making stage must be given to the public as per *Bagshaw* and *Emery* and the decision made by the Committee was correct in recognising that.

22. The Objector seeks to rely on *Dorset* to support the proposition being advanced. However *Dorset* was decided after proper scrutiny of the evidence at a public inquiry which was the correct procedure to follow and the procedure which has been followed in this case.

23. It is not accepted that at the order-making stage consideration must be given to what would happen if an objection were not repeated following the publication of an order. If no objections were made following the publication of the order, consideration would then have to be given to whether the evidence adduced was sufficient to justify its confirmation.

24. The application for costs is speculative and misconceived in law. To accept the case made by the Objector would put an unreasonable burden upon local authorities, potentially act as a barrier to the making of Orders and fail to have regard to the two stages of order making and order confirmation.

25. It is not accepted that the decision reached by the Committee was unreasonable or that the Council's behaviour in its conduct of this matter has been anything other than reasonable. The application for costs should be rejected.

Reasons

26. The Objector claims that had the Council engaged in a thorough analysis of the 8 user evidence forms which had been submitted, the Council would have seen

that 2 of the 8 respondents claimed to have had permission to use the paths and that 1 respondent considered that the paths were private. Such an analysis would have reduced the number of users whose evidence could be taken to support the claim to 5. Of these, 3 respondents did not demonstrate use for the full period of 20 years (having not commenced use until November 1998) and 1 had a gap in his continuous use of around 3 years when he was working abroad.

27. In the Objector's submission, this meant that there were only two users who could demonstrate use as of right during the first 9 months of the relevant 20-year period and such limited evidence would have been insufficient to alert a reasonable landowner that a public right of way was being asserted.

28. I consider that the Objector's analysis of the user evidence is fair and reasonable if the paper evidence is taken at face value. Two of the users do indicate that use was permissive or with permission and one considered the route to be private. However, even discounting the evidence of these respondents, there would remain 5 users to attest to use of the path throughout the relevant 20-year period, albeit that not each of those users could demonstrate individual use for 20 years prior to February 2008.

29. Although Andrew Gardner had a three year break in his otherwise continuous use, his user evidence form sets out that during that period he engaged in daily use when home on leave from his appointment abroad. He therefore made some use of the claimed paths during his periods of home leave, although on an infrequent and sporadic basis. The three members of the Wagstaff family may not be able to demonstrate use throughout the relevant 20-year period either, but it is not necessary for all witnesses to be able to demonstrate use throughout the relevant period on an individual basis. What is required is that collectively the use can demonstrate use by the public throughout the period.

30. The Objector submits that use of the claimed paths by two people during the first 9 months of the relevant period would have been insufficient to alert the landowner that a public right was being asserted. However, if the user evidence has to be taken at face value in the initial analysis, it is evident that these two individuals were not using the paths in isolation at the beginning of the relevant period. Both respondents note that the paths were in frequent use by residents in the village or visitors staying at the caravan site adjacent to the woods. Mr Eden believed the paths were public as they had clearly been in regular use and had been before he commenced use; Mr Gardner believed the paths had always been used by many people.

31. There was therefore evidence before the Council that Mr Eden and Mr Gardner were not using the paths in isolation and that it had been supplied with indirect evidence of use by more than just these two individuals. This additional, indirect evidence of use supported the claim and use by a number of other people may have been sufficient to put a landowner on notice that the public were asserting a right of way. That the Objector was aware of the public behaving as if they were asserting a right of way is demonstrated in the action it took in procuring and erecting suitably worded prohibitory notices in the vicinity of the paths at issue.

32. Setting aside 3 of the 8 user evidence forms for the reasons given by the Objector, leaves the evidence forms of 5 users which, on any analysis, demonstrate use throughout the relevant 20-year period. That Mr Gardner and

the Wagstaffs have gaps in their personal period of use is of little account as the gaps in their use are filled by use by other members of the public.

33. The Objector draws my attention to the *Dorset* case to support the proposition that the evidence of five individuals (even if accepted as being true) would be insufficient for the confirmation of the Order. I am not persuaded that this case is of any relevance as the user evidence in *Dorset* was rejected as being insufficient at the schedule 15 stage. At the schedule 15 stage, the test to be applied is the balance of probabilities, whereas at the schedule 14 stage (the stage at which the Council made its decision in this case), the standard of proof is at the lower level of a reasonable allegation. The test to be addressed at the Order making stage is clearly stated in the Committee Report (see paragraph 5 above).

34. It is the schedule 14 decision of the Council which the Objector seeks to attack, submitting that the Council should not have determined the application at that stage without pausing to ask itself whether the evidence available to it would have satisfied the more stringent 'balance of probability' test for confirmation of the order at the schedule 15 stage. The Objector submits that it was unreasonable for the Council not to have asked this supplemental question as part of its deliberations.

35. I do not subscribe to the Objector's argument on this point, nor am I persuaded by it. At the order making stage, all the Council is required to do is to assess the evidence before it in the light of the requirements of schedule 14 and the guidance offered by the Courts in *Bagshaw* and *Emery*. There is no authority for the proposition put forward by the Objector that the Council should contemplate whether the evidence would support the confirmation of an order at the schedule 15 stage as part of its schedule 14 deliberations.

36. The appropriate time for the Council to consider whether the evidence before it is sufficient to warrant the confirmation of an order is at the schedule 15 stage. If no objection is made to an order following notice of its making having been given, the Council will then be in a position to make a determination as to whether the evidence it has is or is not sufficient to warrant the confirmation of the order. However, the legislation does not place the Council under a duty to contemplate matters which are the province of schedule 15 as part of its deliberations at the schedule 14 stage. To do otherwise would be to make redundant the two-stage process laid down by Parliament in the 1981 Act.

37. I consider that the Council correctly identified the appropriate test in the Committee Report and that the Committee correctly applied that test in accordance with schedule 14 as clarified by *Bagshaw* and *Emery*. In such circumstances, the decision reached by the Committee cannot be anything other than reasonable.

38. As I have concluded that the Council's determination of the application was reasonable, it follows that the Objector has failed to demonstrate that the Council behaved unreasonably. I conclude that the application for costs should be dismissed.

Alan Beckett

Inspector