



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 September 2018

Appeal Ref: FPS/N4720/14A/2

- 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 Leeds City Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 25 June 2004 was refused by the Council on 25 January 2018.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a number of footpaths within Cragg Wood, Rawdon (as shown by bold broken green lines 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 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 the Courts in the *Bagshaw and Norton*¹ and *Emery*² cases.
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 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

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 v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

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?

Test 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.

6. In relation to Test B, the Court of Appeal recognised in the Emery case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In Emery, Roche LJ held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"
7. Roche LJ also held that "*Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication*".

The site and paths at issue

8. There are a number of routes at issue in this appeal, all of which are located within Cragg Woods, Rawdon. The appellant states that the routes which were the subject of the application made in 2004 were C – G – H; A – I – D – G; D – B – F – E and J – I. These routes are shown on the plan appended to this decision. However, the application form submitted on behalf of the Rambler's Association in June 2004 does not distinguish the claimed footpaths in any way; the application simply describes the route being claimed as "*from Cragg Wood Drive (two points) to Cragg Wood*".
9. The application was not submitted with a plan showing the claimed routes and the description on the application form does not suggest that what was being claimed was a through route between Cragg Wood Drive and Cliffe Drive or Crag Wood Drive and Aireborough footpath 103. Nonetheless, the Council appears to have given consideration to a number of routes within Cragg Woods as shown on the plans which accompanied the user evidence forms which were submitted in support of the application. The routes at issue in this appeal appear to be defined routes through the woodland the use of which would be capable of giving rise to a public right of way; the evidence adduced does not, on paper suggest that the public have been engaged in general wandering through the woods.

User evidence

10. For a claim for a right of way to succeed, the user evidence has to demonstrate that use has occurred over a defined route for at least twenty years prior to the date at which the public's right to do so was brought into question. Whilst not all witnesses are required to be able to demonstrate personal use of the appeal routes for the whole of the twenty-year period, collectively, the evidence should demonstrate use throughout that period.
11. In this case, it is common ground that use of a route or routes through Cragg Wood was brought into question in April 2004 when a metal gate and fencing was erected within Cragg Wood at the boundary with Cragg Wood Drive and the steps at the western end of Cragg Wood removed. In March and April 2004 statements and plans under the provisions of section 31 (6) of the 1980 Act were deposited with the Council by the owners of Buckstone Grange and Buckstone Hall Lodge.
12. The erection of the fence and the removal of the steps at Cragg Wood Drive prompted an application to be made to the Council to record a public right of way through Cragg Wood. For the purposes of Section 31 (2) of the 1980 Act the works undertaken in Cragg Wood in April 2004 which prevented access to the wood can be considered to be the date at which public use of the path was brought into question.
13. One other event which may be considered to have brought use of the paths into question occurred in or around June 1988 and was reported to the Council in July 1988 in a letter written by the leader of a group of Girl Guides. This group of Guides had been walking through the woods when they were shouted at by a lady who appeared from either Buckstone Grange or Buckstone Hall Lodge and who told them to leave her back garden. The letter suggests that an earlier letter had been written about this event which had been published in a local newspaper although no copy of this letter has been submitted.
14. However, there is nothing in the letter to demonstrate that the person who shouted at the guides was the owner of the land, nor is there any indication in the letter that the Guides were walking on any of the paths subject to this appeal. Although the incident is said to have been publicised in the press, a copy of the letter to the press has not been submitted and it is not known in what terms that letter was couched, nor is it known if the location at which this incident took place had been identified.
15. Whereas an action which brings the public's right to use a path or way into question does not have to be taken by the landowner, the record of the incident with the Guide group lacks sufficient detail to serve as an event which brought into question the public's right to use the routes subject to this appeal. Furthermore, despite a letter being written to the Council and to the press, the reported incident does not appear to have resulted in a general outcry amongst local residents and users that their right to use the paths at issue had been questioned. This is in direct contrast to the impact the erection of the fence and removal of the steps had in 2004.
16. At this stage, it is doubtful whether the 1988 incident brought use of the appeal routes into question. It is common ground between the parties that the fence erected in 2004 had such an effect and resulted in an application being made to record those routes within Cragg Wood that had been used. Accordingly, for

the purposes of section 31 (2) of the 1980 Act and for the purposes of this appeal, I consider the relevant 20-year period of use to be April 1984 to April 2004.

17. Thirty-eight user evidence forms were submitted in support of the application. Not all of the claimed footpaths were used by each of the respondents and the Council gave consideration to the user evidence on the basis of the paths shown by each respondent on the plan attached to their UEF. A – I – D – B was used by 36 people of whom 23 recorded only using the route as a cul-de-sac with no onward continuation to either Cliffe Drive or Aireborough footpath 103. The longest period of claimed use was 48 years and 19 respondents claimed use of the path for the full period of 20 years prior to 2004. One respondent used the path daily, three had used it several times a week, twelve several times a month and twenty occasionally.
18. Four of the respondents had used C – G – D with two having used the path for 20 years or more prior to 2004; one respondent had used the route daily, two several days a week and one several days a month. One respondent showed use of F – E over a 45 year period prior to 2004 and had used the route as a means of travel from Cliffe Drive to Cragg Woods via point B.
19. Fifteen respondents claimed to have used a path on the alignment of D – G – H to travel between Cragg Woods and Aireborough footpath 103; 10 people had used this route for 20 years or more prior to 2004 with one person using the path daily, 3 several times per week, four several times per month and seven occasionally. The Council note that the line drawn on individual UEF maps for this path varied and was not shown fully as the route of Aireborough footpath 103 was outside the area shown on the map provided to respondents. I acknowledge that there are variations between the lines shown by individual respondents, however they were being asked to show the line walked on a plan of the woods which contained no identifying features from which the line walked could be identified; the line shown would therefore be the best estimate which the respondents could make. The lines representing the claimed route are however consistent with an identifiable route having been walked as opposed to being evidence of general roaming through the woods.
20. Five people also showed I – J as a route which had been walked; four respondents claimed to have done so for 20 years prior to 2004 with the remaining individual claiming 17 years use. Two respondents had used the path daily, one several days a week, one several days a month and one occasionally.
21. In addition to the 38 UEFs submitted in support of the application in 2004, a further 11 UEFs were submitted in support of the appeal. Each of these forms is accompanied by a map showing the routes which have been walked; these can broadly be described as A – D – G – H; D – B – F – E and C – G. There is no indication in these UEFs of the use of the path I – J. Of these 11 respondents the earliest use commenced in 1955 with 9 of the respondents claiming to have used the paths in excess of 20 years prior to 2004; one respondent failed to indicate when use had commenced and one other stated that use had been as part of a journey to and from school with use appearing to have been of limited duration.
22. Although the initial UEF evidence suggested that A – I – D – B was a cul-de-sac route with no onward continuation, the user evidence submitted in 2018

- suggests that this was not the case. The Council had conducted a site visit in 2016 and discovered a significant drop in ground level between points B and F from which it concluded that use would have been difficult due to the steepness of the slope. Nonetheless, the respondents claim to have been able to use such a route since at least 1955 and it may be that the conditions found in 2016 by the Council were different from those that prevailed at an earlier date. Taking the evidence collectively, it suggests that a through route between Cragg Wood Drive and Cliffe Drive via A – I – D – B – F – E had been in use by the public for more than 20 years prior to 2004.
23. The user evidence also suggests that there were defined routes through Cragg Woods to Aireborough footpath 103 which commenced at two points on Cragg Wood Drive which had been in use by the public for more than 20 years prior to 2004.
 24. The Council submits that use of the routes A – D, I – J or any route that incorporated these paths would have involved walking in an area where there had been challenges to such use in 1988; in the Council's view, it would not be possible to show that use had been uninterrupted during the relevant 20-year period. The incident in 1988 does not appear to have prevented or interrupted claimed use of the paths; whilst the UEFs report access being blocked in 2004, there is no indication of any prior impediment to use of the paths at issue. There is not necessarily a conflict in the evidence on this matter, merely a conflict between how that evidence is interpreted.
 25. The Council considers that the evidence of use submitted in relation to claimed paths to be insufficient in terms of quantity and quality for presumed dedication to have occurred. The appellant submits that all that is required to satisfy the provisions of section 31 (1) of the 1980 Act is that use can be demonstrated to have been by members of the public and that the law says nothing about how many of them have used the path. With regard to this issue, there is clearly a conflict in the interpretation to be placed on the evidence adduced, but on paper at least, the evidence of 49 individuals as to their use of the paths would appear to be at a level to demonstrate that the public were using the paths at issue as if they had a right to do so.
 26. The Council had sought information regarding the claim from the owners of the land crossed by the claimed footpaths but had not received any responses. A letter had been sent to the Council by the owners of Buckstone Court dated 12 November 2004 in which it was asserted that during their 33-year occupation of the property they had not dedicated a public right of way and did not intend to dedicate a public right of way over their property. The owners also stated that they had challenged anyone they had seen trespassing. In contrast, none of those who completed a UEF recalled any challenges to their use until access to Cragg Wood was blocked in 2004. There is clearly a conflict within the evidence relating to challenges to use and the effectiveness or otherwise of those challenges.
 27. Correspondence has been received from a party who has recently taken up residence at Buckstone Hall Lodge and who states that a survey of that part of Cragg Wood crossed by the claimed route A – I – D – B revealed that there was no detectable sign of a worn path along much of that route. Whilst there may not be any sign of a used path on the ground at the moment this does not mean that use of the claimed path did not occur prior to the blocking of the

access at A in 2004 or that it would not have been possible for such use to have occurred prior to that date.

28. There are therefore conflicts in the evidence relating to the use of the claimed paths and conflicts between the parties in the interpretation to be placed on that evidence. Consequently, the appeal does not succeed against Test A set out in paragraph 5 above, but as no incontrovertible evidence has been submitted which would inevitably defeat the claim. The appeal succeeds against Test B as it is reasonable for the appellant to allege that rights of way subsist within Cragg Wood.

Conclusion

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

Formal Decision

30. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Leeds City 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 for Devon to add those public footpaths proposed in the application dated 25 June 2004. 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

