



Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 25 January 2019

Appeal Ref: FPS/P3800/14A/3

- 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 West Sussex County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 5 December 2016 was refused by the Council on 15 June 2018.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a public footpath from a point on public bridleway 1163 and running in a generally westerly then southerly direction to a point on Fyning Lane (as shown between red lines and points A – B – C 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.
3. 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.

Main issues

4. 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.
5. 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.

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

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*".

Reasons

The path at issue

8. The claimed path commences on public bridleway 1163 opposite a property known as Bennetts House (at point A on the plan appended to this decision) and runs in a generally westerly direction to the north of two properties known as Fyning Copse and Fyning Twitten. Where the claimed path meets the access track to the property known as Foresters (at point B on the appended plan), the claimed path turns to the south and runs over that access track to connect with Fyning Lane (at point C).
9. The evidence adduced by the parties is unclear as to whether the path between points A and B crosses land in the ownership of the Fyning Estate (to the north of A – B) or whether the land crossed by the path is part of Fyning Copse and Fyning Twitten. It is noted that the applicant served notice of the application on the land in addition to serving notice on the owners of the land adjacent to the claimed path. For the purposes of this decision it is not necessary for the owner of the land crossed by the claimed path to be identified.

Documentary evidence

10. In support of the application, extracts from Ordnance Survey ('OS') maps were submitted. The OS maps of 1873, 1897 and 2008 show the existence of a route on a similar alignment to the claimed path, with that route annotated 'F.P.' on the 1897 map and as 'path (um)' on the 2008 map. The OS maps submitted demonstrate the existence through time of a route on the alignment of the claimed path but do not provide evidence of the status of the route.
11. Similarly, the extracts from a number of planning applications made in relation to Fyning Copse provide evidence of the existence of the claimed path but not of its status. The plans which form part of the correspondence around a planning application made in 2002 show the existence of a footpath on the northern boundary of Fyning Copse. The reference to the path in the response

from the Sussex Downs Conservation Board ("*I note from my site visit....that the site might be visible from the path that runs along the northern boundary of the property...*") demonstrates that in October 2002 a route on the same alignment as the claimed path was visible on the ground.

12. None of this evidence demonstrates that the claimed path is a public right of way but it provides evidence that a feature capable of accommodating pedestrian traffic had been present in the landscape since at least 1873 and remained visible into the early years of the current century.

User evidence

13. In this case, it is common ground that public use of the claimed path was brought into question in February 1995 when excavation works associated with the construction of an extension to Fyning Copse were undertaken. The available evidence suggests that the ground crossed by the claimed path was excavated up to a depth of 2.9 metres and completely blocked to use by members of the public. The excavation works remained until around August 1997 when the extension to the house was completed.
14. The works undertaken in February 1995 on the line of the claimed footpath which prevented access along it can be considered to be the event which brought public use of the path into question. The relevant 20-year period of use is therefore February 1975 to February 1995.
15. Eighteen user evidence forms (UEFs) were submitted in support of the application. However, since the application was submitted to the Council two witnesses have withdrawn their evidence leaving 16 UEFs which collectively claim use of the path at issue between 1939 and 2016.
16. Of the 16 UEFs submitted, three respondents claim use of the path throughout the 20-year period which ended in February 1995 and six others claim use of the path for part of that period ranging from 6 years to 19 years. Of the remaining 7 UEFs, three respondents claimed use of the path for varying periods which ended prior to 1995 whereas use by four respondents did not commence until after 1995. Frequency of claimed use ranged from 3 times per year to weekly. Most users claim to have seen other pedestrians using the claimed path.
17. The majority of respondents claim not to have seen any prohibitory notices along the path during their use, although four respondents note that a 'private' sign has been present since 2016. Twelve users note that in January 2016 gates had been erected at two points along the claimed path; there is no indication that these gates had been locked. None of the respondents have been told by an owner or occupier that the claimed route was not public nor have they sought or been given permission to use the claimed path.

Landowner evidence

18. The owners of Fyning Copse have been resident since 1990 and contest the claimed use of the path by the public. In addition to use of the path being brought into question in 1995 by the excavation works they contend that use of the path would not have been possible on a number of occasions over the 28 years which they had owned the property. It is stated that whilst undertaking building works at the property during 1991 and at subsequent dates, the claimed route has been used to store materials or has been obstructed by

scaffolding. The owners contend that these actions are evidence of a lack of intention to dedicate a public right of way. Furthermore, they say the absence of complaints during the various building works demonstrates that the use of the path is not as extensive as has been claimed.

19. The owners of Fyning Copse provided a number of statements from current and former employees who worked at the property together with statements from others who had day-to-day knowledge of the property. None of the people had observed anyone using the path prior to 2016. The validity of the user evidence forms is questioned as the claimed route does not form part of a route from Fyning to Rogate village as stated in some of the forms; such a journey would require a walk through the Fyning Hill Estate woods to the north and west of the claimed path.
20. The owners of Fyning Twitten have been resident for 5 years although they have lived in Fyning since 1997. Searches conducted as part of their purchase of the property did not suggest the existence of a public right of way and no-one has been observed using the claimed path other than the owners of Fyning Copse. They note that there are large signs on the Fyning Hill Estate which require pedestrians to keep to the clearly signed public rights of way. The fact that the claimed path is overgrown with bracken which has not been trodden down is considered to demonstrate the lack of use of the claimed footpath.
21. The owners of Forester's Cottage (to the north of point B) state that B – C forms part of their private access to the house and that in 14 years they have not seen anyone walking along the claimed route. The owners contend that use of B – C would not have been possible between February and March 2008 due to forestry operations and that maintenance of the hedges adjacent to B – C requires the blocking of the access track; no complaints have been made about the unavailability of the claimed route during such works.
22. The Agent for the Fyning Hill Estate has been in post since 1991 and states that a "*private land*" sign has been present along the claimed route A – B located near the security access gate into the estate. Fencing erected around 15 years ago across the claimed route was repeatedly cut by the public such that the Estate erected a gate in the fence line. The claimed route has always been narrow and overgrown and is obstructed at various points by mature trees. It is contended that the boundary fence of Fyning Twitten has not been maintained and has fallen over the path making it impassable.
23. Thirty letters and emails of objection were received by the Council from local residents who oppose the application. The gist of these objections is that it has not been understood locally that the claimed route is a public right of way as it is not an attractive route and that there are other more attractive, convenient and available routes.

Consideration of the evidence

24. For a claim for a right of way to succeed, the tests set out in section 31 of the Highways Act 1980 (the 1980 Act) have to be satisfied. The evidence has to demonstrate uninterrupted use by the public as of right (that is, without force, secrecy or permission) 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 claimed path for the

whole of the twenty-year period, collectively, the evidence should demonstrate use throughout that period.

25. Evidence has been given by 3 individuals as to their use of the claimed route throughout the relevant 20-year period, with evidence from 5 other individuals regarding their use for periods ranging between 6 and 19 years during that period. None of these persons had been challenged or given permission to use the path and there is no evidence that use required the breaking or scaling of fences or was contrary to prohibitive notices. Taken at face value, the evidence would seem to satisfy the tests set out in section 31 of the 1980 Act.
26. In direct conflict with the evidence of claimed use is the evidence provided by the landowners of the path being blocked for periods of time from 1991 onwards and the consequent interruption of any claimed use.
27. Applying the tests at the schedule 14 stage as clarified by the Court in *Bagshaw and Norton* and in *Emery*, I find that there is credible evidence of use by the public of the claimed route and that there is a conflict between that claimed use and the evidence of the landowners of obstruction and interruption of use during the relevant period.
28. Although there is a conflict between the evidence of the users and landowners, no evidence has been submitted which would establish incontrovertibly that the owners of the land during the relevant period had demonstrated a lack of intention to dedicate, or that the route was of such a character that use of it by the public could not give rise at common law to a presumption of dedication. It follows that I conclude that that the application succeeds against Test B as set out in paragraphs 5 to 7 above as it is reasonable for the appellant to allege at this stage the existence of a public right of way over the claimed path.

Conclusion

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

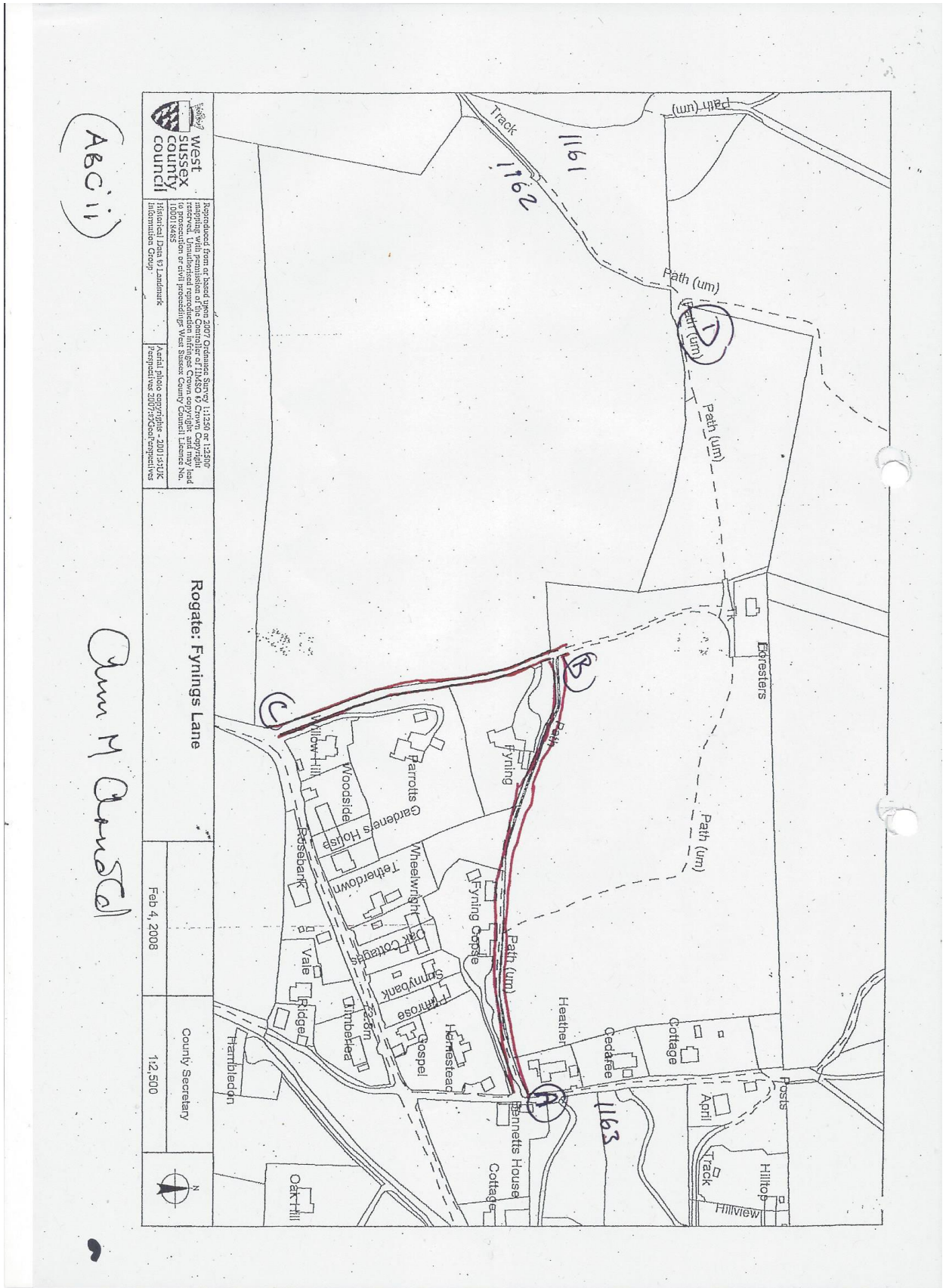
Formal Decision

30. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act West Sussex County 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 to add the public footpath proposed in the application dated 5 December 2016. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector

APPENDIX – plan of the claimed footpath



(A&C ii)

Ann M. Davis