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| **Costs Decision** |
| Inquiry opened on 14 December 2020 |
| **by Heidi Cruickshank BSc, MSc (Hons), MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 27 May 2021** |

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| **Costs application in relation to Order Ref: ROW/3225371** |
| * 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 Oxted Residential Limited for a full award of costs against Surrey County Council. In the alternative an application is made for a partial award of costs against Surrey County Council. |
| * The Inquiry was held in connection with The Surrey County Council Footpath No. 612 (Oxted), 613 (Oxted & Limpsfield) and 614 (Oxted) Definitive Map Modification Order 2018. |
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Decision

1. The costs application fails, and no award of costs is made.

The submissions on behalf of Oxted Residential Limited

1. The application was submitted by email on 11 March 2021[[1]](#footnote-1) with the formal application made orally at the close of the Inquiry, on 12 March 2021.
2. The application related to two aspects, firstly for a full award of costs in relation to the resistance to confirmation of the Order as a whole. In the alternative, a partial award of costs was sought in relation to the adjournment of the Inquiry in December 2020.

*Full Award*

1. Surrey County Council (“SCC”) acted on the basis that the nine-month break in the user of routes FP613 and FP614 in 2004 did not bring the use into question because it was not an action of the landowner. That was contrary to well established case law. It is well established that the act bringing the user into question is not required to be by or on behalf of the landowner, see: *R(Godmanchester Town Council) v Secretary of State for the Environment, Food & Rural Affairs [2008] 1 AC 221* per Lord Scott at [70]. See also: PINS Consistency Guidelines (2016) para.5.6.
2. SCC also relied on the PINS Advice Note 15 (“AN15”) (para.8), however, that has been held not to be an accurate statement of the law in *R(Roxlena Limited) v Cumbria County Council [2017] EWHC 2651 (Admin)* (“*Roxlena*”)*[[2]](#footnote-2)* Kerr J at [73].
3. SCC proceeded on the basis that deriving access through gaps beside locked gates did not amount to a contrary indication of dedication or render the use contentious. That is again contrary to well established case law, see*: R v Secretary of State for the Environment, Ex p. Blake [1984] [[3]](#footnote-3)* (*Blake*), where Walton J held that there was not “*a more eloquent statement of intention not to dedicate*” than erecting locked gates (p.104).
4. Even taking the supporters’ evidence at its highest, SCC therefore acted unreasonably by making the Order contrary to well established case law. Had SCC understood those legal propositions, it would never have made the Order.
5. All those errors were pointed out to SCC by Oxted Residential Limited (“ORL”) within its Statement of Case. SCC also acted unreasonably by continuing its support for the confirmation of the Order and, specifically, filing a proof of evidence which re-asserted the incorrect legal propositions.
6. Finally, SCC’s assessment of the evidence itself was partial. It failed to interview those on behalf of the landowner. Had SCC done so, it would have appreciated the pattern of contentious use and would not have made the Order, therefore avoiding the need for an inquiry.

*Partial Award*

1. By r.16(3) of The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 (“the 2007 Regulations”), SCC was obliged to have advertised the Inquiry by way of site notices not less than four weeks prior to the opening of the Inquiry. Contrary to that express obligation, SCC failed to advertise the Inquiry in accordance with r.16. Given that failure, the Inspector was compelled to adjourn the Inquiry on 14 December 2020.
2. This caused ORL to incur wasted cost, including (a) additional legal fees and (b) lost accommodation fees for counsel.
3. The legal fees arise from attendance on the first day of the Inquiry. At this time accommodation was booked for Counsel and clients to be together during the course of the Inquiry and this was not refundable.
4. The Government has amended certain matters in response to the continuation of events under the Covid-19 restrictions. However, the 2007 Regulations were not amended and, therefore, needed to be followed.

The submissions by Mr Ward for Surrey County Council

*Full Award*

1. The applicants are suggesting that none of the routes should be claimed and the Order should not have been made. At the time of the making of the Order the test to be applied was that of whether the routes could be reasonably alleged to subsist, a much lower standard. If the Inspector is minded to confirm the Order, even with modifications, it was not unreasonable for SCC to have made it; if confirmed at all the claim for a full award of costs must fail.
2. In relation to the matter of bringing into question regarding the school works SCC say that the question of interruption and subjective intention is a live issue with *Lewis v Thomas (1950)[[4]](#footnote-4)* and *Fernlee Estates Ltd v City & County of Swansea and the National Assembly for Wales (2001)[[5]](#footnote-5)* remaining good law. In any event there is a question of common law dedication on either side of the interruption, if it was effective. AN15 and *Roxlena* illustrate examples where the facts of interruption may be relevant.
3. With regard to *Blake,* SCC have made submissions and say the interpretation differs. Even if found against SCC, this was not an unreasonable stance.
4. In relation to interviewing the landowners, SCC made repeated attempts to speak to them from 2013 but only received information in 2018, as shown by the chronology[[6]](#footnote-6). Efforts were made by SCC to engage the objectors and they spoke at the Committee before the determination to make the Order.

*Partial Award*

1. The notice matter was unfortunate, but parties were made aware of the issue around 5 days in advance. SCC did not receive the site notice from the Planning Inspectorate, who would normally send it. In the highly unusual circumstances, it never occurred to the Planning Inspectorate or to SCC that notice was needed. The landowner never queried the matter and so it cannot have been unreasonable. SCC say this is unfortunate but cannot be held against them.
2. In relation to unnecessary costs this was a virtual event and so there was no need to travel. Accommodation may have been an issue but it seems that Counsel is working from home and so it is hard to see what wasted costs could arise. The preparation was needed to attend this week in any case. Barring seven minutes on opening there should be no additional expenses.

Reasons

*Full Award*

1. As will be seen from the Order decision (“the OD”) the Order has not been confirmed. Whilst I agree with the SCC that had any part of the Order been confirmed this element of the costs claim would fail, I do not find non-confirmation to mean that the application should automatically succeed.
2. The Order is made due to occurrence of an event specified in section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, which sets out that where has been a “…*discovery by the authority of evidence which (when considered with all other relevant evidence to them) shows…that a right of way…subsists or is reasonably alleged to subsist over land*…”. My confirmation must relate to the higher test of whether, on the balance of probabilities, a right of way subsists. However, I do not consider that SCC acted unreasonably in finding that the rights were reasonably alleged to subsist. There was conflicting evidence, which I consider benefitted from being heard to clarify matters relevant to confirmation, or otherwise, of the Order.
3. With regard to the claim that SCC failed to interview and take account of the landowners evidence, it is clear that the SCC Officer met with the owners of the land affected by the claimed route L – M – N – K[[7]](#footnote-7) in November 2017 to discuss their knowledge of the routes. It is also clear that SCC sought rebuttal evidence from the applicants for costs on a number of occasions from December 2013. When some evidence, and Counsel’s opinion, was sent through in January 2018 the SCC Officer fairly asked for deferment of the Committee report to take account of that evidence. The landowners, including representatives of the applicants for costs, attended and spoke at the Committee meeting on 22 June 2018.
4. In relation to section G – H, which is FP613 and links to FP614, it will be seen from the OD that I did not agree with SCC’s argument on this matter. Nonetheless, I do not consider their argument was entirely unreasonable. Nor do I consider it took significant time to be dealt with as part of the Inquiry processes. The removal of that point or argument would not, in my view, have shortened the number of sitting days nor entirely avoided an Inquiry occurring.
5. Taking account of these points I am satisfied that no prejudice arose from the way in which SCC carried out its investigation into the application and reached a decision to make the Order. I am also satisfied that it was not unreasonable for them to support the confirmation of the Order at the Inquiry. I consider that it was reasonable to allege that the public rights subsisted and for the evidence to be tested. As a result, the claim for a full award of costs fails.

*Partial Award*

1. As noted at paragraph 1 of the OD I was made aware of the issue regarding failure to place notices on site just prior to the opening of the Inquiry on 14 December 2020. SCC contacted the Planning Inspectorate on 9 December to ask whether notices should have been put up on site or in the local newspaper advertising the Public Inquiry, given that the event was being held virtually. As a result, the Planning Inspectorate wrote to all parties on that date to confirm that the Inquiry could not proceed as intended but would open to investigate resumption dates. That process took no more than 7 minutes with adjournment to 8 March 2021.
2. As noted in the OD, the Inquiry was due to open on 1 April 2020. A letter was sent to SCC by the Planning Inspectorate on 24 September 2019 providing relevant information which stated:

“*I also enclose a copy of a site notice for the inquiry and a copy of the order map.* ***Not less than 4 weeks*** *before the date fixed for the inquiry, copies of the site notice will need to be:*

1. *displayed in a prominent position at each end of the way(s) affected by the Order(s) along with a copy of the map;*
2. *displayed in such other places within the locality as you consider appropriate along with a copy of the map;*
3. *published in one or more newspapers circulating in the locality where the land to which the Order relates is situated; and*
4. *publicised by any other means you consider appropriate*.”
5. On reorganisation of the Inquiry date it is clear no revised notice was sent to SCC with similar instructions to those above.
6. The requirement for notice of the Inquiry arises from section 16 of the 2007 Regulations. These set out at sub-section 3 that “*Not less than four weeks before the date fixed for the inquiry, the authority—*
7. *shall cause a notice of the inquiry to be displayed in a prominent position at each end of so much of any way or proposed way as is affected by the order and in such other places in the locality as the authority may consider appropriate;*
8. *shall publish a notice of the inquiry in one or more newspapers circulating in the locality in which the land to which the order relates is situated; and*
9. *may publish notice of the inquiry by any additional means they consider appropriate.*
10. Whilst the requirement is for the authority, in this case SCC, to cause the notice to be displayed there is nothing in the 2007 Regulations to say that they should produce that notice. As is clear from paragraph 26 above it has been custom and practice for the Planning Inspectorate to supply the notice, that not being set out as a requirement in the 2007 Regulations.
11. As such I do not consider that SCC behaved unreasonably by not placing a notice on site or in a local newspaper as required by the 2007 Regulations. They had not been supplied with an appropriate notice for this purpose as would normally be the case.
12. Whilst the applicant for costs may have incurred unnecessary expense in relation to the planned sitting days of 14 – 18 December 2020 the Inquiry was planned to run as a virtual event. When the Inquiry subsequently resumed the applicants were not working from a single venue. I consider it their choice to have attempted to work in that way initially and, as a result, booked non-refundable accommodation at a time when the Covid-19 restrictions remained fluid and subject to change.
13. Nonetheless, I accept that there would have been some unnecessary expense in relation to the time attending the opening of the Inquiry, even if it were for such a short period. Whilst the Inquiry itself was adjourned at 10.07, time would have spent, for example, in organising and identifying alternative dates.
14. Taking account of all the above matters, I accept that some unnecessary expense for the applicant arose in relation to the need to adjourn the Inquiry initially. However, for the reasons set out above, I am not satisfied that there was unreasonable behaviour by SCC, which gave rise to such expense. As a result, the application for a partial award of costs fails.

*Conclusions*

1. With the above matters in mind, I do not consider that any unnecessary expense that may have arisen was due to unreasonable behaviour on the part of SCC. The application for either a full or partial award of costs fails, and no award is made.

Heidi Cruickshank

**Inspector**

1. Inquiry document 11 [↑](#footnote-ref-1)
2. [2017] EWHC 2651 (Admin) [↑](#footnote-ref-2)
3. [1984] JPL 101 [↑](#footnote-ref-3)
4. [1950] 1 KB 438 [↑](#footnote-ref-4)
5. [2001] EWHC Admin 360 [↑](#footnote-ref-5)
6. Inquiry document 12 [↑](#footnote-ref-6)
7. Letters A – N and A1 & I1 refer to letters as used in the Order map [↑](#footnote-ref-7)