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| **Appeal Decision** |
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| **by N C Farthing LLB** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 12 January 2023** |

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| **Appeal Ref: ROW/3305421** |
| * This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Kent County Council not to make an order under Section 53(2) of that Act. |
| * By application dated 11 September 2017, Mr K Kemp claimed that a route running through Bossenden Wood from the London Road to footpath ZR528 and bridleway ZR529 at Dunkirk, Kent should be added to the definitive map and statement for the area as a public footpath. |
| * The application was refused by Kent County Council on 7 July 2022 and the appellant was formally notified of the decision by letter dated 20 July 2022. |
| **Summary of Decision: The appeal is dismissed.** |
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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 Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted. In this case, I am satisfied I can reach a reliable decision without visiting the site.
2. The appellant requests that the Secretary of State directs Kent County Council (KCC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record as a public footpath the route that is the subject of this appeal (the appeal route).
3. I have before me the submissions from the appellant and KCC, which include the application and the decision report. I have considered all these documents in forming my conclusions.
4. A report prepared by KCC included a plan which identified clearly the route claimed by the appellant and is annotated with points A – J. I shall refer to this plan in this decision letter as ‘the plan’. For ease of reference a copy of the plan is appended below.

Main issues

1. The application was based on the premise that the evidence is sufficient to show that, in the past, the appeal route has been used in such a way and on such terms that a public right of way on foot can be deemed to have been established over it. KCC accepted that there has been use of the appeal route by the public but concluded that use was not undertaken as of right and further that the landowner has provided sufficient evidence of a lack of intention to dedicate the route as a public right of way.
2. The main issue in this case is whether KCC was correct to reject the application and to decline to make the order requested.

**Legal framework**

1. Section 53(2) of the 1981 Act requires the surveying authority (in this case KCC) to make orders to modify its definitive map and statement in consequence of certain specified events as set out in Section 53(3).
2. Sub-section 53(3)(b) describes one such event as “*the expiration … of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path*”.
3. Another event is set out in sub-section 53(3)(c)(i): “*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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 …"*.
4. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) therefore comprises two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order requested by the appellant.
5. The issue was addressed in the High Court case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1995] JPL 1019* and later clarified in *R v Secretary of State for Wales ex parte Emery [1998] 4 All ER 367*: when considering whether a right of way subsists (test A) clear evidence in favour of the appellant is required and no credible evidence to the contrary. However, when considering whether a right of way has been reasonably alleged to subsist (test B), if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
6. For the purposes of this appeal, if the evidence is sufficient to satisfy the lesser test (B), then an order should be made, although the higher test (A) would be applicable if the matter fell exclusively under sub-section 53(3)(b).
7. As regards evidence of use by the public, section 31 of the Highways Act 1980 (the 1980 Act) sets out the requirements for presumed dedication under statute. Firstly, there must be sufficient evidence of use of the claimed route by the public, as of right and without interruption, over the twenty-year period immediately prior to its status being brought into question in order to raise a presumption of dedication. This presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the landowner/s during this period to dedicate the route as a public right of way.
8. Alternatively, if the case is not made out under statute, the evidence may be considered under the common law. In this case the issues to be addressed would be whether the owner of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owner, and whether there is evidence of acceptance of the claimed right by the public.

Reasons

1. KCC accepted that there is evidence of use by the public of the appeal route during the relevant period, but concluded that the use was with permission, and thus not as of right, and furthermore that the landowner had sufficiently demonstrated a lack of intention to dedicate so as to rebut any presumption of dedication that would otherwise arise.
2. In addition to statements from users and information from the landowners and other consultees, KCC addressed a number of sources of historical evidence, but these did not reveal any substantive support for a public way of any antiquity. I note the route was not claimed at the time of the compilation of the First Definitive Map, or subsequently until now.
3. The Appellant seeks to rely upon the representation of a similar route on the First Edition OS Map of Dunkirk (1872). Ordnance Survey maps record physical features but do not purport to distinguish between public and private status of routes depicted. The appearance of a similar route on this OS map is evidence only that such a feature existed on the ground at the time the survey was undertaken; it is no evidence that the route enjoyed public status. Accordingly, the case rests on satisfying the test set out in Section 31 of the 1980 Act on the basis of use by the public in the late twentieth and early twenty first centuries.
4. With the application submitted in September 2017, the appellant provided evidence from twenty four people. Subsequently a further 7 user evidence forms were provided. Analysis of the evidence was undertaken by KCC and this is represented in tabular form appended to the investigation report. Although there is evidence from one person claiming use from the late 1950’s and one from the 1960’s, the preponderance of the evidence is of use from the 1980’s and since. The frequency of use varies considerably between users, but I accept that the evidence from the 1980’s onwards is, on a balance of probability, sufficient to constitute actual use by the public within the requirements of section 31 of the 1980 Act.

*Bringing into question the status of the route*

1. Reliance upon the statutory presumption of dedication under section 31 of the 1980 Act requires a date to be established when the right of the pubic to use the route was brought into question. It is use of the route during the twenty year period preceding that date which will determine whether or not a presumption arises.
2. For the right of the public to be brought into question there must be some act which is sufficient to bring home to users that their entitlement to use the route is being challenged. It is not necessary for the action to be undertaken by the landowner, although this is often the case.
3. In this case there are three events which constitute a sufficient challenge; first the making of the application for a definitive map modification order in 2017, second the submission by the landowner in 2009 of a statement and declaration pursuant to section 31(6) of the 1980 Act and third the landowner, from 1985, giving permission to the public to use the appeal route.
4. As a consequence, the twenty-year periods for consideration are those ending September 2017 being the date of application, April 2009 being the date of the first section 31(6) deposit and 1985 being the date when the RSPB created the permissive routes through Bossenden Wood.

*Claimed use by the public 1997-2017*

1. The user evidence forms show that 30 of the 31 users claim to have used the route on foot for some part or the whole of this period. The frequency of use varies from regular, being weekly or more often, to occasional, with one witness referring to use three or four times a year. This level of use, if undertaken as of right, would be sufficient to give rise to a presumption of dedication pursuant to section 31 of the 1980 Act.
2. Whilst the application is to record the route as a footpath there is some evidence of use on horseback or on a bicycle. The extent and frequency of such use is very modest and not enough to suggest a claim for bridleway status.
3. The evidence from the landowner, which is corroborated by the appellant, is that from 1985 the appeal route was made available for public use on a permissive basis and that the route was waymarked accordingly. For a presumption of dedication to arise it is required that the use by the public is undertaken as of right, meaning without force, secrecy, or permission. The fact that the landowner gave permission for the public to use the route, and notified users by means of the waymarkers, is sufficient to prevent public use being as of right with the consequence that no presumption of dedication will arise.
4. Section 31 of the 1980 Act provides that any presumption of dedication arising from public use will be rebutted if the landowner can prove that they demonstrated sufficiently a lack of intention to dedicate during the relevant period. Section 31(6) provides a statutory means of demonstrating such lack of intention by depositing with the highway authority a map and statement acknowledging any public rights which are accepted to exist, and stating a lack intention to dedicate any further rights.
5. On 7 April 2009 the RSPB, as landowner, deposited a statement and map with KCC pursuant to section 31(6). This was followed up on 16 January 2018 with a further statement and map, and on 25 January 2018 with a statutory declaration. The effect of lodging the statement and map in April 2009 was to rebut any presumption of dedication that would otherwise have arisen and the subsequent deposits have continued this protection.
6. Thus no presumption of dedication can arise for the period 1997 to 2017 because the use was not undertaken as of right and furthermore any presumption that would arise is rebutted by reason of the landowner having sufficiently demonstrated a lack of intention to dedicate.

*Claimed use by the public for the period 1989 to 2009*

1. Having concluded that no presumption of dedication arises for the period ending in 2017 it is necessary to consider other possible dates of challenge and the evidence of use in the preceding 20 years. 2009 was the date of the first section 31(6) deposit made by the landowner which operated to bring into question the right of the public to use the route. On this basis the period for consideration is 1989 to 2009.
2. I have accepted that use of the appeal route was made permissive in 1985. Consequently no use after that date can be relied upon to support a presumption of dedication.

*Claimed use by the public for the period 1965 to 1985*

1. The final period for consideration is the twenty years preceding the setting out by the RSPB in 1985 of the appeal route as part of the network of permissive paths through Bossenden Wood.
2. This period pre-dates the permissive regime and the section 31(6) deposits; hence the issues to be considered are the sufficiency of the user evidence and whether there is any other evidence of lack of intention to dedicate on the part of the landowner.
3. Only two witnesses give evidence of use from 1965 or earlier and one of these refers to that use being monthly in the early years. One witness refers to use from 1970 and two more from the mid-1970s. That is the extent of the evidence of use for this period.
4. For a presumption of dedication to arise section 31 of the 1980 Act requires that the route must have ‘been actually enjoyed by the public as of right and without interruption for a full period of twenty years’. The evidence of public use of the appeal route throughout the period 1965 to 1985 is very modest and, certainly for the early part of the period, is insufficient to support even a reasonable allegation that the claimed public right of way subsists.

*Common Law*

1. Finally it is necessary to consider whether there is evidence of express or implied dedication at common law by a competent landowner, and acceptance of dedication by the public.
2. There is no evidence of the landowner having expressly dedicated the appeal route.
3. For an implication of dedication to arise at common law mere use by the public is not necessarily sufficient. There must be evidence from which an inference can be drawn properly that the landowner intended to dedicate the route for use by the public. In this case the landowner has, by its actions demonstrated consistently since 1985 that it did not intend the appeal route to be dedicated. For the period prior to that the evidence of use is wholly insufficient to support an inference of dedication.

**Other matters**

1. The appellant makes reference to the fact that the appeal route does not appear on the 3rd Edition OS map (1907-1923) and states that a professional archaeologist has commented that the fact that it was not depicted on the map is not evidence that the route did not exist at that time. I do not have before me any evidence from the archaeologist referred to, however I place little if any weight on the absence of the appeal route from this map. I have commented previously that the presence of the route on the map would, in any event, be no evidence of its status.
2. The appellant raises as a ground of appeal the fact that the landowner did not challenge pedestrian users of the appeal route and that the route was not closed periodically. Whilst challenge to users and periodic closure can operate to prevent a presumption of dedication arising, in this case there was no need for either as the landowner had undertaken other steps sufficient to achieve the same outcome. Indeed it would have been perverse for the landowner to make permissive access available and then to challenge those taking advantage of that permission
3. The appellant also suggests that KCC should have checked the Finance Act map at the National Archives. The authority has adequately explained why it did not do so. In any event it is for the appellant to provide evidence to support its case and could have pursued this line of enquiry had he chosen to do so.
4. The appellant further suggests that the historical interest of the site is a reason for the appeal to succeed. The legal framework for dealing with a definitive map modification order has been explained above. The exercise is to establish whether the evidence shows that the appeal route has already acquired the claimed status. Issues of desirability are not material to the exercise.

**Summary and conclusions**

1. As I have noted above, in order to justify the making of a definitive map modification order to add a public right of way under sub-section 53(3)(c)(i) of the 1981 Act it is necessary only to provide sufficient evidence to ‘reasonably allege’ the existence of a public path.
2. Here, there is credible evidence of use from 31 people who claim to have used the appeal route at various times and for varying periods with differing degrees of frequency. The evidence however demonstrates that since 1985 such use has been permissive, and thus not as of right. Furthermore by a series of section 31(6) deposits from 2009 onwards the landowner has demonstrated a lack of intention to dedicate so as to rebut any presumption of dedication that would otherwise arise.
3. The evidence of use prior to 1985 is insufficient to meet the requirements of section 31 of the 1980 Act
4. There is no credible evidence to support a reasonable allegation of common law dedication.
5. I have noted at paragraph 11 above the guidance from the Courts applicable when deciding whether an order should be made. In this case there is no conflict of evidence as the user evidence appears unchallenged and the actions of the landowner in creating a permissive route are endorsed by the appellant. The issue to be decided is the application of the appropriate legal principles to that evidence. For the reasons given my conclusion is that the evidence does not give rise to even a reasonable allegation that the appeal route subsists as a public footpath.

Conclusion

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

Formal Decision

1. The appeal is dismissed.
2. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Nigel Farthing

**Inspector**