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| **Appeal Decision** |
| **by Ian Radcliffe BSc(Hons) MRTPI MCIEH DMS** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 12 May 2023** |

**Appeal Ref: FPS/D0840/14A/3**

* 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 Cornwall Council (‘the Council’) not to make an Order under section 53 (2) of that Act.

* The application dated 13 August 2010 was refused by the Council on 13 April 2022.
* The Appellant claims that the definitive map and statement of public rights of way

should be modified by adding a footpath as shown on the plan appended as Appendix A to this decision; that is, from point A (GR SW 4224/2464) to an unrecorded track south-south-west of Choone Farm GR SW 4241/2461 (point B); from point B to footpath 52 St Buryan GR 4314/2448 (point C).

**Summary of Decision: The Appeal is allowed.**

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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 with this case.
2. The appeal concerns an application made by Adriana McClary and Michelle McClary (‘the appellants’) to add a public footpath. In reaching my decision I have taken into account the submissions from the appellants, the Council, Cornwall Ramblers and the owners of the land across which the claimed footpath passes.

Main Issue

1. The main issue in this appeal is whether there has been a discovery of evidence sufficient to engage the terms of section 53(3) of the 1981 Act.

Legal Framework

1. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (‘DMS’) under continuous review, and to modify them upon the occurrence of specific events cited in section 53(3).
2. Section 53(3)(c)(i) of the 1981 Act specifies 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 the area to which the map relates. The DMS is a minimum record of public rights and does not preclude the existence of other rights that are currently unrecorded.
3. It is the discovery of evidence by the surveying authority which engages the provisions of section 53 (3) of the 1981 Act and the ‘events’ specified in section 53 (3) (c) of the Act. Evidence can be discovered by the surveying authority or that evidence can be discovered by a third party (such as the appellants) and provided to the surveying authority for its consideration. In *R v SSE ex parte* *Simms and Burrows* [1990]*, Mayhew v SSE* [1992] [1993]*, Kotarski v SSEFRA & Devon CC* [2010] *and Roxlena Ltd, R(On the Application Of) v Cumbria County Council* [2019]*,*the Courts have examined what the ‘discovery of evidence’ entails.
4. If the surveying authority have ‘discovered’ evidence, then the question arises as to whether it can be concluded that a public right of way subsists or can be reasonably alleged to subsist.
5. As made clear by the High Court in *R v SSE ex parte Bagshaw and Norton* [1994] (‘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. If either of the tests is met Bagshaw and Norton held that a Definitive Map Modification Order (DMMO) should be made.
2. In relation to Test B, the Court of Appeal recognised in the case of *R v SSW ex parte Emery* [1996,1998] (‘Emery’) that there may be instances where conflicting evidence was presented at the schedule 14 stage. In Emery, Roche L J 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*."
3. Limited documentary evidence has been submitted by Cornwall Ramblers in support of the appellants’ contention of the existence of the claimed public right of way which is the subject of this appeal. The evidence in this case primarily relates to use.

Reasons

1. The appeal concerns a claimed route shown on the plan in Appendix A. The route starts on a classified road C157 (point A) and crosses agricultural land to the south of Choone Farm and its vehicular access (point B) before joining footpath 52/1 St Buryan at its junction with footpath 52/2 (point C) some distance further to the east. In so doing the route crosses land owned by Mr & Mrs Care of Choone Farm and Tregothnan Estate. The owners of Choone Farm objected to the application to add the footpath to the definitive map whilst the Tregothnan Estate did not.

*Documentary evidence*

1. St Buryan footpath 52 starts at the classified road B3315 and terminates to the west at Furnace Cottage by Choone Farm without providing any onward connection to the highway.
2. The current access to Choone Farm connects the property to the C157 road to the south-west. The 1840 Tithe Map and the OS Maps though from their first inception through to the 1961 edition show that the Choone Farm access to the C157 was to the west in the direction of Moorcroft Cottages and the C157 roadside stone cross. This access followed a line to the north of, and parallel to, appeal route section A-B.
3. The plans and documentation created under the Finance Act 1910 provided by Cornwall Ramblers show that what was at that time referred to as Choone rather than Choone Farm was located within Hereditament 37 where a deduction was made for a public right of way. As the only route across this hereditament was the western access to Choone this is good evidence that it was considered at that time to be a public right of way. This is supported by the book ‘Walks in West Cornwall’ first published in 1962 which contains a route that continues past the end of St Buryan footpath 52 through the yard at Choone Farm and along the farm access to connect with the road that leads to St Buryan.
4. At some time after 1962 this access was closed and the new access to the south-west was opened. ‘O*nce a highway always a highway’* is a legal maxim though that applies even when a route has not been in route for many years. However, I have no evidence from users of the original alignment and that claim has not been made.
5. The claimed footpath route between points A and B is said by the current owner of Choone Farm to have been created at the time that the farm was renovated around 1979 to allow a member of the family to walk to and from work. As a result, there is no documentary evidence of the claimed route prior to that year. The view of the appellants and Cornwall Ramblers is that the route was effectively a permissive path created to divert walkers to the south of Choone Farm so that they no longer followed the route of the closed western farm access and walked through its yard. A Council report on the claimed route identifies stone stiles including in the vicinity of points A, B and C.
6. The claimed route, other than for a slight southerly deviation between points B and C across agricultural fields, is contained within a book ‘Mermaid to Merrymaid – Journey to the Stones’ that was first published in 1987. Taking into account its second edition published in 1996, it is estimated that 20,000 copies of this guidebook were sold. The claimed route was considered by the author of the book to be a public footpath and it was widely promoted as such in his publication to those attracted to walk in the area. However, by itself this does not show that the claimed route is a public right of way.
7. Aerial photographs taken in 1988, 2000 and 2005 fail to show any sign of the claimed route. If the route had been regularly walked it is reasonable to expect that the route would be at least partly visible.
8. On the basis of the documentary evidence, I find that it is reasonable to conclude that the claimed route may well have been created to divert walkers around the buildings at Choone Farm, whilst also allowing a family member to walk to and from work. It may be understood by some that the claimed route was permissive, which means that permission for its use could be removed. However, I have no evidence before me that those submitting user evidence understood this to be the case.

*User evidence*

1. In circumstances where evidence of long use has been submitted, the provisions of section 31 of the Highway Act 1980 (‘the 1980 Act’) are relevant. The tests to be considered under this section are:
2. the date on which the claimed right to use the route was brought into question;
3. whether the route was used by the public as of right and without interruption for a period of not less than 20 years ending on the date on which their right to do so was brought into question; and,
4. whether there is sufficient evidence that there was during this 20 year period no intention to dedicate the claimed footpath.
5. On the basis that verbal notice was given that the path was not open to the public in May 2010 this is the earliest date when the public right to use the path was first brought into question. The relevant twenty year period of use by members of the public therefore runs from May 1990 to May 2010.
6. In support of the application twelve user evidence forms were submitted. Half of the users live at an address close to the start of the application route and five of the remaining users live in Germany. The majority of these users are related. Some of the users who resided locally state that they used the claimed route so frequently that they were unable to state how many times a year they used it. Other local users gave a frequency of between ten and three hundred and sixty five times a year. In relation to the users who reside in Germany, the Council relays that they stated that they only used the claimed route when on holiday. The evidence of four users indicates that the route had been in regular use from 1990 to 2010. Collectively, the remaining user evidence indicates that the route was in use from 1984 to 2010.
7. The number of user evidence forms is low. However, this must be viewed in context. As the surrounding area is sparsely populated regular local users would be few in number and those who have been drawn to walk the route as a result of its inclusion in the guidebook [18] are unlikely to have been captured by the user evidence forms. Given that 20,000 copies of the guidebook have been sold, it is reasonable to assume over the relevant period that even if only a small percentage of its readers walked the claimed route this would equate to a notable number of people.
8. The evidence is that use of the claimed route during the relevant 20 year period was carried out openly, did not involve force and was uninterrupted. No challenges by landowners to use of the claimed route by users, whether verbal, in the form of signs or by way of civil action for trespass prior to May 2010 have been reported. Whilst obstructions were reported in the user evidence forms there is no substantive evidence that they were put in place during the relevant period. Furthermore, there is no evidence that during that period any landowner expressed an intention not to dedicate the claimed route as a public footpath.
9. Taking all these matters into account, I am therefore satisfied that the user evidence is supportive of the claimed route being a right of way. As noted earlier there is a potential conflict in evidence regarding whether use may be permissive but, on balance, use was not with explicit permission from the landowner.

**Conclusion**

1. For the reasons given above in relation to the documentary and user evidence I conclude that it is reasonable to allege that the claimed route is a right of way. As a result, an order should be made to add it to the definitive map. There is some conflicting evidence regarding the appeal route between points B and C as in the guide book the route between these points wanders southwards rather than following a straight line. However, the evidence directly before me of the used route is the alignment B to C.
2. Having regard to these and all other matters raised in the written representations the appeal should therefore be allowed in respect of the claimed route.

**Formal Decision**

1. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, Cornwall Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by adding a footpath as requested by the application dated 13 August 2010.
2. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Ian Radcliffe

Inspector

APPENDIX A

