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| **Order Decision** |
| Hearing held on 22 August 2022  Site visits made on 21 and 22 August 2023 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 5 February 2025** |

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| **Order Ref: ROW/3295334M** |
| * This Order is made under Section 53(3)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The East Sussex (Public Footpath Kingston near Lewes 21) Definitive Map Modification Order 2021. |
| * The Order is dated 24 September 2021 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding a footpath between Ashcombe Lane to the south-western terminal point of public footpath Lewes 37, as shown on the Order Map and described in the Order Schedule. |
| * There were 4 objections outstanding when East Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is not confirmed** |
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Procedural Matters

1. This decision should be read in conjunction with the Interim Order Decision (‘ID’) dated 29 February 2024, with the numbers in square brackets [ ] representing the paragraph in the ID. The ID proposed to confirm the Order with modifications to the alignment of the Order route.
2. Two duly made objections were received to the proposed modifications. In addition, representations were received from the Order making authority (OMA), from the Parish Council and from the applicant who supported confirmation of the Order subject to further modifications.

The Main Issues

1. The principal objectors (the Objectors) have raised four matters by way of objection to the proposed modification of the Order.
2. First, notwithstanding the concession made at the hearing, the Objectors argue that the requirement for the discovery of evidence is not met and, on that basis, there is no jurisdiction for a modification order to be made. The Objectors appear to accept that the Wiston Estate Terrier (the Terrier) had not been considered previously but argue that it is of no probative value and therefore should not be considered to be ‘evidence’ within the requirements of Section 53(3)(c) of the 1981 Act.
3. Second, the Objectors argue that there is no evidence that the requirement contained in section 10 of the General Inclosure Act 1801(the 1801 Act) for any footpath to be ‘set out’ was complied with and that in consequence the public right of way never came into being.
4. Third, it is said that the modification to the Order route proposed by the ID is of such substance that it does not constitute a modification of the Order route but ‘an almost completely new route’. It is argued that this is beyond the modification power of an inspector at this stage of the process and would require a new application for a Definitive Map Modification Order (DMMO) to be made.
5. Fourth, it is argued that the evidence does not support the alignment of the Order route proposed by the ID and, furthermore, that the evidence is insufficient to allow any route to be identified with the level of precision required, even having regard to the latitude provided by the judgment of Sir George Newman in *Perkins* set out in para [34] of the ID.

Reasons

*Discovery of evidence*

1. Section 53(3)(c) of the 1981 Act requires that there should be ‘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’.
2. The evidence which is discovered is not required to be determinative of the issue; the section states specifically that it should be considered along with ’all other relevant evidence available’. The discovered evidence must. however, be relevant to the issue, and I accept the categorisation used by the Objectors that it must have ‘probative value’.
3. The Objectors argue that because the status of the Order route is derived from The Kingston and Iford Inclosure Act and Map 1830 (the Award), evidence which predates the Award cannot assist in determining the existence of the claimed public footpath. The Terrier appears to date from between 1750 and 1761 and thus, it is argued, cannot have any probative value in this exercise. I accept this argument in relation to the creation of the right of way however, as the Objectors identify, the 1801 Act requires the right of way should be both ‘set out and appointed’.
4. One of the Objectors’ arguments, which I deal with below, is that the Order route was not ‘set out’ in the sense of being physically established on the ground. The Terrier suggests that the Order route (or one very similar) was in existence some 70 or 80 years prior to the Award. If this had been a pre-existing public right of way it would have been extinguished by the Award if not specifically preserved by it. If the effect of the Award was to preserve an established public right of way, there would have been no need for the Order route to have been physically set out thereafter. To the extent that the Terrier is some evidence of the prior existence of a footpath possibly replicating the Order route, I find that it is relevant and of probative value in a decision as to whether the Order should be confirmed.

Whether the Order route was ‘set out’.

1. Section 10 of the 1801 Act empowered the Commissioners to ‘set out and appoint such………. Footways……….as he or they shall think requisite.’ The Objectors explore the precise meaning of this requirement in the case of a footpath and conclude that setting out must have involved some physical delineation of the route. In the case of a newly created public footpath, I would accept the logic of this argument. However, in a case where the Award is effectively preserving an existing and established footpath, no physical setting out would have been necessary.
2. The Terrier is evidence that a physical route, in the close vicinity of the Order route, did exist for a significant number of years prior to the Award. It is necessary to consider whether, on a balance of probabilities, the route depicted by the Terrier was the same as the Order route. The logic of the previous paragraph will apply only if the Terrier route and the Order route were one and the same.
3. The Terrier is described in the ID [16] to [20]. It is not drawn to scale and contains no measurements. The depiction is compressed, and the orientation is problematic. It is described as at best indicative. However, it does contain a representation of the strip pattern of land occupation which can be correlated with the pattern depicted on the Kingston Parish and Calculations map (the Calculations map). It depicts a route from Ashcombe Lane towards Lewis in the same manner as the Order route. It is entirely possible that the route depicted was identical to the Order route.
4. The Objectors state that there is no evidence that the Order route was set out; indeed, they go further and assert there is positive evidence that it was not. The evidence referred to relates to two flint walls which it is said straddle the route of Footpath 7 to the west of Ashcombe Lane. These walls are said to have been in existence since prior to 1830 when the Award was made. The Order route is part only of Footpath 7 and does not include the section west of Ashcombe Lane where the flint walls stood. I recognise the walls would be an issue for consideration if the Order route extended to this leg of Footpath 7, but that is not the case. If I were to consider the evidence relating to sections of Footpath 7 which are not within the Order route, I would have to consider also the fact that the north-eastern leg of Footpath 7 (again not part of the Order route) has been recorded on the DMS as a public footpath, apparently in reliance upon the evidence of the Award. Accordingly, I do not accept that there is any evidence which would have prevented the Order route from being set out.
5. As to whether there is any evidence that the Order route was in fact ‘set out’, in terms of being physically identified on the ground, paragraph [14] of the ID highlights the fact that there is no extant physical evidence of the Order route, and no map post-dating the Award which depicts it. The Objectors rely upon this as support for an argument that the Order route was never set out. An alternative explanation could be that prior to inclosure, Footpath 7 served a valuable purpose and was preserved by the Award in the expectation that it would continue to be useful. For whatever reason, perhaps as a result of changes to land ownership and use following inclosure, the Order route quickly fell into disuse and was effectively forgotten.
6. I have to consider the evidence upon a balance of probabilities. I must attach significant weight to the evidence of the Award. I must therefore start from the premise that the intention of the commissioners was to provide a public footpath of which the Order route is the central section. It must follow that the commissioners believed the footpath would serve a valuable purpose, and the logical reason for this is that the footpath was already in existence and in use. It would however seem that the commissioners were wrong, and that after the changes brought about by the Award, the footpath was for some reason either not needed or not wanted. However, having regard to the evidence of the Terrier, and the Calculations map, I am satisfied, upon a balance of probability that the pre-existing route was that which the Award sought to preserve and for this reason I do not accept that physical setting out would have been required after the Award.

Extent of proposed modification

1. The Objectors assert that the modification proposed by the ID ‘is not a modification of the original route but an almost completely new route’. It is accepted that the changes to the alignment of the Order route proposed by the ID would result in the original route and the modified route coinciding at two points only, where the two alternatives cross one another. However, it is apparent that a single exercise is being undertaken, namely an attempt to identify on the ground the route described by the Award as Footpath 7. There is only a single route at issue. The fact that there is no agreement about the correct alignment does not, in my judgment, result in different routes being considered, rather different interpretations of a single route.

Merits of the proposed modification

1. The Objectors make a valid point about the modification of the Order route so as to connect to the western terminus of FP37 Lewes (FP37). They argue, correctly in my opinion, that the alignment of the Order route must be determined on the relevant evidence available. What is being interpreted is the 1830 Award and it would not be appropriate to rely upon the current DMS depiction (as amended) of FP37 to establish the eastern terminus of the Order route. Thus, whilst indisputably the Order route and FP37 are two parts of the single route set out in the Award, the DMS recording of FP 37 (as amended) is not conclusive as to the eastern terminus of the Order route. This is the case even though, as the Objectors rightly point out, this could lead to a result where the Order route were recorded in a position where it does not connect to FP 37, resulting in the absurd situation of two cul-de-sac routes.
2. In response to the ID, the Objectors have provided further detail about the exercise carried out by their surveyor to produce the Appendix 4 map, which I relied upon in proposing modifications to the Order. It is apparent that this map is derived solely from the Award map.
3. The Objectors’ surveyor has now produced a further overlay, based solely upon the Calculations map. I shall refer to this as the Rev A map or route. This results in a route which is ‘significantly different’ to the Appendix 4 route. The Rev A route is positioned approximately 10m to the north of the Appendix 4 route, although at its greatest the disparity between the two routes is said to be 17.2m.
4. The surveyor was asked which of these two routes should be preferred. His response was “*The question of what route to consider correct would be based on the perceived merit of the mapping used, as the overlays are simply fitting these plans to the current OS mapping. So the question to be asked is what map is more reliable. The Kingston Parish and Calculations Map certainly appears to be more detailed and of finer quality”*. The response was however qualified in the following terms “*If a choice of the 2 routes need to be [made], I would suggest further research into the origins of the plans would be needed and the choice be based on the merits of these maps*.”
5. I am not aware that any further research has been undertaken but the Objectors argue that the Rev A map should be preferred to the Appendix 4 map because it is derived from a ‘more detailed’ map of ‘finer quality’.
6. If I am to accept this further evidence from the surveyor, which I do, the basis upon which I had proposed to modify the Order is no longer tenable.
7. Paragraphs [29] to [35] of the ID set out the approach to be taken when interpreting historical documentary material, especially old maps. It includes the following extract from the judgment of Sir George Newman in *Perkins*; “*Where, as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes, in my judgment, there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence.”*
8. Paragraphs [41] to [53] of the ID grapple with the question whether the Order route is capable of being reconciled sufficiently with the Inclosure Act route. At paragraph [54] I concluded that “the evidence of the existence of a public footpath is sufficiently compelling to meet the balance of probabilities test”. I proposed a modification to the Order to show the Appendix 4 route (modified to take account of the reassessment of the western terminal point of FP 37 Lewes) and I interpreted this on the Order map to the best of my ability.
9. I have given careful consideration to the objections and representations made in response to the ID and to the further evidence presented. No evidence has been presented which causes me to doubt the weight which I must attach to the Award and it remains the case that it is compelling evidence of the status of the Order route. However, I have revisited my conclusions in relation to the adequacy of the evidence to sufficiently identify the alignment of the Order route.
10. I am mindful of the guidance given by *Perkins.* I recognise the latitude that is available to interpret historic evidence and, in proposing the modification to the Order, I had sought to give effect to this. The premise for that proposal was that the Appendix 4 map is a reasonable ‘best fit’ of the Award route onto current OS mapping. The further expert evidence, which I have accepted, undermines that premise.
11. I have considered whether the correct approach would be to propose a further modification of the Order so as to depict the Rev A route. I have concluded that would not be the appropriate course in this case for the reasons set out below.
12. I have referred to the guidance given in *Perkins* and that there ‘*is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence’.* I have considered the latitude this guidance affords which the ID sought to accommodate. However, the latitude cannot be without limitation; the alignment which is to be recorded on the DMS must be a reasonable representation of the route depicted in the evidence. In deciding what is reasonable it is, in my view, necessary to have regard to the relevant context.
13. At [14] of the ID I referred to the unusual features of the present case where there are no extant physical features demonstrating, or even suggesting, the location of the Order route. There is no representation of the Order route on any map post-dating the Award. This context distinguishes this case from most DMMO applications where some such evidence will be available.
14. I am also mindful that the Order route, however interpreted, passes over a number of different land ownerships and in the vicinity of a number of structures, such that a modest variation in the alignment of the route could have a significant practical impact. Whilst this is not a factor that can be taken into account in establishing the existence of the Order route, it seems to me that it is a factor which is relevant to the latitude which can be applied to the ascertainment of the definitive alignment. Thus, greater latitude might be afforded where the route runs over a single, open field than where it runs through a developed landscape in different ownerships.
15. In this case the evidence before me suggests that the Order route lies somewhere within a relatively wide corridor. The Appendix 4 route is shown substantially to the north of the Order route. The Rev A route is shown further north again. The Order route in turn differs from the route suggested in the application for the DMMO. The corridor to accommodate the various alternatives is wide, I believe in general about 20m but in places more.
16. The western section of this corridor passes through various land ownerships, some developed, some undergoing development. The alignment of the Order route is a matter of very real significance to the owners of these holdings. Extensive attempts have been made to interpret the relevant map evidence, but no consensus has been achieved, and each attempt has brought forth a different result. No single unequivocal point of reference has been established. In all of the circumstances I conclude that, even allowing for the latitude afforded by *Perkins*, the evidence does not allow me, on a balance of probability, to determine the appropriate alignment of the Order route sufficiently to confirm the Order.

**Conclusions**

1. Having regard to the objections and representations made to the proposed modification of the Order, and all other material before me, I conclude that the alignment of the route set out as Footpath 7 in the Award cannot be ascertained with sufficient certainty for the Order to be confirmed.

**Other Matters**

1. Representations have been made as to the value of the Order route as a public footpath giving access from the village to Juggs Lane without having to use Ashcombe Lane which can be very busy and unsafe for pedestrians. Suggestions have been made for the creation of a route achieving this purpose but without following the line of the Order route. I understand the logic and sentiment behind these suggestions, but these are not matters which I can consider. My role is limited to deciding whether or not the Order before me should be confirmed.

**Formal Decision**

1. I do not confirm the Order.

Nigel Farthing

Inspector

