



Appeal Decision

by **Charlotte Ditchburn BSc (Honours) MIPROW**

An Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 18 April 2024

Appeal Ref: ROW/3318077

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 Bath & North East Somerset Council ('the Council') not to make an Order under section 53 (2) of that Act.

The application dated 16 December 2020 was refused by the Council on 7 February 2023.

The Appellant claims that the definitive map and statement of public rights of way should be modified by adding the footpath as shown on the plan appended to this decision.

Summary of Decision: The Appeal is allowed.

Preliminary Matters

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.

The appeal has been determined on the papers submitted.

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 cases of *Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402 [1995] ('Bagshaw and Norton') and *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367 ('Emery').

The original application sought to add a route from the adopted highway from Pepper Shells Lane, through Park Copse to a junction with public footpath BA8/65. The Council stated that the section between points A and B on the Plan formed part of Peppershells Lane, an Unclassified County Road (UCR), which they considered unrecordable on the Definitive Map and Statement (DMS). UCR classification has no legal standing, but it carries some inference that the public may use the highway with vehicles. Therefore, I am considering the full length of the application route in this decision.

Main Issues

The main issue in this case is whether a public right of way subsists or can be reasonably alleged to subsist over the Appeal route.

Legislative Framework

The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the definitive map subsists is dealt with under section 53 of the 1981 Act. 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.

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.

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.*"

Part of the evidence adduced is of claimed use by the public. This requires me to consider the requirements of Section 31(1) of the Highways Act 1980 ('the 1980 Act') which provides that "Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it" and Section 31(2), that "The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice ... or otherwise". The question of dedication may also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance with no set period of user.

Reasons

Documentary Evidence

Ordnance Survey (OS) Maps

OS maps of various scales between 1912 and 1972 show the appeal route approximating to the alignment of the appeal route, showing the physical existence of a route through Park Copse.

OS maps have long carried a disclaimer as regards the routes they show, so do not provide evidence of status but are useful evidence of the physical existence and alignment of the routes recorded at the time. Nevertheless, the inclusion of the route on a series of OS maps, as here, can be useful evidence in helping to determine status when considered together with other evidence. I conclude that alone, the OS maps are of limited value as regards status but show a route capable of use on foot.

Definitive Map Records

The Council have confirmed that the application route was not included on the original definitive map and no evidence has been found of its inclusion on any draft maps, statements or surveys.

Statutory Dedication

When was use of the claimed route called into question?

Section 31(6) of the 1980 Act allows an owner to indicate any ways over the land which are dedicated as highways by the deposit of a map and statement with the authority responsible for maintaining the DMS. Where such a deposit has been made, declarations made by the owner or their successors in title and lodged by them with the council within the relevant period from the date of the deposit to the effect that no additional way has been dedicated are, in the absence of proof of a contrary intention, sufficient evidence to negate the intention of the owner or their successors in title to dedicate any such additional way as a highway.

A deposit under the 1980 Act dated 20 November 2012 was submitted to the Council. This related to all of the land crossed by the Definitive Map Modification Order application route except for the section from Point A to Point B and was submitted by its owner. The deposit stated that the appeal route was not admitted as an existing public right of way.

A declaration under the 1980 Act dated 15 October 2021 was subsequently submitted by the owner. This stated that no additional ways had been dedicated over the land within the 2012 deposit.

The deposit and declaration were both in the required form and were signed and dated. As a result, together they initially provided protection from the acquisition of public rights over the land for ten years from the date of the deposit. That protection was then extended to twenty years by statutory provisions which came into effect on 1 October 2013. These documents consequently provide sufficient proof that no ways were dedicated over the land concerned over the period 20 November 2012 to 15 October 2021.

A deposit made under section 31(6) may be taken as a date that public use of a route was called into question. Order Making Authorities are required to keep a register of section 31(6) declarations; accordingly, they are in the public domain, such that at least some users of a claimed way may become aware that their use is being challenged. The November 2012 deposit consequently brought such use into question, with a resulting statutory twenty-year period of 1992-2012 arising for consideration of the section of the application route which crossed the land covered by the deposit. As there is no earlier date of challenge, this relevant period is applicable for the entire route including the section from points A to B.

User evidence

The User Evidence Forms (UEFs) and emails with evidence of use show that 21 users claim to have used the route on foot for some part or the whole of the relevant period. The frequency of use varies from regular, being weekly or more often, to occasional, with one witness referring to two or three times a year and one stating use approximately six times over a 40 year period. No one recalls being challenged or given

permission to use the appeal route. Use appears to have been open without secrecy or force. 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.

The Council argue that there is insufficient evidence to demonstrate that the appeal route has been dedicated as a public right of way either under section 31(1) of the 1980 Act or at common law as they are not satisfied that the appeal route could be unambiguously identified.

The nature of the area through which the appeal route runs means that a lay person is unlikely to be able to plot the route precisely. The appeal route runs through a wooded area, with no known points of reference, it is not unreasonable for the UEF maps to deviate from the route walked on the ground that the users intended to claim. Taking the evidence as a whole, with the descriptions of the route and evidence from the consultation and follow up telephone calls made by the Council, it is reasonable that the application map was drawn at 'best guess', it would be unjust to require a standard that would be impossible to meet. As per the *Emery* case, the Schedule 14 procedure is preliminary and separate from the Schedule 15 procedure where conflicting evidence can be heard, and evidence determined following a public inquiry. At this stage I must consider whether it is reasonable to allege the path exists. Although the maps attached to the UEFs do not reflect the precise alignment of the appeal route, I am satisfied that users were using the same alignment not wandering beyond the appeal route. Therefore, there is a single defined way, albeit difficult to accurately depict on a map, and I conclude it is still reasonable to allege the route subsists.

Landowner Evidence

The landowner provided a landowner evidence form, accompanied by written statements from five local residents. The landowner mentions use by horse riders and cyclists (BMX riders) but does not provide any further details regarding numbers or frequency of use.

The landowner states to have routinely challenged anyone using the appeal route but cannot provide any specific dates of this other than on one occasion. A local resident involved with the Woollard Shoot submits that they turned people back, but they are unable to provide further details about who they were or when this took place.

The landowner submits that a gate was present at point B on the Plan in 1971, that a new gate was installed at the same location in the mid-1970s which remained in situ until the early 1980s and that another gate was erected at some point after 2004. One of the local residents states that barriers were repeatedly erected and removed over the years. The Landowner states that a row of Rolled Steel Joists (RSJs) were inserted vertically into the ground at this same location, but they disappeared in the earlier 2000s. Three of the local residents recall the RSJs being present in the past.

The landowner does not regard the appeal route as a public right of way and has not tolerated use by the general public. Statutory declarations under Section 31(6) of the 1980 Act were deposited with the Council in 2012 and 2021, they cannot act retrospectively and so do not demonstrate a lack of intention to dedicate during the relevant period.

Furthermore, the identified evidence above suggesting a lack of landowner acquiescence in the public use of the route prior to the 2012 deposit additionally

suggests that there may be insufficient evidence of acquiescence on the part of the landowners for the dedication of section B-D at common law.

Obstructions

A number of users refer to a gate in their UEFs prior to 2020 but the Council clarified during telephone interviews that they were actually referring to a kissing gate on public footpath BA8/65. None of the users recall gates or other obstructions preventing access prior to 2020 which is beyond the relevant period.

Notices

A notice is present on the appeal route which is said to have been erected in 1980. The route is signed "private shoot keep out" the sign is said to have been legible until some point between 1999 and 2003.

I need to consider how this notice would have been understood by members of the public. The sign does not make it clear that there was no intention to dedicate a public right of way. Reference to 'private' does not preclude the existence of public rights and many rights of way cross private land. By referring to a shoot, the notice may be interpreted by users as being directed towards use during times of private shoots over the land.

Five of the users recall the metal sign but none recall it being legible and no other users recall seeing the metal sign.

Conclusions on the User Evidence

The user evidence indicates use by the public as of right, without challenge, secrecy, force, permission, or interruption for a period of forty-five years between 1967 and 2022 on foot. This is contested by the landowner who says that public use was limited, that they challenged use and have taken action to prevent dedication of public rights since 2012. I have considered above that the notice did not explicitly state there was no public right of way.

Even if these events were found to have called use of the appeal route into question, there is evidence of enjoyment by the public dating back to 1967 which could be sufficient to raise a presumption of dedication for most of the claimed challenges.

The disputes regarding challenges, intention of the notices and depicted alignment of the appeal route cannot be resolved from the written submissions before me. A significant amount of user evidence is provided in support of the appeal route, which at face value appears credible. There is no incontrovertible evidence to demonstrate a lack of intention to dedicate by the landowners.

Overall Conclusions

The documentary evidence is not sufficient alone, but I find that the user evidence meets the Section 31 test. Therefore, there is no need to consider the user evidence in terms of common law.

Having regard to the above, I find there to be conflict in the user evidence with regards to alignment, but the evidence produced by the claimant together with all the other evidence available show that there is sufficient evidence of use. In my judgement the evidence suffices to support the rights for footpath status. Therefore, an Order should be made on the grounds that a right of way can be reasonably alleged to subsist. If

objections are made there would be an opportunity for the conflicting evidence to be tested more thoroughly and the issues determined at an inquiry.

Conclusions

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

Formal Decision

In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Bath & North East Somerset Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add the public footpath proposed in the application dated 16 December 2020 and shown on the plan appended to this decision.

This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Charlotte Ditchburn

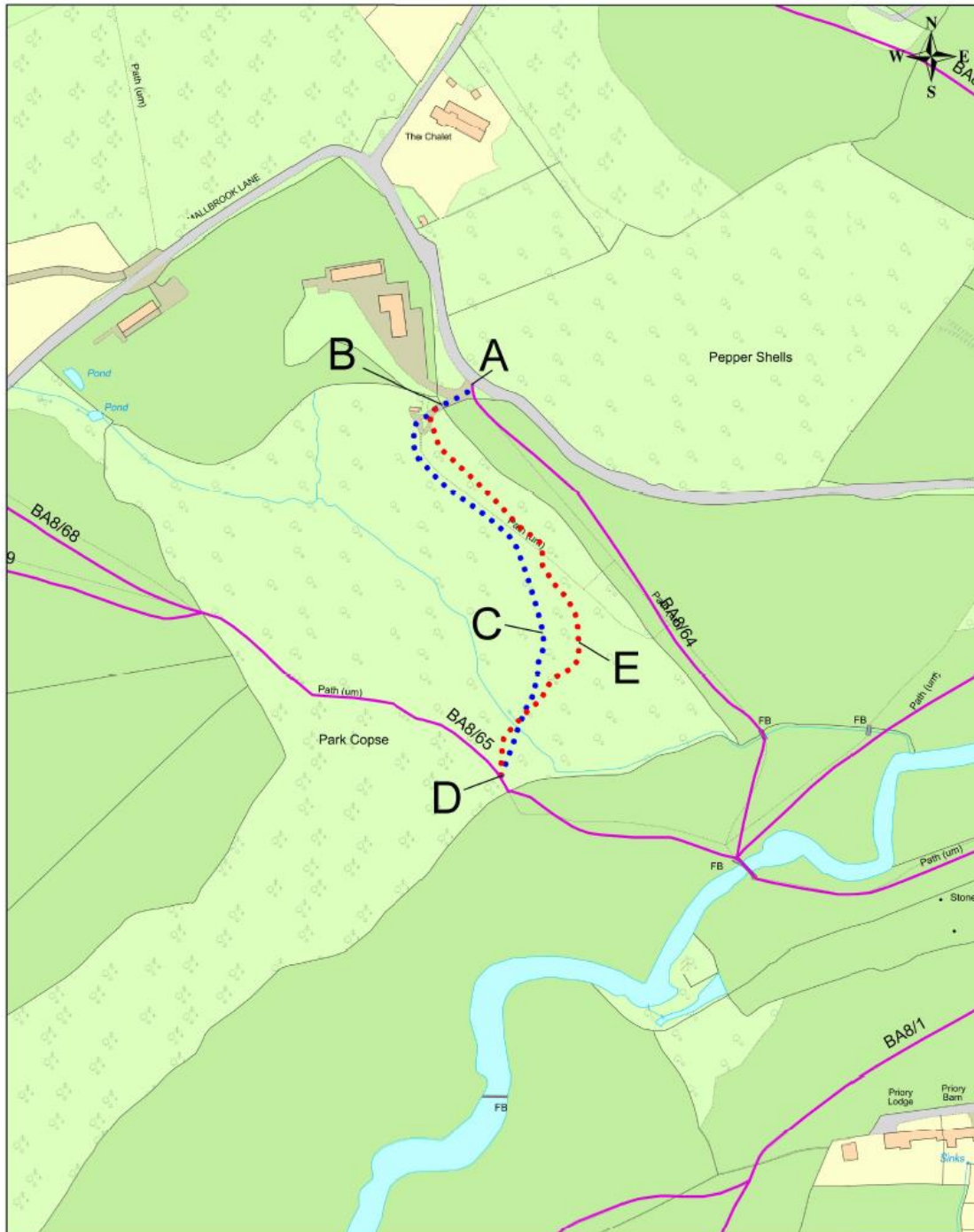
Inspector

Plan

Application Route A B C D
Alternative Route B E D
Unaffected public footpath

Scale 1:2500

OMA4
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