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Stephen Kisko
Definitive Map Officer
East Sussex County Council

By email only to: stephen.kisko@eastsussex.gov.uk

Our ref NB/MT/977516/1
Your ref
Date 19 April 2018

Dear Mr Kisko

Wildlife and Countryside Act 1981 s53
Claimed Public Right of Way (Bridleway) at Barcombe Mills/Hayes Lane
Our client: Mr Leonard Leeson

We write in relation to the above application for the existence of a Bridleway, and are instructed to object to the application. We confirm that our client is the owner of land registered at the Land Registry under title numbers ESX25721 and ESX109335, both of which are affected by the application.

Whilst our client objects to any Order being made which would see recognition of the route as a Bridleway, he asks us to confirm that he accepts that the route is well used as a footpath.

Legal Test
Under s53 Wildlife and Countryside Act 1981 ('the 1981 Act') the Council is obliged to make an Order where a new right of way has been created, being a right of way such that the land over which the right subsists is a public path. Under s66 of the 1981 Act 'public path' means a highway being either a footpath or a Bridleway.

Common law provides for the evidence to show that it can be inferred that the land owner intended, at some point, to dedicate public footpath rights and the public, by using the routes, accepted that dedication. s31 of the Highways Act 1980 ('the 1980 Act') provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is presumed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. This provision reverses the burden of proof, but does not affect the fundamental point that there must be use of a sufficient degree in order to make an Order.

It is important to consider whether the evidence shows that there was sufficient use by people whom the owner would have recognised as purporting to use the route 'as of right'. It is recognised that if the use is of a period of less than 20 years, it is possible to draw an inference if the quality and depth of the evidence is apparent.

Importantly, the route claimed here is a Bridleway; under s66(1) of the 1981 Act that includes "*a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway*". Under s30(1) of the Countryside Act 1968 any member of the public has a right to ride a bicycle on any Bridleway; however, s66(3) of the 1981 Act explicitly states that the provisions of s30(1) of the 1968 Act shall not affect the definition of Bridleway in s66(1) of the 1981 Act which is to be

used for the purpose of deciding whether a Bridleway has come into existence. It is submitted therefore that, whilst under the 1968 Act a bicycle can be ridden on a Bridleway, the 1981 Act means that use of a route by the public with bicycles is not relevant to any question as to whether that route has been or should be inferred to have been dedicated as a Bridleway. A Bridleway can only be dedicated where the public has enjoyed use of it on or with a horse (as defined in the legislation).

You should therefore ignore all evidence of use by bicycle or on foot.

Enjoyed as of right and without interruption
To be as of right the use must have been open, without force, without secrecy and without permission:

1. Our client moved to Barcombe House in July 2005. Since then, he has challenged several people who have travelled along the route without right or permission by horse, asking them not to use it and informing them that it is a private lane; this has occurred on about 5 occasions over the last few years. Mr Leeson has spoken to horse riders when challenging their use that the lane is a private road, owned by himself, and asked them to refrain from using it in the future.
2. Our client has also erected several notices to make it clear that the route is private. The notices have included unequivocal wording to the route as a “Private Road”. The notices have been located at the start of the lane leading up to our client’s house from the Mills, and have been erected for up to 13 years; this is supported by Jane Cleaver who says that signs near Barcombe House have been there 'for years'. Some of the notices erected by our client have either been vandalised or stolen; as a result there have been periods when no notice was present because it had been stolen and before a replacement had been erected, which would explain why some of the user evidence refers to there being no signs. There may also have been periods when the notice was insufficiently clear because it had been vandalised. The signs are now on metal poles set into concrete and warn off improper use from both directions. However the fact that one user noticed the signs as being there for ‘many years’ is indicative that the signs were in situ for substantial periods.
3. Gates were installed by the Environment Agency. Those gates were locked by the Environment Agency in May 2017 until October 2017. Several of the user statements refer to the gates, including Lucy Kalogerides’.

The locking of the gates unequivocally brought into question the right of the public to use the route such that if it is relevant, the 20 year period runs back from May 2017 to May 1997.

The evidence before the Council
Although several statements have been submitted as to the use of the route, several factors cast doubt on the strength of the claim. As you know, an earlier application included various user statements, but these were not in the Council’s preferred format, making it difficult to draw any conclusions as to their probative value.

Of the 26 people who have submitted statements in respect of the current claim, only 9 have ever used the route on horseback. Of those, only 3 appear to have potentially used the route for in excess of 20 years:

i) The applicant claims to have used it, first bi-weekly and then monthly.
ii) Ms Kalogekides used it 6 times a year for a short period. This is very infrequent
iii) Ms Priest says she has known the route for 20 years; however, her evidence is not at all clear as to the number of years she has actually <u>used</u> it, and whether on given occasions that use was on horse or bicycle. Also, the plan attached to her evidence does not correctly depict the route, because in addition to the claimed route her plan includes a road to the north of the proposed

route which is shown on the definitive map as being part Restricted Byway and part Footpath; it is not therefore clear whether her evidence as to use relates to the claimed route, or the other route. The infrequency of that use (between monthly and yearly) is insufficient to establish a presumption of dedication.

iv) Ms Simpson's evidence is unclear. She states she has used the route from 1972 to 2018, and that her use was monthly for the first 10 years, and "more latterly approx 6 times per year". It is not clear if Ms Simpson's use has been continual over the 46 year period, or whether there was a break after the first 10 years, given that her reference to 'more latterly' would need to cover a very lengthy period since 1982. Even if the use has been continual over the 46 year period, it is submitted that the frequency of use since 1982 (approximately 6 times per year) is insufficiently regular to establish a presumption of dedication.

This level of use, even taken at face value, is minimal. In short, the best that can be said is that for most of the period, perhaps two or three horses a month were ridden on the route. An owner of the land could not reasonably be expected to have noticed such infrequent use, or to have been in a position to take steps to challenge it.

If one takes into account the original evidence, bearing in mind the lack of complete information, and ignoring those who have made statements for both applications, there is little of consequence added to the above. Ms Bell used it 4 times a year over 2 years; Ms Cornwell claims greater use (a 13 year period, ending in 1990) but is unspecific as to how much equine use (as distinct from footpath use) was involved; Ms Windrum used it weekly for an 8 year period; there was minimal use by Dr Taylor and Ms Whiteman.

Conclusion

The evidence of use is scant and falls well below the threshold which must be met in order for the Council to make a draft Order modifying the map. It does not show a sufficient degree of use over a full 20 year period to bring the presumption into play at all. The evidence as to use is insufficiently clear to enable an inference of dedication to be drawn under the common law.

Further, sufficient evidence exists to demonstrate that the landowner had no intention to dedicate the route during the relevant period, and that on the contrary he took steps to avoid any inference being drawn. The evidence of challenge and of the erection and re-erection of signs indicates that our client was conscious of some level of use, but that he took reasonable and sensible steps to ensure that users were aware that the route was not a public route. It is well established that a single act of interruption is of much more weight than many acts of user (Poole v Huskinson (1843)).

The case of Winterburn v Bennett [2016] EWCA Civ 482 is a recent instance (albeit in the closely related field of 'village green' law) where the Court of Appeal has explained that signage and challenges do not have to be effective in practice to be effective in law. In that case signs were repeatedly taken down by members of the public. The Court approved a dictum from Patten LJ that the trial judge had held that '*the signs* [i.e. the ones in that case, which were simply expressed] *were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?*' Patten LJ held that the owner's case was right. In the Winterburn case David Richards LJ put it thus: *'In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of*

cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land.' The same is true here. Enough has been done to make clear that the owner did not acquiesce in the use of the route.

We would respectfully suggest that the Council should not make a draft Order. Our client should not be put to the substantial cost of objecting to the confirmation of that Order, given the lack of evidence as to user and the clear evidence as to challenge.

Yours sincerely

[redacted]

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