



Appeal Decision

by **Helen Heward BSc (Hons), MRTPI**

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

Decision date: 16 JANUARY 2020

Appeal Ref: FPS/G1440/14A/7

- 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 The East Sussex County Council not to make an Order under Section 53(2) of that Act (the 1981 Act).
- The application dated 24 October 2017 was refused by way of a decision notice dated 28 February 2019.
- The Appellant, Anne Scott, claims that a route should be recorded as a public footpath on the Definitive Map and Statement for the area.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. The route is through the Roebuck Centre, a complex of small business units, in the Old Town of Hastings. The route has four access points. The Council labelled it in three sections: A-B-C, B-D-E and D-F-G. The Appellant disputes some aspects of the Council's referencing. I am satisfied that it provides a fair reflection of the route shown on the application, helpfully labels all of the key junctions and that no one would be prejudiced by me referring to the Council's annotations.

Main issues

2. Section 53(3)(b) of the 1981 Act relates to the situation where there has been "*the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path...*".
3. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows... "*(i) 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, being a right of way to which this Part applies.*"
4. *R v the Secretary of State for the Environment ex parte Norton and Bagshaw, 1994*¹, as clarified in *R v Secretary of State for Wales ex parte Emery, 1997*², sets out that there are two tests in relation to such applications and that an Order should be made. The tests were described as "A" and "B"

A: does a right of way subsist on the balance of probabilities?

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 [1994] 68 P & C.R. 402

² [1998] 4 All ER 367

5. It was also held in *Norton & Bagshaw* that an Order should be made where either of the tests is met. The evidence to establish Test B will be less than that necessary to establish Test A.
6. It was noted in *Emery* 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."

Reasons

Historical mapping and documentary evidence

7. Evidence includes an extract from Grants Map of 1852, a copy of a map of Breeds' Yard 1879–1931 from Anthony Hyde's book *The Breeds of Hastings* and extracts from the Epoch 1 (1863-94), 1872-1878 County series six-inch first edition, Epoch 2 (1897-99), and Epoch 3 (1909-1912). There are also various OS maps from 1895 to 1946 starting with the 1895 OS extract: 1 inch to 1-mile Sheet 320, Hastings (Hills) to the OS national Grid, TQ8209-A (includes Hastings) 1956. These maps and documents indicate that some sections of the route may have been possible and also variously show buildings on parts of the route.
8. Extracts from the National Parks and Access to the Countryside Act 1949 Maps for the area starting with the draft Definitive Rights of Way Map for the County Borough of Hastings (1950's) to Hastings Borough Council Maps_H14-1_2 1974 Definitive Map with Diversions since 1971 Inset Map do not show the route.
9. A Parish and Ramblers Surveys Map (inset for Hastings Town Centre) shows a number of footpaths near to the site but does not show any public rights of way corresponding with the claimed route.
10. Photographs from 1911 and 1948 are inconclusive. An aerial photograph shows a large open area at the southern end of the site where some sections of the claimed route lie. A plan from 1984 may show the configuration of the buildings and spaces much as today and Drawing 3264/12 from a previous planning application clearly indicates gaps which might have been for pedestrians.
11. I do not doubt that the network of passages and twittens in the locality is part of the historic character of the locality. The landowner does not have documentary or historical evidence to support their view. However, all of the historical mapping and documentary evidence of buildings, spaces and possible routes before me does not amount to evidence of a public right of way along the claimed route and is not sufficient to substantiate a claim.

User Evidence

12. Section 31 of the Highways Act 1980 ("the 1980 Act") states that where a way has been enjoyed by the public 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 to dedicate it during that period. The period of 20 years is calculated retrospectively from the date on which the right of the public to use the way is brought into question.

13. It was held in *R (on the application of Godmanchester and Drain) v SSEFRA, 2007*³, that *"Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway."*
14. A copy of an email from the Appellant to the Council advises that the Appellant met the landowner's agent when crossing the site one day in spring/summer 2017 and he advised her that there was no public right of way, whereupon the Appellant disagreed and continued on her way. She made the application shortly after. This gives a relevant 20-year period of 1997-2017.
15. A letter dated January 2018, by a local resident attests to having been challenged by the landowner about 8 years ago when the landowner told them that it was private property and there was no public right of way. This would interrupt the 1997-2017 period and brings into question an earlier period of 1990-2010.
16. The application was accompanied by eight User evidence Forms (UEFs) completed by nine people. All but one claim to have used the route for the claimed 20-year period. One indicates usage for 17 years. The evidence of all but one of the UEFs also provide evidence of usage for the earlier period, although one user comments that they used the route monthly, as opposed to weekly, before 1992.
17. The number of user claims is low in a highly populated urban area. For a site close to the centre and between several destination points this is somewhat surprising. However, one must be cautious about the weight to be attached to attempts to interpret the meaning or significance of a lack of response to a perceived threat to a route. I do not consider that it is the number of users which is the important matter, so much as the amount of use, which also relates to frequency.
18. Most users attest to using the route very frequently; daily or several times a week. The purposes of use of the claimed route can be summarised as a short cut between the surrounding streets to go about their daily business, either as residents of the locality, or as regular visitors to the area, to go to and from local amenities including bus stops, shops, work, doctors and places of interest.
19. The Appellant claims that all users who completed UEFs were never challenged during the relevant period. Users refer to frequently seeing others using the route, that barriers allowed pedestrian access, that they saw signage to stop vehicles but not addressing pedestrian use of the route. Some assumed that bollards at two of the entry points indicated pedestrian but not vehicular access. A user claims to have spoken to the 'owner' whilst using the route and that she was told by the previous owner and tenant of the Old Brewery commercial premises that it was a public right of way.
20. *Emery* indicates that *"...where the applicant...produces credible evidence of actual enjoyment of a way as a public right of way over a full period of twenty years...then the allegation that a right of way subsists is reasonable..."*. Given the urban context and the referencing of the surrounding streets the reasons stated, and frequency are plausible.
21. To establish a public right of way it is not sufficient to assert that a way was used often, to count the number of people seen at a given time or suggest that the evidence is representative of a greater number of users. Rather, it is necessary to demonstrate use 'as of right' which requires a far higher burden of proof.

³ [2007] UKHL 28

22. The claimed route offers different options for crossing the site. Using the Council's annotation, A-B-D-F-G provides a roughly north-south main route through the site. B-C creates a short spur off to the west and D-E provides a short spur to the east.
23. When the evidence of use of the various sections is considered UEF's No's 3 and 5 do not indicate use of the Roebuck Street entrance (Point A). UEF No 6 does not claim to have used the High Street entrance (Point C) and UEF's No's 2, 4 and 7 do not indicate use of entrance E to the Bourne. But for most of the route there is evidence of use from seven users for 20-years, with only spur D-E having slightly less. This is the case for both the periods 1997-2017 and 1990-2010.
24. At appeal the claim is supported by evidence prepared for a previous application (of which the Council has no record). Document "3a" relates to access to a property at 32 and 32a High Street, but it is not clear what type of right of access it refers to. A statutory declaration ("3b") appears to relate to rights enjoyed as tenants of the Roebuck Centre. There is a reference to a public right of way to High Street, but it does not evidence that they used it as such. Declaration "3c" from a previous owner of The Old Brewery in Roebuck Yard most likely refers to pedestrian rights that they and their tenants enjoyed and subsequently passed on. None of these documents materially add to the evidence of use of the claimed route as a public right of way.
25. Nonetheless, and on balance, I consider that user from the application is sufficient to raise a presumption of dedication within both of the relevant twenty-year periods under s31(1) of the 1980 Act.

Is there is a conflict of credible evidence?

26. If there is evidence to show that the landowner did not intend to dedicate a public right of way within the relevant period, the statutory presumption can be overturned. In this case an owner/occupier's questionnaire dated 19 January 2018 and 10 witness statements were submitted.
27. Five witnesses, including leaseholders, claim to have challenged people as to the purpose of their visit and to have advised people that it was not a public right of way. One adds that he advised people that they were crossing private land and that there was no public right of way, and that he witnessed the landowner and another witness both do the same. The landowner confirmed that leaseholders were not required to take any action regarding people using the route.
28. Six witnesses claim to have seen or known of the landowners' challenging people, and one witness claims to have seen the landowner 'turn people away'. Witness 8 (occupier of 2 Roebuck Street opposite Point A) and witness 9 (occupier of 34 High Street) claim to have been challenged by the landowner and told it was not a public right of way when crossing the yard. One about 8 years ago and the other on several undated occasions. The architect, acting on behalf of the landowner, also claims that he was challenged by the landowner when using the route.
29. Some of the statements provided by tenants explain their motivation to challenge people, including concerns such as health and safety when vehicles are manoeuvring. Some recognised a problem in identifying people walking through the site, or parking to go shopping elsewhere. It was difficult identifying the public from visitors to premises on the site. Other witnesses who attest to the landowner challenging people provide a reasonably consistent picture of having observed challenges and of knowing of particular concerns about health and safety.

30. The landowner admits that the public have access to the area and that they are aware that the public has used the routes from time to time without accessing businesses. The landowner also states that it has been hard to distinguish customers from other public use. With a number of access points and several uses operating on the site I find this both plausible and likely.
31. The site includes areas with little differentiation of surfacing and spaces. It would be possible to take slightly different routes, not all on the exact alignment of the claimed route. But the site is quite small, the variations limited, and the claimed route covers all principle options for crossing the site. It is likely that a reasonable person entering onto the site and being challenged at any point would have formed a general understanding of that applying to the general area of the claimed route.
32. The site is in an urban area, by all accounts many people would walk into and around the site, some in connection with the several businesses located there. As the Council point out, this is an area with a high population. The total number of people who were using the route or part of it could have been high. The probability of a number of users going unchallenged must also be quite high. I do not find it surprising that the users who support the claim were not challenged. But that does not mean that I consider it unlikely that the claimed challenges were made.
33. The landowner's evidence covers the period from 1981. Four witness statements state they have knowledge/experiences of 20 years or more. A landowner's lack of intention to dedicate does not have to be continuously displayed or demonstrated throughout the whole period. It is not necessary that challenges were made all of the time or to all of the users. Any series of acts indicating an intention to keep the way private might be enough.
34. I consider that the witness statements provide a reasonable and plausible body of evidence of multiple overt challenges on a number of occasions by the landowner and several leaseholders. They are sufficient to rebut the presumption that a way has been dedicated during the claimed period 1997-2017 and, on balance, during the latter part of the earlier period 1990-2010. Overall, the evidence supports the landowners' claim that they had no intention to dedicate.

Other Matters

35. In the case of *R (Lewis) v Redcar and Cleveland (No 2), 2010*⁴ ("Redcar") it was held that for use to be 'as of right' it must be without force, without secrecy and without permission. The landowner's use of the route would have been by right and therefore would neither count toward user evidence nor toward the number of people challenged.
36. There is no evidence that prior to the claim, a landowner had put up any signs that would have deterred public use on foot. Nor any evidence of a declaration under s31(6) of the Highways Act 1990.
37. There is some evidence about barriers and bollards. Temporary barriers such as those on the site in use when works are in place would not necessarily indicate an intention not to dedicate. On the other hand, bollards at some of the access points allowing pedestrians through and other features of the public highway beyond are not in themselves evidence of a public right of way. This evidence neither weighs

⁴ [2010] UKSC 11

for or against the claim. A lack of signage is not persuasive evidence that the landowner acquiesced.

38. A blue plaque by the Old Hastings Preservation Society, a sign 'please do not obstruct this forecourt' at the southern end of point G, a sign signalling the entrance to the Roebuck Centre, listing businesses and stating that parking was not for the public but for official purposes, and other internal site parking and manoeuvring signage add no weight to the claim either way.
39. Planning documents might indicate pedestrian routes but are not proof of a public right of way. The landowner has submitted a planning application for development which was refused by the Council. An appeal may follow but these current planning matters are not relevant to the claim. Similarly matters relating to health and safety are not material to this case.
40. The Appellant considers that the people challenged by the landowner and his witnesses should be added to the number of users. However, this cannot be so because if those persons had continued to use the route it would have been in the knowledge that it was not a public right of way. In any event I accepted that user evidence from the application was sufficient to raise a presumption of dedication. Therefore, this point is not significant.
41. The Appellant questions the independence of witness statements. It is necessary to consider all evidence carefully. The landowner confirmed that tenants were not under any obligation to challenge people and the information provided witnesses creates a reasonably coherent and convincing body of evidence.

Conclusions

42. On balance I found that there was sufficient user evidence to raise a presumption of dedication within both relevant twenty-year periods under s31(1) of the 1980 Act. Against this I found reasonable credible evidence that it is at least likely that some users of the route were made aware that the owner had challenged their right to use the way as a highway during the claimed period 1997-2017 and, on balance, during the earlier period 1990-2010.
43. *Emery* indicates that where there is conflicting evidence, which could only be tested or evaluated by cross-examination, an Order would seem likely to be appropriate. The making of an Order leaves both the applicant and objector with the ability to object under Schedule 15. At that stage the conflicting evidence can be heard, and those issues determined. Therefore, and having regard to all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

44. The appeal is allowed, and Sussex County Council is directed to make an Order to record the claimed route on the Definitive Map and Statement.

Helen Heward

Inspector