
Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 09 August 2019

Appeal Ref: FPS/P3800/14A/5

- This Appeal, dated 25 March 2019, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of West Sussex County Council ('the Council') not to make an Order under 53(2) of that Act.
- The Application dated 10 May 2016 was refused by the Council and the applicant was notified by letter dated 7 March 2019.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the Appeal route as a Public Bridleway.

Summary of Decision: The Appeal is allowed.

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 to the 1981 Act. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
2. The appeal route runs from Top Road, Sharpthorne in the south to Grinstead Lane in the north and is in two parts. Most of the route, from Sharpthorne north to Blackland Wood, is currently not registered as a public right of way of any sort (Points A to B on the application plan). The remainder of the appeal route, from Point B to Point C, follows the line of a path currently recorded on the Definitive Map and Statement as Footpath 51Esx.
3. Submissions have been made by the appellant (Mr Paul Brown), West Sussex County Council, and by RH and RW Clutton ('Cluttons') on behalf of three of the landowners: Istock Bricks Limited, the Mayes Estate and The Guide Association. Comments have also been received from Mr and Mrs Ashby who own adjoining property and have an interest in the proposal.

The Main Issues

4. The original application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the Council) to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify it upon the occurrence of specific events, cited in Section 53(3). The application is based solely on historical documentary evidence. No user evidence of any sort has been submitted.
 5. The appropriate event for most of the route (Points A-B) is set out in Section 53(3)(c)(i) of the 1981 Act, which provides that an order to modify the DMS
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should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied:

- 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 be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

6. However, for the section of the appeal route between Points B and C the appropriate event is set out in Section 53(3)(c)(ii) of the 1981 Act, which states that an order should be made to modify the DMS if evidence is discovered which, when considered with all other relevant evidence available, shows that a highway shown on the map and statement as a highway of one description ought to be there shown as a highway of a different description. The test in these circumstances is the balance of probabilities.
7. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances.

Reasons

Background

8. The appeal route runs for a large part of its length (Points A-B) along a long-established boundary between two parishes: West Hoathly on the west and East Grinstead on the east. This also forms the boundary between areas of land historically divided into hundreds, and other ecclesiastical and administrative boundaries, mostly no longer in common use.
9. Points B-C of the appeal route, now known as Footpath 51Esx, formerly lay in the administrative area of East Sussex, but became part of West Sussex through local government reorganisation. The boundary between the two authorities now runs along the western side of Grinstead Lane – the northern terminus of the appeal route.
10. The vicinity of the appeal route, and the appeal route itself, has been affected over the years by the extraction of marl, and clay for brickmaking. Up to the middle ages, the area was also known for small-scale iron smelting. The appeal route is currently partially unusable because of an active permission to extend, and work, a site occupied by Ibstock Bricks Limited. The appellant has made it clear that if his application were to be successful, he would not expect the path to be made available for use immediately, but only on the completion of extraction, and the restoration of the quarry.

11. A railway was constructed through the area in the late 1870s, but it does not directly affect the line of the appeal route.¹

Common Law dedication

12. Dedication at common law requires either that there be evidence of an express intention to dedicate a way as a highway, together with the acceptance of that dedication by the public; or alternatively, a sufficiency of evidence from which it is possible to infer that a dedication must have taken place.
13. Given the absence of any user evidence, it is necessary to examine the historical evidence to see whether there is any basis for inferring that it was the intention of the landowner or landowners at any time to dedicate the appeal route as a public bridleway. The onus is on the person asserting that the right exists to show that the facts overall support an inference that a highway (in this case, a bridleway) has been dedicated.

Pre- 1841 Commercial and Ordnance Survey Mapping

14. The earliest map referred to by the appellant is a map dating from 1724 prepared by Richard Budgen. The appellant claims that the appeal route is shown and can be identified by the depiction of the boundaries shown on the map of the old hundreds and deaneries. The Council is of the view that the route interpreted by the appellant to be the appeal route is, in fact, the line of the present Grinstead Lane. This view is shared by the objectors to the proposal.
15. Although the map is of a small scale, there are features on it which are identifiable with those shown on more modern maps. Grinstead Lane, on modern maps, joins Top Road at Tyes Cross, opposite the road which continues south to Horsted Keynes. The relevant route shown on Budgen's map does not join Top Road at that clearly marked spot, but further to the west. Furthermore, it is clearly marked as running between the boundaries of two administrative units identified in the key to the map. The copies of the map available to me do not allow me to confidently identify which type of boundary, but I do agree with the appellant that the route shown on this map is more likely to follow a route similar to the appeal route rather than the route of the present day Grinstead Lane, although it must merge with the line of what is now Grinstead Lane before reaching Willots Bridge.
16. This situation is shown more clearly on the 1813 First Edition of the Ordnance Survey ('OS') map which is at a larger scale than the Budgen map. The route of what is now Grinstead Lane is clearly shown running to Tyes Cross, and there is a route following a broadly similar line to the appeal route to the west of it, identifiable because of the position of the property known as New Combe (nowadays spelt New Coombe). However, at that property the route shown on the map detours along a loop to the west which appears to correspond broadly to what is now shown on the Ordnance Survey map as two footpaths. One of these paths is the south westward extension of Footpath 51Esx (Footpath 2 West Hoathly) but as I do not have access to the DMS I do not know the number of the other path.
17. I agree with the Council's assessment that these maps are not determinative of the status of the route in highway terms, although I acknowledge they do

¹ Now the preserved Bluebell Railway

suggest the physical existence of a long-standing through route along an alignment similar to, but not necessarily exactly the same as, the appeal route.

Tithe Maps and Apportionments

18. The area crossed by the appeal route is the subject of two Tithe Apportionments. One for East Grinstead and one for West Hoathly; both undertaken in around 1840/1. The entire appeal route is shown on the East Grinstead Tithe Map and coloured brown, in the same manner as the adjoining Grinstead Lane, and thus appears to have been considered unproductive. Whilst it is also shown on the West Hoathly Tithe Map it is not shown in colour and approximately one third of the route appears to run through a number of productive fields.
19. In their submission on behalf of the landowners, Cluttons include an extract from the Planning Inspectorate Consistency Guidelines in support of their views on the value or otherwise of the Tithe Maps. However the guidance quoted relates to another process entirely: that of the land valuations undertaken from 1910 to 1919 by the Inland Revenue in respect of the provisions for a land tax in the Finance Act 1910. It has no bearing on the much earlier process of Tithe Apportionment.
20. Nevertheless, it has been long established that it was not the purpose of the Tithe Commutation process to identify highways, but rather to establish which land was, and was not, subject to a tithe, and to commute that value to a monetary figure. Very occasionally such documentation offers more of an insight into the status of tracks or ways shown on them, but normally it is only possible to infer that the route existed on the ground, and so to determine whether or not it was considered productive in terms of a tithe.
21. In this case with respect to the East Grinstead apportionment, the appeal route does not appear to have a number on the map, and the inference must therefore be that no tithes were due in respect of it. With respect to the West Hoathly map, the copy of which does not appear to be of the same quality as the East Grinstead map, no extracts from the accompanying apportionment have been submitted to shed any light on the description of the route which might have been obtained by examining the entries for field numbers 423, 415, 414 and 413.² However, as later documentation provided by the applicant suggests that the entire route lies, and always has done, in East Grinstead parish the Tithe Map for East Grinstead carries more weight.
22. The information to be gleaned from these documents appears to support the existence of a through route on the alignment of the present appeal route. Notwithstanding, I agree with the assessment made by the Council that the information provided by Tithe Maps is limited to supporting the physical existence of the route in 1841. It provides no evidence of its status in terms of highway.

Post 1841 Ordnance Survey mapping

23. The appeal route is shown less distinctly by the time of the 1874 OS County Series map. The appellant remarks that the map shows the appeal route, starting at Top Road at Cuckams and running north, with a parcel number (2373), described in the accompanying Book of Reference as a 'Road' with an

² Where the appeal route appears to lie within productive fields

area of 0.958 acres. However, I note that this parcel does not continue into the field to the north (i.e. field number 2369) and the description of that parcel includes no reference to any track or road.

24. The appellant draws the inference that this evidence shows that the road was in public use at that time, but I am unable to draw the same conclusion. The Council considers that the map indicates a gate across the route at the southern junction with Top Road and that this militates against it being a public route. Whilst I accept the appellant's view that the presence of a gate is not fatal to the existence of highway rights, this mapping evidence does tend to suggest that, whatever its use or status prior to that time, by 1874 the appeal route did not continue to the north of parcel 2373, or was not being used as a through route of any consequence. The existence of a possible gate strengthens the impression given that, by that time, the appeal route had been truncated and was being used as access to fields or property, and not as a highway.
25. By the time of the subsequent edition of the County series mapping at the same scale (25 inches or 1:2500) in 1896, the area of the parcel of land equivalent to 2373 (parcel 38) was shown as having an area of only .692 of an acre. No explanation has been provided for this reduction but there are some changes to field boundaries in the vicinity and the parcel of land representing the appeal route appears to stop short of its depiction on the earlier map, which would account for the smaller acreage. Furthermore, it is shown clearly separated from the adjoining field 26 and there is no onward depiction of a double pecked route to the north.
26. The appellant places great weight on the contents of the OS Boundary Remarks Book which describes the southern end of the appeal route as an 'Ancient Road'. However, the purpose of this document, as pointed out by the appellant himself, was to establish accurately the location of administrative boundaries in accordance with the provisions of the Ordnance Survey Act 1841. The annotation referred to is written only in one place on the boundary depicted, approximately alongside Mare Pit Wood and opposite a feature which appears to be an excavation of some sort. The date of this document is not clear, but would support that a route had existed, at least at this point, at some time in the past. It may have still been in existence as a through route at the time this document was prepared, but in the absence of a clear date it does not advance the appellant's case.
27. With respect to the northern end of the appeal route, all these and subsequent OS maps show several routes through Blackland Wood, with double pecked lines. This includes the section of the appeal route between Points B and C, but not the section of the appeal route lying within Blackland Wood to the immediate south of Point B.
28. This evidence would seem to show that the appeal route had ceased to be a through route at some point between 1841 and 1874, and that parts of it had been absorbed into the surrounding fields or shaws.³ The OS maps and documents cannot provide evidence of the status of any route in highway terms and would appear not to support the continued existence of a through route on the line of the appeal route.

³ The wooded thickets running along the boundary of the fields

Property History

29. The property documents submitted indicate that some of the application route was sold as part of one of the lots when the Courtlands estate was sold in 1867. The sale catalogue indicates that the length of the appeal route known then as Cookhams Lane was sold as part of the Cookham Farm lot. The area of Cookham Lane was given as 3 roods and 39 perches, which accords with the area of .958 acres given on the 1874 OS map.⁴ Cookhams Lane ran alongside Fields 15 and 16 which were also included in the same lot. No details of the remaining lots have been provided, despite the sale plan clearly including land covering the entirety of the length of the appeal route.
30. In 1987, an article entitled 'The Origins of the of Plawhatch Estate' was published in 'The Bulletin of the East Grinstead Society'. It was written by Major REW Grubb. In 1876 the Arbuthnot family purchased the Manors of Mayes and Neylands, both of which were in the parish of East Grinstead. Major Grubb (a member of the family which still owns the Mayes estate) describes how the indenture plans showed *'the north end of the then road which left Sharpthorne immediately to the west of the Sharpthorne recreation ground by Cookhams Farm and carried on through a muddy track through Mare Wood and thence north of Blacklands Farm to enter Grinstead Lane almost opposite Neylands Farm Cottages where the footpath now emerges. This road was discontinued at the turn of the century.'*
31. After the 1914-1918 war, the Arbuthnot family purchased further land which included Cookhams Farm and later still, the remainder of the Courtlands Estate which lay north of the Sharpthorne – Tyes Cross Road. No further mention is made of the appeal route in Major Grubb's article, but this evidence indicates that the cessation of use of the appeal route as a through route may post date the 1876 sale of the Mayes estate. Major Grubb's article is support for the appellant's argument that such a through route had existed at one time but does not provide evidence of its status in highway terms. It also supports that the route had fallen out of use but does not provide clear evidence of when that may have occurred or by what legal process, if any.
32. The objectors argue that the southern part of the route was the private access to New Coombe and that once the alternative route was provided (at the time of the railway construction) the route was used only as a means of accessing farmland.
33. Whilst I accept that the route may have fallen out of use at about that time, no documentation has been provided to show that the only use of the route was in a private capacity. Equally, no copy of any legal stopping up has been submitted.

The Definitive Map Process

34. There is no evidence that the section of the appeal route between Points A and B was ever claimed as part of the process for producing the original DMS. However, the DMS is only definitive in what it actually shows, and the non-appearance of a route on the map is not evidence that a public right of way does not or cannot exist.

⁴ There are 40 perches in a rood, and four roods in an acre

35. Nevertheless, the absence of a claim for a footpath over the majority of the route, and a claim as a public footpath and not a bridleway for the section between Points B and C, does provide some evidence of the repute of the way at the time. The conclusion that the route had fallen into disuse some time around the end of the 19th century and the beginning of the 20th century, made by Major Grubb in his article about the origins of the Plawhatch Estate, seems to have a great deal of merit.

Planning Permission

36. A planning application to extend the existing clay quarry works adjacent to the appeal route, was made in 1998. An Archaeological Desk-based Assessment was commissioned, to form part of the necessary Environmental Assessment in connection with the planning application. These documents together provide further evidence that an old route existed along the line of the appeal route at this location, and the permission has a condition requiring its eventual restoration as a landscape feature. No attempt is made to determine whether the route benefitted from highway status as that was not germane to the application nor a function of the archaeological survey.

37. The information provided by these documents supports the physical existence of the route but does not shed light on its potential status in highway terms.

Landscape photographs

38. The photographs submitted by Mr Brown show a significant holloway along parts of the line of the appeal route, and a wide defined track through Blackland Wood. He also describes the appearance of the route running through double hedged sections in the parts of the appeal route alignment where the OS maps indicates a shaw (or wooded boundary). When considered with the evidence of the Archaeological Assessment this supports the long-standing existence of a route along the line of the appeal route. Its appearance would support that it was not merely used on foot.

39. The references in OS documents and Major Grubbs article to a feature described as a 'road' suggest a feature that was of more import than a footpath. Routes used by horses or for driving stock were frequently termed 'bridle-roads' or 'drove roads' rather than paths, and support Mr Brown's claim.

Conclusion on the documentary evidence

40. The Council considers that the evidence submitted does not meet the required tests for making an Order. For the section from Point A to Point B the Council takes the view that there is insufficient evidence to support even a reasonable allegation that the route is a bridleway, and for the section from Point B to Point C the Council claims that no new evidence has been discovered that would not have been available when the DMS was first produced.

41. The objectors consider that the route between Points A and B, inasmuch as it has existed on the ground over the years, has always been a private route, and not open to the public. With respect to the section of the route between Points B and C it is contended that there is no evidence to support a status higher than that recorded at present: i.e. a public footpath.

42. In the absence of any evidence of use it is very difficult to show, to the required level of proof, whether highway rights subsist over an unrecorded

route. It is only necessary at this stage to show that it can be reasonably alleged that they subsist. However, the evidence required to meet even the lesser test needs to be consistent and positive.

43. In this case, for the section of the appeal route between Points A and B there is no express evidence to support public status. However, the evidence that it physically existed on the ground until approximately the second half of the 19th century is strongly supported by the mapping evidence, other documentary evidence and the landscape descriptions. The Budgen's map is evidence that the route may have been important during the 18th century, but other documents suggest that status was rapidly eroded during the following century. No evidence has been submitted to indicate that it was ever stopped up by legal order, but equally there is no evidence that its declining importance was ever challenged by the public.
44. Nevertheless, had the route not been a public route, I doubt if Major Grubb would have referred to it in his article. If it had only been a private route across the estate lands it would be unlikely to have warranted a mention.
45. For the section of the appeal route between Points A and B I therefore consider that the requirements of Test B have been satisfied and a right of way is reasonably alleged to subsist. The documentary and landscape evidence would support a way of higher status than a footpath, and I consider it reasonable to allege that the way would have been used with horses or for driving stock. A bridleway would be the appropriate status.
46. For the section from B to C, as it is already a recorded public footpath, it is necessary to show that a bridleway subsists on the balance of probabilities. I disagree with the Council that no new evidence has been discovered. I have no information about what documentation was examined prior to the preparation of the DMS for East Sussex and nothing has been submitted to support the Council's assertion that, just because the documents may have existed, they were taken into account during that process. I consider it highly unlikely that the surveying authority at the time examined all the documents which have been referred to by Mr Brown in his submissions. In particular, they would not have had access to the article written by Major Grubb which I consider to be strong evidence in support of the existence of a route (particularly at this northern end) which was more than a footpath. The appearance of the path at this point also suggests a route of more significance than a public footpath. I therefore consider that the criteria are also met in respect of the section of the appeal route between Points B and C, particularly when taking a pragmatic approach and considering the route as a whole.

Other Matters

47. Much of the submitted material is merely speculation on by whom, or how, the route might or might not have been used. Such speculation may be based on general historical research, but little of it is specific to the appeal route. I have therefore avoided commenting on it, however interesting it may be, and instead focussed on the crux of the matter. That is not to say that I disagree with some of the potential explanations, whether put forward by the appellant or by the objectors, but merely state that they do not assist me in coming to a decision on the status of the route which is the subject of this Appeal.

Conclusions

48. Taking the appeal route as a whole, and having regard to these, and to all other relevant matters raised in the written representations, I conclude that the Appeal should be allowed. An Order should be made.

Formal Decision

49. The Appeal is allowed.

Helen Slade

Inspector