



Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 15 March 2021

Appeal Ref: FPS/G1440/14A/11

- 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 East Sussex County Council ('the Council') not to make an Order under section 53 (2) of that Act.
- The application dated 25 May 2018 was refused by the Council on 13 August 2020.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding 3 public footpaths as shown on the plan appended to this decision; that is, from point A (GR 538740 117736) to Chailey FP 5a at GR 538567 117742 (point B); from point A to Chailey Footpath 7b at GR 538556 118153 (point C); and from point A to the Lewes to Chailey road at GR 539002 117761 (point D).

Summary of Decision: The Appeal is dismissed.

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 of the 1981 Act.
2. This appeal has been determined on the papers submitted.
3. 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 *Simms and Burrows*¹; *Mayhew*²; *Kotarski*³ and *Roxlena*⁴ cases. I have also taken in to account the findings of the Courts in the *Bagshaw and Norton*⁵ and *Emery*⁶ cases.

Main issue

4. The principal issue between the parties is whether there had been a discovery of evidence had so that the terms of Section 53 (3) of the 1981 Act were engaged.
5. If section 53 (3) was engaged, the issue would be whether the documentary evidence demonstrated that the appeal routes should be recorded in the definitive map and statement.

¹ *R v Secretary of State for the Environment ex parte Simms and Burrows* [1990] 60 P & CR 105

² *Mayhew v Secretary of State for the Environment* [1992] 65 P & CR 344

³ *Kotarski v Secretary of State for Environment, Food and Rural Affairs* [2010] EWHC 1036

⁴ *R (oao Roxlena Ltd) v Cumbria County Council* [2019] EWCA Civ 1639

⁵ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

⁶ *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

Legislative Framework

6. 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 by the surveying authority 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.
7. It is the discovery of evidence by the surveying authority which engages the provisions of section 53 (3) of the 1981 Act and the 'events' specified in section 53 (3) (c) of the Act. Evidence can be discovered by the surveying authority or that evidence can be discovered by a third party (such as the Appellant) and provided to the surveying authority for its consideration. In *Simms and Burrows, Mayhew, Kotarski and Roxlena*, the Courts have examined what the 'discovery of evidence' entails.
8. If the surveying authority have 'discovered' evidence, then the question arises as to whether it can be concluded that a public right of way subsists or can be reasonably alleged to subsist.
9. 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.
10. 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.*"
11. No evidence of use has been submitted in support of the Appellant's contention of the existence of the claimed public rights of way which are the subject of this appeal. The evidence in this case is derived from documentary sources.

Background

12. The appeal concerns three interlinking routes which cross a parcel of land to the north-west of the settlement of South Chailey. The point common to all three claimed routes (point A) is approximately 280 metres west of the Lewes – Chailey road. The claimed routes cross agricultural land with part of the route A – C passing through an area of woodland. The land forms part of the Hooke Estate, but has been described on various Ordnance Survey maps as 'South Common'; it is not disputed that the land crossed by the appeal routes was

inclosed under the provisions of the Warmingore Inclosure Act 1841. The Hooke Estate objected to the application to add the footpaths at issue to the definitive map.

13. The Appellant relies principally upon the provisions of the Warmingore Inclosure Act 1841 and the award made under that Act. Although the Appellant provided copies of Quarter Sessions records and extracts from the deposited plans for the construction of the Lewes to East Grinstead railway, neither of these documentary sources have any relevance to the appeal routes. Similarly, extracts from the tithe records and Finance Act 1910 records for the area do not indicate the existence of any identifiable routes over the land. The principal focus of the Appellant's case is on the inclosure records.
14. The dispute between the Appellant and the Council relates to whether the inclosure records were considered by the Council in the period prior to the publication of the first draft definitive map in 1954. The Appellant contends that they were not and thus constitute evidence which has been discovered sufficient to engage section 53 (3). The Council's case is that these documents had been considered as part of the definitive map process and did not constitute evidence that had been discovered; section 53 (3) was not engaged.
15. I will turn first to the Inclosure Award documents and then turn to the question of whether it can be said that evidence has been 'discovered' such that section 53 (3) is engaged and whether public rights of way subsist or can be reasonably alleged to subsist.

Documentary evidence

Warmingore Inclosure Act 1841 and Award

16. The Warmingore Inclosure Award was made under the provisions of an "Act for Inclosing Lands in the Manor of Warmingore in the County of Sussex" (the 1841 Act'). Whilst I have not been provided with a copy of the 1841 Act or relevant extracts from it which relate to the Commissioners powers to set out roads, bridleways and footpaths, there does not appear to be any dispute between the parties that the Commissioners were granted such powers under the 1841 Act.
17. That part of the Inclosure Award map relevant to the paths at issue shows three routes crossing South Common on the approximate alignment of the claimed footpaths. These routes are numbered 66, 72 and 73 and are described in the text of the award.
18. Route 66 is described under the heading of 'Private Carriage Roads' as "*and one other private carriage road to the width of 20 feet marked No. 66....leading over the South Common in the parish of Chailey from the Turnpike Road from Lewes to Chailey in a Westerly Direction into the allotment awarded to John Attree marked No. 16a in the said map or survey and which said private road adjoins the allotments No.s 35, 36 and 37 on the said Map or Survey on the North to the Allotment marked No. 34 in the said Map or Survey on the South and which said Carriage Road is set out and appointed for the use and Convenience of the Owner and Occupiers of the Lands and Allotments adjoining thereto but shall be used and enjoyed as a public footpath for all her*

- Majesties liege subjects*". Path 66 set out under the award corresponds with the claimed route A – D.
19. Path 72 was described as "*One other public footpath of the width of three feet marked No. 72 in the map or survey annexed to this my Award and leading across the said South Common in an easterly direction from a stile in the old enclosed land of James Ingham esquire called Barn Mead over the Allotments awarded to Thomas Richardson esquire and John Attree respectively into the private carriage road marked No. 66 and along the same into the Turnpike from Lewes to Chailey*". Path 72 corresponds with the claimed route B – A – D.
 20. Path 73 was described in the Award as "*One other public footpath of the width of three feet marked No. 73 in the map or survey annexed to this my award leading across the South Common in the parish of Chailey from a public footpath through the lands of the late Henry Poole called The Hook in a South Easterly direction to the western end of the said private carriage road hereinbefore mentioned marked No. 66 on the said map or survey and along the same into the turnpike road between Lewes and Chailey*". Path 73 corresponds with the claimed route C – A – D.
 21. The Appellant has not discovered any evidence within the Quarter Sessions records of the stopping up or diversion of paths 66, 72 or 73 described in the Inclosure Award.
 22. The initial maps drawn up by Chailey Parish Council as part of the survey of public rights of way under the National Parks and Access to the Countryside Act 1949 do not show any of the appeal routes, nor were they shown in the draft, provisional or first definitive maps.
 23. The Appellant has examined and catalogued the digitised records held by the public rights of way team of the Council and from that exercise and from the examination of other material not catalogued, the Appellant states that from such a study it is possible to gain a very clear picture of the process which led to the production of the definitive map and an understanding of which documents were and were not examined.
 24. The Appellant contends that as part of the process leading to the publication of the draft map in September 1953, searches were made within the archives for relevant material within the deposited plans of railway schemes, Inclosure Awards and Quarter Sessions records. In the Council's digitised records which relate to the parish of Chailey is a handwritten note, dated 9 April 1953, which lists the public routes set out by the Inclosure Commissioners within the parish. Four routes are itemised, with routes '3' and '4' corresponding with the Appeal routes. Route 3 is described as "not on draft map", whereas route 4 is described as "part on draft map, part not".
 25. The Appellant submits that the handwritten note was drawn up by an archivist undertaking research amongst the Council's archives and who had access to the draft map some six months prior to its publication. It is the Appellant's case that the information obtained from the Inclosure Award was not considered by those responsible for the compilation and publication of the draft map, or those who were in a position to make a determination that the draft map should be amended prior to its publication.

26. The Appellant refers to the findings of the Court of Appeal in the *Roxlena* case, where Lindblom LJ held that the matter which engaged an 'event' specified in section 53 (3) (c) was "*not simply the "discovery" of the evidence in the sense of it being physically found. It also requires a consideration of that evidence, together with any other relevant evidence available to the surveying authority which actually shows the circumstance in subsection (i), (ii) or (iii)...*" and that "*consideration of the evidence must surely be a consideration of its substance, by the surveying authority, rather than its merely being received from the applicant with the application. It involves the surveying authority undertaking that "mental process" on the evidence discovered. If the evidence has not been considered, a relevant event for the purposes of section 53 (3) (c) (i), (ii) or (iii) will not have occurred.*"
27. The Council does not dispute that the claimed routes are those set out in the Inclosure Award or that the Inclosure Commissioners had the power to set out and appoint public footpaths and bridleways. The Council contends that as the handwritten note of 9 April 1953 forms part of the Council's own archive of documents relating to the compilation and publication of the draft map of public rights of way, it serves as evidence that the Inclosure Award had been considered as part of the draft map process and that a decision had been taken not to include those awarded routes on the draft map.
28. Consequently, in the Council's submission, the Inclosure Award evidence adduced by the Appellant was not new evidence or evidence which had not previously been considered and therefore could not be put forward by the Appellant to overturn the decision not to show these routes on the draft map or the subsequent first definitive map. In the Council's view the appeal should be dismissed, irrespective of what conclusion may currently be drawn from the Inclosure Award evidence.
29. The issue between the Appellant and the Council is therefore whether the evidence found in the Inclosure Award had or had not been considered by the Council in the preparation of the draft map, and whether that evidence was or was not 'new' evidence which would trigger an event under section 53 (3) (c) of the 1981 Act.
30. What constitutes the 'discovery' of evidence has been considered by the Courts in the cases of *Simms & Burrows*, *Mayhew*, *Kotarski* and more recently in *Roxlena*.
31. *Simms & Burrows* concerned the possible rectification of alleged errors on the definitive map said to have been present when the map was initially compiled; the Court finding that the use of the word 'discovery' embraced the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the date the definitive map was first drawn up.
32. In *Mayhew*, the evidence considered by the surveying authority had apparently been known to it for some years prior to making a definitive map modification order ('DMMO') to record as a Byway Open to All Traffic a footpath which was shown on the definitive map. It was argued that the evidence which the Council

- used to make the DMMO had not been 'discovered' as it had been within the surveying authorities' archives.
33. This argument was dismissed by the Court, Potts J holding that "to discover" meant to "find out or become aware"; that "discovery" involved a mental process "in the sense of the discoverer applying his mind to something previously unknown to him"; and that the "event" in Section 53 (3) (c) was the "finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared"⁷.
34. In *Kotarski*, Simon J held that even though an anomaly between what was recorded in the definitive map and what was recorded in the definitive statement in relation to a path or way had existed for some time, the discovery (that is, the mental process which is involved in noticing the anomalous situation) was sufficient to satisfy the requirements of section 53 (3) (c).
35. For evidence to be 'discovered' sufficient to trigger an event under section 53 (3) (c), that evidence need not be new (it may reside in the surveying authorities archive), but it has to be evidence which had not previously been considered by the surveying authority when compiling the definitive map. It also requires the 'discoverer' to have applied his or her mind to something previously unknown - whether that concerns evidence of the status of a route or an anomaly between the map and statement.
36. In this case, the question is whether the surveying authority of the day gave consideration to the Warmingore Inclosure Award when the draft map was drawn up in 1953. At a distance of almost 70 years it is likely to be difficult to determine with any certainty which documents were considered when the draft map was drawn up as records of the procedures undertaken and the sources of information available to the surveying authority may have been misplaced, lost or destroyed.
37. With regard to the parish records of Chailey however, there appears to be a substantive archive of material which the Appellant and the Council have had access to. Included in that archive is the handwritten note dated 9 April 1953 which demonstrates that someone who had a copy of, or access to, a pre-publication draft map had made a comparison between the Inclosure Award records and what was shown on that map.
38. It is not known who that person was or what position they held within the surveying authority. Nor is it known what happened to the information set out in the April 1953 note prior to the publication of the draft map in September 1953; who it was handed to or what anyone else who received that information did with it. What is known is that the April 1953 note forms part of the Council's archive and that the Appeal routes were not shown on the draft map when published, nor on the subsequent provisional and definitive maps.
39. Although the Appellant speculates that the handwritten note had been compiled by an archivist with no connection to the draft map process, no evidence has been submitted to substantiate that speculation. However, it seems to me to be more likely than not that the person who compiled the April 1953 note did have some connection with the draft map process as that person was able to compare the Inclosure Award evidence to a pre-publication version of the draft

⁷ In *Mayhew*, the definitive map had a relevant date of 1964, whereas the evidence of the route having a higher status had been present in the archives since around 1969.

map. This conclusion is supported by both the text contained within the note and the fact that the note has remained within the Council's archive of the process surrounding the compilation of the definitive map.

40. It is surprising therefore that if in 1953 the Council was aware of the evidence contained within the Warmingore Inclosure Award that no action was taken on that evidence. Looking at that evidence with the benefit of all the case law on the inclosure process which has developed since the 1949 Act it seems inconceivable that such positive evidence of the existence of public rights was not acted on. It is also understandable why the Appellant considers that the Council had not previously considered this evidence. Even during the 1949 Act process, it is highly likely that surveying authorities would have been aware of the importance of Inclosure Award records. The evidence before me demonstrates that the Council was so aware, as it had undertaken research into the Warmingore Inclosure Award in April 1953.
41. That the Council seemingly failed to act upon the Inclosure Award evidence (for whatever reason) does not however displace the fact that (a) the Council was aware of the existence of the Inclosure Award evidence prior to the publication of the draft map; (b) that the Council had considered such evidence; and (c) had exercised the mental process involved in assessing that evidence in relation to the pre-publication draft map. It is not possible for evidence which has previously been considered to be re-evaluated in the absence of relevant evidence which was not available to the Council when the definitive map was first compiled.
42. As such, I concur with the Council that the inclosure evidence in this case is not evidence which was unknown at the time the draft map was compiled and therefore does not engage section 53 (3) (c) of the 1981 Act to overturn the exclusion of the routes during the compilation of the definitive map.
43. As the evidence submitted is not sufficient to trigger an event under section 53 (3) (c) of the 1981 Act, I do not need to consider that evidence against Test A or Test B identified in paragraph 9 above.
44. It follows that I conclude that the appeal should be dismissed.

Formal Decision

45. I dismiss the Appeal

Alan Beckett

Inspector

APPENDIX

