The Planning Inspectorate

APPENDIX 3

# Appeal Decision

**by Martin Elliott BSc FIPROW**

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

**Decision date: 21 February 2011**

## Appeal Ref: NATROW/Y3940/529A/10/20

- 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 Wiltshire County Council not to make an Order under section 53(2) of that Act.
- The Application dated 18 March 2009 was refused by Wiltshire County Council on 15 March 2010
- The Applicant claims that the appeal route at Chittoe Heath in the Parish of Bromham, Wiltshire, leading from the western and north western edge of Chittoe Plantation through and around the plantation, should be added to the definitive map and statement for the area as a footpath.

**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 an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.

2. In addition to the representations made by the applicant and the Council a third party, Mr and Mrs Seed, leaseholders of part of Chittoe Plantation through which the claimed route passes, have also made representations. I have taken into account all the representations in reaching my decision.

3. The evidence in this case is user. I have not visited the site but I am satisfied I can make my decision without the need to do so.

4. The application is for the addition of a footpath; this is further described in the application as a footpath through and around Chittoe Plantation as marked red on the application plan. Whilst the application does make reference to a footpath, when taken with the application plan it is clear that the application relates to a number of paths. My determination relates to the footpaths shown on the map. There is nothing before me to suggest that anyone will have misunderstood the intentions of the application or that anyone will have been prejudiced.

5. In my decision I shall refer to the route around the plantation including the spur paths leading to the edge of the plantation as the perimeter paths. Other routes through the plantation shall be referred to as the cross paths.

## Main issues

6. Section 53(3)(c)(i) provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a right of way subsists or is reasonably alleged to

subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402* (*Bagshaw*):

Test A: Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed paths is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

7. Section 31 of the Highways Act 1980 Act 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 deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

## Reasons

### *When the right to use the ways was brought into question*

8. There appears to be no dispute as to the fact that the right to use the ways was brought into question in December 2008/January 2009 when a 'no public right of way' notice was erected at the entry point into the wood at its south western corner. At this time challenges were also said to have been made by Mr Seed. The erection of the notice and the challenges by Mr Seed are recognised in a number of evidence of use forms.

9. The notice and the challenges would have brought the right to use the ways into question and sets a relevant twenty year period of 1988 to 2008.

### *Evidence of use 1988 to 2008*

10. The Council has concluded that there is sufficient evidence of use to support the application. However, Mr and Mrs Seed assert that there are very few applicants who still claim twenty year use and that their evidence is inconsistent.

11. From my examination of the evidence of use forms ten individuals have used the perimeter path for the full twenty year period. A number of other individuals have used the ways for part of the twenty year period with four individuals using the ways for a substantial part of the period. My analysis indicates that fewer individuals used the cross paths. Use was generally on a weekly or daily basis and many recall seeing others in the plantation although it is not clear if this was along the claimed routes. There is nothing before me to suggest that the evidence is inconsistent such that it should not be accepted. However, I consider the accuracy of the accompanying maps and the details of the exact route used at paragraph 23 below.

12. In my view the evidence is sufficient to demonstrate use of the perimeter route by the public for the full twenty years. As regards use of the cross paths whilst it is less than the perimeter path I also consider that, whilst the evidence is very finely balanced, it is sufficient to demonstrate use by the public for the full twenty year period.

***Use as of right***

13. Use as of right is defined as use without force, stealth or permission. The Council have concluded that use is as of right.

14. Mr and Mrs Seed disagree with the Council's views on the fencing of the wood and say they have provided evidence to support their position. They do not elaborate on why they disagree with the view of the Council or the relevant context. Nevertheless I consider it appropriate to consider the fencing of the wood in relation to use by force.

15. No direct evidence has been provided to me in relation to the fencing of the land but the Council deals with this issue in its decision report. In my view, the evidence suggests that the wood was fenced around its boundary and that fences were broken down or became out of repair. However, the evidence of use forms do not indicate the existence of any fencing which prevented use of the ways. Reference is made to broken down or dilapidated fences around the perimeter of the wood but there is no indication that access was prevented until 2008/2009. A number refer to the existence of stiles in the boundary fence. There is nothing before me to suggest that those using the ways used force to access the wood and on balance I conclude that use was without force.

16. In relation to use with permission the statement from Mr and Mrs Seed states that they have granted permission, for anyone who has applied, to walk the woods. The statement does not provide any indication as to the dates when permission was granted. However, it is noted that Mr and Mrs Seed did not take on the lease for the wood until 11 December 2008. There is no indication that, prior to Mr and Mrs Seed taking the lease, any previous lessee or landowner granted permission to use the ways. I note the observation in relation to Mrs Collins but, whilst she says that the previous lessee allowed reasonable and responsible access, her form makes it clear that she did not have permission to use the wood. I do not think it can be inferred from her evidence that the previous lessee granted permission to use the wood. In any event the granting of permission to some does not mean that use by others is not without permission. I conclude that use of the ways was without permission.

17. Mr and Mrs Seed indicate that several of the witnesses have signed written submissions confirming their belief that no right of way exists. Those that have made written submission are not identified by Mr and Mrs Seed but I note that correspondence attached to the Council's Decision Report identifies these as '(Stainer, Wiggins x2, Beater)'; no statements are attached to the report. In the absence of copies of any statements I am unable to attach any significant weight to the assertions made by Mr and Mrs Seed. In any event I do not accept that the evidence of those who have subsequently made written submissions should be discounted. These individuals claim use of the various ways and there is nothing to indicate that their use was not as of right. There is no requirement for use to be as of right for it to be in the belief that the way

is public[1]. Even if these individuals are excluded from my assessment of the evidence of use, which I do not consider necessary, there remains sufficient evidence, albeit diminished, to support use by the public such as to raise a reasonable allegation that public rights subsist.

18. There is no suggestion that use was in secrecy and bearing in mind the above I conclude overall that use was as of right.

***Use without interruption***

19. None of the evidence of use forms indicate any challenge or effective interruption to the use of the ways until December 2008/January 2009. Mr and Mrs Seed suggest that most of the twenty two individuals who have completed an evidence of use form are dog walkers who have been challenged by them for letting their dogs loose and wandering freely through the woods. Whilst no dates are given the statement of Mr and Mrs Seed is consistent with the evidence of use forms which suggest that any challenges were those which brought the right to use the ways into question. It should be noted that for an interruption to be effective there must be some interference in the right of passage along any way and it must be with the intent to prevent public use. The challenges identified by Mr and Mrs Seed appear to relate to a more general use of the wood notwithstanding the fact that challenges in respect of the use of the ways appear to have been effective from December 2008. On balance I conclude that use during the twenty year period was without interruption.

***Whether there is a way***

20. The Council finds that the evidence supports the use of Chittoe Plantation as being as of right and without interruption for a full twenty year period. Further, that there is insufficient evidence of a lack of intention to dedicate. However, the Council says that the claimed paths were not sufficiently defined to be identifiable either to record on the definitive map or on the ground. The Council concludes that the application does not advance sufficient evidence to identify that the same route has been used by the witnesses or to identify the location of the way. The uncertainty over the actual route walked fails to satisfy the definition of 'a way' as used in section 31(1) of the 1980 Act.

21. The appeal is on the basis that the Council has failed to give sufficient weight to the evidence of use forms, that there has been a failure to investigate the evidence and that the decision of the Council is inconsistent. The Council has applied the incorrect test to the evidence of use in accordance with *Bagshaw* and that the claimed routes have been shown to satisfy the test that they are reasonably alleged to subsist. It is contended that the Council is in error in concluding that the only basis upon which it can be decided as to whether a right of way is reasonably alleged to subsist is if the route can be seen.

22. Mr and Mrs Seed contend that the user evidence is inconsistent and that there is a wide variety of routes claimed. The evidence is disingenuous and users have never stuck to a path or paths; there is no path because walkers have walked in the open woodland as they please. There had been no failure to reconcile the witness statements with the user evidence.

23. In my view there are twenty two evidence of use forms which indicate the use of various ways in Chittoe Plantation for a number of years. A number of the

[1] *R v Oxfordshire County Council ex parte Sunningwell PC [1999] 3 All ER 385*

forms indicate that the routes were well trodden. I accept that there is a degree of variance in the routes marked on the plans which were said to have been walked. However, given that there no clear landmarks, or features on the map to follow, it is not unexpected that users will mark different alignments. Given this I consider that the routes marked on the various maps are within a reasonable degree of tolerance. On balance, the evidence of use forms demonstrate the use of a route around the perimeter of the wood and a number of cross paths as identified on the application map. Other routes appear to have been used but these do not form part of the application and it may be the case that some use of the woods has not been along the paths identified in the application. There is nothing before me to support the contention that the user evidence is disingenuous and some weight should be given to signed evidence of use forms which identify the use of defined routes.

24. The point is raised by the appellant that the claimed route runs through a heavily wooded plantation and that the path is obscured by fallen leaves during the autumn and winter. This is accepted by the Council but they make the point that the leaseholder has granted a number of licences to use the woods and that some walking continues. The Council accepts that more of a path is visible outside the months of December to March but say that it is not possible to follow a defined route around the whole perimeter. Officers visited the site during the months of December 2009 and February 2010 and found that parts of the perimeter route were clear and unequivocal. However, they do not acknowledge the existence of any cross paths. I note the issue raised by Mr and Mrs Seed in respect of the density of the woodland but this issue was raised by the applicant in the context of the leaf fall and not in relation to the density of vegetation and the differing routes.

25. Having regard to the above there appears to be a conflict of credible evidence in relation to the evidence of use forms, which indicate use of the appeal routes, and the absence of continuous clearly defined routes on the ground. The test to be applied is that identified in *Bagshaw*. The evidence of use raises a reasonable allegation that the ways have been used and whilst the routes, or parts of the routes, are not apparent on the ground this does not provide incontrovertible evidence that the ways were not used and could not be reasonably alleged to subsist. The absence of any discernible track does not necessarily mean that any way was not used. The appropriate course of action where there is a conflict of evidence is for an order to be made so that if objections are made then the evidence can be tested.

26. The Council provides an excerpt from Pratt and Mackenzie's Law of Highways (21st Edition). Whilst I concur with the view expressed, in respect of Chittoe Plantation there is evidence of an enduring trackway and whilst this is said to be discontinuous, as I have outlined above, the absence of any route does not provide incontrovertible evidence that the ways were not used. The Council identifies a number of items of case law referred to in the publication[2] but does not give any indication as to any argument that they wish to advance, if any, from the cases nor does it provide any relevant extracts. In view of this I am unable to make any observations in respect of these cases.

27. In relation to Highway Law (4th Edition) by Stephen Sauvain QC the extract indicates the uncertainty as to what constitutes a way which could not give rise

[2] *Eyre v New Forest Highway Board (1892) 56 J.P. 517, Chapman v Cripps (1862) 2 F.& F. 864 and Schinge v Dowell (1862) 2F. & F. 849*

to dedication at common law (section 31 of the 1980 Act) but refers to the case of the *Attorney-General ex rel. Yorkshire Derwent Trust Limited v Brotherton [1991] 1 AC 425*. The Council refer to the statement that '*you do not dedicate a right or direction of travel. You create a right by dedicating the land for use as a public passage.*' I accept this statement but it does not assist in defining the physical characteristics of a way and it does not suggest that it is a prerequisite of the existence of a right of way that a route should be discernible.

28. As regards *Oxfordshire County Council v Oxfordshire City Council [2004] EWHC 12 (Ch)* I again concur with the view expressed. However, in respect of the claim subject to the appeal, evidence has been given to the effect that certain routes were used. Whilst in parts there may be no clearly identifiable route I have already concluded that the absence of any route does not provide incontrovertible evidence that a right of way along the routes claimed cannot be reasonably alleged to subsist.

29. The decision report refers to an order made by the Council which was not confirmed because the right of passage had not been established over a more or less defined route. I note the point but in the absence of any details of that particular case no comparisons can be drawn. In respect of the appeal there is a conflict in the evidence in relation to the use of the ways and the lack, in parts, of a defined route. As outlined previously, where there is a conflict of evidence, an order should be made on the basis that a right is reasonably alleged to subsist. Confirmation of an order requires that, on the balance of probabilities, a right of way subsists; this is a higher test than a reasonable allegation.

30. Having regard to the above, whilst the evidence of use forms identify the use of the various ways there is a conflict of evidence as to the existence of any defined way.

***Evidence of a lack of intention to dedicate by the landowner***

31. The Council contend that there is insufficient evidence to demonstrate a lack of intention to dedicate. For there to be sufficient evidence that there is no intention to dedicate the ways there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the way, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the owner was intending to disabuse the user of the notion that the way was a public footpath. It is not necessary to demonstrate a lack of intention throughout the relevant period but where that evidence is for a short period of time then questions of whether this is sufficient will arise.

32. Chittoe Plantation forms part of the Spye Park Estate and between 1864 and 2005 was owned by Spicer and from 2005 to date by Blue Haze Corporation. In 1954 the woods were leased to the Ministry of Agriculture, Fisheries and Food on a 999 year lease. The lease was sold in 1992 to Bratton Ltd and in 2002 to BCH (UK) Ltd. On 11 December 2008 the land was divided and the lease for the majority of the land was taken by Mr and Mrs Seed. Given the length of the lease, and in the absence of any evidence to the contrary, there is no automatic distinction between any actions of a tenant and that of the landowner.

33. Mr and Mrs Seed do not accept views of the Council in respect of signage of the woods. The context of this representation is not clarified but the original report by the Council considers notices in the context of section 31(3) of the 1981 Act. In my view it is therefore appropriate to consider the representation in relation to any lack of intention to dedicate.

34. The evidence of Mr Kerry, said to be the owner of BCH (UK) Ltd and leaseholder since 2002, is that he recalls putting up a sign close to the access point into the wood near to the cross roads on Chittoe Heath. The notices said '*Private Woodland Keep Out*'. Mr Kerry recalls that the erection of the notice was when visiting the wood with an employee Mr Yates in August 2002; Mr Yates also recalls putting up the notice. He refers to returning to the wood several months later to erect three similarly worded signs. A Mr Townend, employee of BCH (UK) Ltd, and a Mr Heard, the stepson of the previous owner and estate manager recalled a sign at this location which said '*private*'. In contrast none of those who have completed evidence of use forms recall seeing any notices in the wood prior to those erected by Mr and Mrs Seed which brought the right to use the way into question. There is no indication that the erection of any notices in 2002 brought it home to those using the way that there was no intention to dedicate and use continued. It should be noted that for any notice to be effective it must clearly indicate that there is no public right of way. Statements to the effect that the woodland is private are not sufficient to demonstrate a lack of intention to dedicate a way since the statement is not inconsistent with the existence of public rights which, by their nature, exist over private land. I also consider the addition of the words '*keep out*' to such a notice as being ambiguous. In the absence of any reference to a right of way the notice may be construed as requiring people to keep to the path.

35. Mr and Mrs Seed also refer to the erection of signs advertising the sale of private woodland. In my view such notices would not have disabused those using the ways of the notion that the paths were public. As noted above the existence of public rights is not precluded by the fact the land is private.

36. On balance I do not consider that any notices erected were sufficient to demonstrate a lack of intention to dedicate. There is no evidence of any other actions sufficient to demonstrate a lack of intention to dedicate.

***Conclusions on the evidence***

37. Having regard to all of the above, on the balance of probabilities, the evidence demonstrates use of the ways by the public as of right and without interruption for a twenty year period. There is insufficient evidence to demonstrate any lack of intention to dedicate. There is however a conflict of credible evidence in relation to the evidence of use and the existence of any defined way but no incontrovertible evidence to suggest that rights cannot be reasonably alleged to subsist. As such the evidence indicates that public rights can be reasonably alleged to subsist and test B, as outlined in paragraph 6, is satisfied. An Order should be made and if any objections are raised then the evidence may be more thoroughly tested.

**Other Matters**

38. The Council makes representations as to the appropriate scale of any Order map and the ability to accurately identify any definitive route; this was in relation to the appellants comments on the variance in the claimed routes. The

appeal is on the claimed routes identified in the original application and the matter as to how this may be depicted on any order plan is not a matter for my consideration. I note the observation that if the Council had been dealing with a creation as opposed to a definitive map modification order based on user it would have been possible to add a route as described in the statement. In my view there is no distinction and the appeal route is capable of being described in any statement.

39. Mr and Mrs Seed say that should the application be granted then they would wish to fence the path but could not do so with the wide variety of routes claimed. The applicant disputes the point made by Mr and Mrs Seed that they have granted permission for anyone who has applied to walk in the woods. The appellant also makes representations in relation to the process of investigations leading up to the decision report of the Council including the stance taken by the third party. I note all these observations but they are not matters for my consideration.

**Conclusion**

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

**Formal Decision**

41. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Wiltshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Wiltshire County Council to add a number of public footpaths as proposed in the application dated 18 March 2009. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

*Martin Elliott*

Inspector