

Cherrygarden Lane link appeal

ROW/3340047

BHS response to KCC statement

A. Introduction

A.1. This is the response of the British Horse Society to the comments submitted by the order-making authority, Kent County Council (KCC), on the Cherrygarden Lane link appeal.

A.2. We refer to the society's original appeal statement of case as BHS-SOC. For example, BHS-SOC/item III.K. We refer to the numbered paragraphs of KCC's comments.

B. The reasonably-alleged test

B.1. In its comments, KCC states that its reasons for rejecting the appeal were set out in the notice of decision, and that,

the Inspector is respectfully requested to read the decision in full when considering this appeal.

B.2. Regrettably, it seems that KCC has not read the society's appeal statement of case in full, as there is little in its own statement which develops its position beyond the original decision, notwithstanding the additional analysis in our appeal.

B.3. We do not repeat here the grounds for appeal.

B.4. However, we wish to reiterate that, in order that the application be granted, the society is required only to reasonably allege that the appeal way subsists — a test which, in our view, KCC has not applied.

B.5. In *R v Secretary of State for Wales ex parte Emery*,¹ the Court of Appeal (on appeal from the High Court) reviewed the decision of the Secretary of State to not allow an appeal against the surveying authority's refusal to make an order to record a public footpath, in circumstances where there was disputed user evidence.

B.6. Roch LJ (with whom the other lord justices of appeal agreed) said, approving the judgment of Owen J in the High Court in *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (cited in BHS-SOC/para.I.H.15):

But where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no inten-

1 [1998] 4 All ER 367

tion to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.

B.7. While the present appeal relates to a claim made on the basis of historical evidence of reputation, the explanation of the reasonably-alleged test in *Bagshaw* and in *Emery* applies equally: see the words of Lindblom LJ in *R (oao Roxlena Ltd) v Cumbria County Council*²:

The crucial question is whether the allegation is a “reasonable” one. This is not a high test, and deliberately so. The fact that the allegation is based on primary documents rather than user evidence as such does not bear on the principle. A reasonable allegation can properly be based on documentary material alone... .

B.8. There is indeed credible historical evidence of reputation; there is — according to KCC, but not accepted by the society — conflicting interpretation of that evidence as to reputation; and there is no documentary evidence which must inevitably defeat the claim.

B.9. Such contrary documentary evidence, sufficient to displace a reasonable allegation, is sometimes referred to as a ‘knock-out blow’, and in his judgment in *Emery*, Roch LJ describes an, in effect, knock-out blow as where³:

...a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail.

B.10. Examples of such a knock-out blow are given earlier in the judgment of Roch LJ — as, for example (in relation to user evidence), a deposit and declaration made under s.31(6) of the Highways Act 1980. A knock-out blow in relation to historical evidence of reputation might comprise, for example, a magistrates’ court stopping-up order, or irrefutable evidence of settlement of the estate at the alleged or probable date of dedication (where no earlier or later date of dedication would be permissible in the particular circumstances). In *R (oao Monckton) v Staffordshire County Council*, the claimant referred to a declaration by Quarter Sessions that no public right of way subsisted over a way,⁴ presumably intending such a declaration to be a knock-out blow.⁵

B.11. There is no knock-out blow in relation to the appeal way, nor indeed does any evidence, on any interpretation, come close to posing as a knock-out blow. It is not possible for a reasonable person to suggest that the application ‘would be bound to fail’. Accordingly, it is submitted that the appeal demonstrates a reasonable allegation that a right of way subsists, and ought to be upheld.

C. KCC commentary

C.1. KCC summarises its reasons for rejecting the society’s application in six bullets at [para.5](#). As noted above, KCC does not develop its approach in the light of the society’s appeal statement of case. Nevertheless, we respond as follows.

² www.bailii.org/ew/cases/EWCA/Civ/2019/1639.html, at [74]

³ At p.379

⁴ Under s.31(3)(a) of the National Parks and Access to the Countryside Act 1949 (now repealed).

⁵ www.bailii.org/ew/cases/EWHC/Admin/2022/3049.html, at [61–70]. The court preferred the defendant council’s analysis that the declaration was, in effect, spent

- b.1: These are early maps, prepared with primitive surveying methods. There can be no serious suggestion other than that all of the early maps show the same appeal way subject to the limitations of surveying done in that era.
- b.2: See rebuttal in BHS-SOC/item III.H.
- b.3: This is not a reason for rejection, merely a dismissal of evidentiary value.
- b.4: See rebuttal in the BHS-SOC/items III.K and III.L.
- b.5: We agree that the plans prepared under the *Finance (1909–1910) Act 1910* (BHS-SOC/item III.M) are inconclusive. The order way is included in the colour wash in both the working plan and the record plan — but so too is the chord⁶ road (and, on record plan sheet LVII/4, many other public roads).
- b.6: If the appeal way had been identified in the parish survey, there would be no application and appeal. It is inevitable that any historical (*i.e.* pre-1949) right of way which is the subject of an application for a definitive map modification order is not recorded on the definitive map and statement, and therefore was not identified in the parish survey (or if it was, it subsequently was deleted). The parish surveys conducted under Part IV of the National Parks and Access to the Countryside Act 1949 were not uniformly perfect.⁷ We suggest in our appeal why the appeal way may have been overlooked (or indeed partially shown) in the parish survey: see BHS-SOC/item III.N.

C.2. In KCC's appraisal of the society's new evidence at [para.9](#), the new evidence has been misunderstood. It is not suggested that the mediæval evidence refers solely to the appeal way, but to Cherrygarden Lane as a whole including the appeal way. Taken in context, and in the absence of the chord road (which seems not to have been constructed until the early nineteenth-century), it is plain that Cherrygarden Lane continued east-south-east, across the Sandwich Road (if it then existed), and towards Sutton and the Kent coast, and its line can still be traced today — possibly known as Saint Margaret Strete or the Pilgrims Way (see BHS-SOC/item III.A).

C.3. At [para.10](#), the purpose of the later Ordnance Survey mapping (*Late C19 and early C20 maps*, BHS-SOC/item III.L) is not to suggest that it is proof of the appeal way's status as a public road — although several editions of the Ordnance Survey one-inch map show the appeal way as of greater status than the chord road, in a context which is highly suggestive that it is part of the public-road network — but to demonstrate that the appeal way has subsisted throughout at least the last five centuries (and almost certainly much longer) and continues to subsist to this day. Indeed, it is only recently that steps have been taken to prevent use, after what may well have been several millennia of continuous use (see BHS-SOC/para.I.H.10).

C.4. KCC refers to other ways shown on the Ordnance Survey New Series one-inch maps which undoubtedly were then private or occupation roads or tracks. But such reference is a distraction. In the context of the 70-metre long appeal way which connects, in a straight line, two ancient roads, where there was no alternative connection until the early nineteenth century, we suggest that the conclusion from the mapping that the appeal way itself was an ancient public road is irresistible.

⁶ The author now recognises that the road in the southern-quadrant does not form a chord, but an arc based on a chord (the chord would be an imaginary line connecting the ends of the arc). However, in view of usage in the society's statement of case, we continue to refer to a chord.

⁷ See the [Parish role in preparing the definitive map](#), published by the society jointly with the Open Spaces Society.

C.5. At para.11, KCC suggests that the appeal way:

fell into disuse...considerably earlier than the mid-20th century (if it was ever a public thoroughfare at all).

But the appeal way has not been in disuse: it was blocked in early 2021 and was used up until that time by horse riders (and presumably still is used by walkers) because, obviously, it has always provided a direct continuation between Cherrygarden Lane and Grannies Lane. It has continued to be shown on maps throughout, albeit with declining importance. There is no evidence that the appeal way ever has been disused.

C.6. At para.12, KCC observes that:

the way is shown in a variable manner on several sources which calls into question whether it really was, as is suggested, established in prehistoric times.

C.7. It adds that:

...notwithstanding the potential limitations of early cartographic practi[c]es, if the claimed route did form a direct crossroads with Cherrygarden Lane and Sandwich Road (as is the Applicant's case), it would have been easy for even the most inexperienced surveyor to accurately record this on a plan.

C.8. We agree with the latter statement. But it is plain as day that early maps are not perfect. It is commonplace that, in considering definitive map modification orders relying on historical evidence, inspectors find that early maps do not show consistent alignments. In *Commission for New Towns v JJ Gallagher Ltd*, Neuberger J (as he then was) considered⁸:

that the fact that the recorded route of Beoley Lane varied, particularly at its southern end, in various maps is explicable by the inevitable inaccuracies in old maps.

C.9. We also agree that it is surprising that the *Poor Law Commissioners' survey* (BHS-SOC/item III.I), which is likely to have adopted the tithe map as its starting point but with elements of resurvey, recorded a staggered junction at A. We suggest that, as the tithe map did not show any way at all between A and Cold Blow Corner, the surveyor was required to draw in the way, and drew it incorrectly on the north or outside of the boundary of parcel 11. We do not accept, and dismiss as absurd, the suggestion that the Commissioners' survey map uniquely recorded a different way on a different alignment which, by implication, existed on the ground at the time of the survey: there is no other evidence for such a conclusion, and no reason to attribute the depiction to anything other than a very minor defect in the survey.

D. Width

D.1. KCC suggests that the true width of the appeal way may be measured from the Ordnance Survey County Series first-edition twenty-five inch map, and concludes that it should be no more than three metres.

⁸ [2002] EWHC 2668 (Ch), at [84] (case included with appeal)

D.2. However, what is shown on the Ordnance Survey map is not the true width of a highway, but what is seen and recorded by the surveyor. The surveyor is no more able to adjudge the width of a highway, than whether it is a highway. But the surveyor does record either what appears to be in constant use (where it is unenclosed), or what may be the boundaries (where it is enclosed).

D.3. In the present case, the surveyor has recorded the width of a defined way. That way appears to have been the width of a single track road. However, there is no reason to infer, in the absence of physical constraints (such as enclosing hedges) that the road was confined to that width, and that if carts were to meet along it, one would have had to wait for another. A reasonable width to accommodate such passing is four metres.

D.4. However, the appeal way does lie within a distinct holloway depression, and the society is content that, as an alternative, the way should be measured by reference to the average width between the tops of the banks on either side of the appeal way.

Hugh Craddock
for British Horse Society

11 October 2024