

 Wright and another v Secretary of State for Environment, Food and Rural Affairs

Overview | [2016] EWHC 1053 (Admin), | [2016] All ER (D) 52 (May)

Wright and another v Secretary of State for Environment, Food and Rural Affairs [2016] EWHC 1053 (Admin)

Queen's Bench Division, Planning Court

Ouseley J

6 May 2016

Judgment

George Laurence QC and Claire Staddon (instructed by **JWK Solicitors**) for the **Claimants**

Tim Buley (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 26 April 2016

Approved Judgment

MR JUSTICE OUSELEY :

1. The Claimants, as trustees, own Burntbarrow Plantation, a 100 acre wood on the outskirts of the village of Storth in Cumbria. This plantation is part of the Dallam Tower Estate, the Estate. The definitive rights of way map, maintained by Cumbria County Council under s53 of the Wildlife and Countryside Act 1981, the 1981 Act, showed a footpath running roughly west to east through its northern part. Members of the public in the Storth village area used other footpaths through the woods. They said that they had done so as of right for the period of twenty years ending in 2007. The paths in question ran from three entry points, known as A, G and F, off two local roads, into the southern part of the woods; these met within 50 yards or less at a point, known as C, whence a single path ran north, before forking at D, to meet the northern footpath at points E and I. In 2007, those three entry points were substantially blocked by the Claimants.

2. Cumbria County Council received the statements of the members of the public, in thirty eight "User Evidence Forms", UEFs, a common type of evidence for this purpose. It also considered the objections lodged by the Claimants. It concluded that this was new evidence showing that rights of way were reasonably alleged to subsist which were not shown on the definitive map, satisfying s53 (3)(c)(i) of the 1981 Act. Accordingly, in June 2013, the County Council, pursuant to its duties in s53(2)(b), made an Order modifying the definitive map to show the paths in question as footpaths over which there were public rights of way. This Order, to give it its full title, is the Cumbria County Council (Parish of Beetham: District of South Lakeland) Definitive Map Modification Order (No 6) 2013, which for ease I call the Order.

3. The Claimant objected, and so the County Council had to submit the Order for confirmation to the Defendant Secretary of State, pursuant to paragraph 7 of Schedule 15 to the Act. A public local Inquiry was held by an Inspector, for the most part in March 2015. The applicants at the Inquiry primarily based their application for the modification on the statutory presumption in s31 of the Highways Act 1980, the 1980

Act. This provides that where a way over land has actually been enjoyed “by the public as of right and without interruption for a full period of twenty 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.” By s31(2), the twenty year period is calculated retrospectively from the date when the right of the public to use the way was brought into question. Here, that was in the summer of 2007, and so the primary relevant twenty year period, through which use as of right had to be shown, ran from the summer of 1987 to the summer of 2007.

4. The Inspector heard oral evidence from eight members of the public about user of the paths, and oral evidence called on behalf of the Estate; he also had the UEFs, which had been considered by the County Council, as well as the objection made by the Estate to the County Council. He concluded, in his Interim Decision of 20 May 2015, that the Order should be confirmed, but with this modification to the Order as made by the County Council: the paths from G and F to C should not be confirmed. It was the paths from A to C, D, E and I which should be shown on the definitive map.

5. The Claimants challenge that decision pursuant to paragraph 12 of Schedule 15 to the 1981 Act, and Part 8 CPR, on the familiar grounds for such a challenge.

6. This decision was in fact an interim Decision, since those adversely affected by the proposed modifications, who wished to raise new issues, had the opportunity to object. There were no objections. Although there was a final decision in September 2015, confirming the Order with the modifications as the Inspector proposed, the relevant decision for the purpose of this challenge is the Interim Order Decision, IOD.

7. The challenge is to the confirmation of the Order in relation to the path from A-C, and relates to the lawfulness of the Inspector's reasoning and conclusion about the evidence of user in the period 1987-1990, which Mr Laurence QC, for the Claimants, termed the Early Years of the twenty year period.

The Decision

8. The Inspector summarised the background to the issues. He noted first the agreement that the paths were blocked at points A, G and F bringing the rights of the public into question in the summer of 2007. The Inspector summarised the position of the parties in IOD [11 and 12].

“11. Some 38 rights of way user evidence forms were submitted to the Council in support of public use of the claimed footpaths and 8 witnesses gave evidence of their use of the Order routes at the Inquiry. Witnesses and evidence forms indicate differences in the routes used.

12. The Plantation is part of the Dallam Tower Estate and in their objection to the Order it is submitted that the public use of the Order routes was not as of right, but by force in the sense of contentious user following forced entry. In any event, the Estate contend that, during the 20 year period before 2007 and earlier, the landowner demonstrated sufficient evidence of a lack of intention to dedicate, whilst there is insufficient evidence of public user in the 20 year period before 1993.”

9. [11] is important for its reference to the UEFs. [12] is important because it shows that the thrust of the case made by the Estate did not relate to the sufficiency of user or to sufficiency of user during the Early Years, but was that, through blockage and signs, it had made clear its case that use of all the paths had been contested during the twenty year period. The reference in the last sentence of [12] to the 20 year period before 1993 is relevant only to footpath F-C, where there was scope for a fall back argument by the applicants, ultimately rejected, to the effect that by the time F-C was blocked in 1993, rights at common law had already been established.

10. The Inspector then set out his conclusions on the evidence about footpath A-C:

“13. From Throughs Lane the Order route starts parallel to the road before turning into the Plantation through a small (0.8m wide) gap in the stonewall alongside the edge of the Plantation. The gap in the wall has dressed stone. The route then climbs a steep bank across a rocky outcrop before descending to point C. It is clearly a less commodious route than the near-by alternative of routes F & G. Upon entering the Plantation at Point B witnesses recalled a large laurel bush with no branches. Mr Morris recalled having to 'limbo' under a branch, but no witnesses indicated that their use of the route was prevented. Mr Morris was a regular (daily) user of route A and other routes after 1982 and three other witnesses gave evidence of their regular use of this route throughout or within the 20 year period before 2007.

14. There is no evidence from any of the witnesses at the Inquiry, or otherwise, to indicate that route A was impeded in any way except by the presence of the laurel tree throughout the 20 years before 2007.”

11. In IOD [19], the Inspector concluded that, during the 20 year period, A-C and its onward continuation to the fork at D and the junctions with the northern footpath at E and I were sufficiently used as of right, without interruption and that there was insufficient evidence of a lack of intention to dedicate by the Estate. “The laurel tree at the entrance of route A, whilst hindering the public use, did not prevent public use and is not any indication of a lack of intention to dedicate.” Such challenges as there were, were insufficient to demonstrate a lack of intention to dedicate.

12. I also need to mention what he decided in relation to footpaths F-C and G-C. The applicants had accepted that in 1993 F-C, “a well-defined track [with] the appearance of an accommodation road” for the use of the Estate had been obstructed by the Estate, and that the subsequent user of that route was contentious, and so could not be relied on to establish any rights. This blockage had however led the public to enter the plantation, through a gap in the wall, at point G, very near to F, and to use the path G-C instead. There was a conflict of evidence or of its interpretation as to whether there had been signs prohibiting such access at or near point G, whether there had been repairs to the wall which the public had forcibly breached, or whether the gap had just arisen out of dilapidation. He concluded “that public use of the way before 1993 would not have been sufficient to come to the attention of the landowner and as Mr Townend, [who represented the applicants] indicated significant use of this route by the public only commenced after route F was obstructed.” There was therefore no twenty year period of use, and he also accepted the Estate's evidence that there was no intention to dedicate.

The challenge

13. Mr Laurence submitted that the inspector had to be satisfied, as a statutory pre-condition to the modification, and whether the point was fully raised or not, that there was evidence of public user as of right throughout the whole of the twenty year period. The Inspector had to consider whether the evidence of user throughout the period, and so in the Early Years as well, was of sufficient quantity and quality, in relation to route A-C.

14. The Inspector, in IOD [13], had based his conclusion as to user exclusively on the evidence given at the Inquiry by the eight witnesses. He considered but had given no weight to the content of the UEFs, which was a rational approach to UEFs. Mr Morris was the only witness named by the Inspector, of the four witnesses who gave evidence about route A-C, who had done so in respect of the Early Years. On the Claimants' identification of the other three who gave evidence about route A-C, only one other, Mrs Rocke, had covered the Early Years. As his reference to “throughout or within” showed, the Inspector had wrongly treated the evidence of the four witnesses as all of a piece with that of the two whose evidence did cover the Early Years. Had he examined those witnesses' evidence separately for the Early Years, as he

should have done, he would have been bound rationally to conclude or at the very least could rationally have concluded that it was insufficient. In any event his reasoning on that point was legally inadequate. Relevant to his consideration of that point, would have been the character of the route A-C as he described it in IOD [13], and the availability without impediment until 1993 of the very nearby and much easier route F-C. It was notable that nothing was done by the Estate to stop the use of route A-C when it had taken steps to interdict the other two southern entry points, which also pointed to the insufficiency of the quantity and quality of the public user of that route.

15. Mr Buley for the Secretary of State responded that this was a very narrowly based challenge, unlike the more general objection set out by the Inspector. The Claimants' case to the Inspector had focused, not on sufficiency of actual use, but on whether it had been as of right or interrupted and on whether there was a lack of intention to dedicate.

16. The objection by the Estate to the County Council had accepted that many of the forest tracks were used by the public. The Estate's original statement of case to the Inquiry had not dealt with the quantity or quality of the actual use by the public: the comment at [5] was just a statement of law, not of the issues; at [15] it said that the relevant County Council committee report on making the Order contained a summary of "alleged use. Although suggestive of considerable use, the Estate contend that the use was challenged...as detailed." It said that its objection had set out in detail the basis upon which the Estate contended that user was not as of right but was contentious. Later, the statement said that the Estate had taken all reasonable and proper steps to ensure that it demonstrated to the public that there was no access to the claimed rights of way and that use by the public was challenged. The Estate's final statement of case, submitted in December 2014, after the initial adjournment of the Inquiry, referred to the fact that the applicants acknowledged that the Estate had blocked the entrances at F and G to prevent access before 2007. It contested the suggestion that the adequacy of user was not in dispute, but nonetheless said that the Estate's case was that, aware as they were of some people gaining access to the woods, they had sought to prevent this by blocking and signs.

17. The Inspector was not asked in submission by the Estate to focus on the Early Years or on the particular section of the footpaths, A-C, as a result of the evidence. The way in which a conclusion on routes F-C and G-C might affect any conclusion on A-C was not raised for his consideration. None of the applicants' witnesses were cross-examined about their evidence of user by the rights of way consultant, who appeared on behalf of the Estate, as HHJ Townend, a retired circuit judge, was not slow to point out to the Inspector.

18. The evidence of the two witnesses, if they had been correctly identified by the Claimants, was sufficient in law to warrant the Inspector's conclusion, particularly in the light of the focus of the Estate's case.

19. Mr Buley however also submitted that the Inspector should be taken to have given weight to the UEFs. These contained further evidence of the Early Years' user.

20. Mr Buley drew my attention to the Planning Inspectorate's "Wildlife and Countryside Act 1981, the Definitive Map Orders: Consistency Guidelines". Paragraph 2.23 notes that it is unusual for all contributors of evidence to be able to appear at an Inquiry. UEFs are one form of written evidence which can be presented, and if relevant, must be examined. "The need for critical scrutiny of User Evidence Forms" is addressed in [5.7]. There it says that these are common in s31 1980 Act applications. "Analysis of UEFs will identify omissions, lack of clarity, inconsistencies and possible collusion, although the completion of common parts of the form by someone organising collection of the evidence is not necessarily evidence of collusion. Analysis allows...[a party] to note the questions to raise at inquiry...UEF's are not standardised, and pose differing questions of varying pertinence and precision."

Conclusions

21. The relevant law is not contentious. *Mann v Brodie* (1885) 10 App. Cas. 378 shows that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 AC 70, and others cited in it, deal with the quality of the user. The use had to be sufficient to bring home to the mind of the reasonable non-absentee landowner that the public were asserting a continuous right to use each route in question. The user over the twenty year period did not have to be by the same people.

22. I also accept Mr Laurence's submission that the Inspector has to be persuaded on the evidence that the user in question endured through the whole of the twenty year period, and that this has to cover each of the routes in question. Mere silence or lack of evidence on the part of the landowner is not the equivalent of positive evidence satisfying s31. However, general comments by the landowner about what he knew and what steps he took or did not take in consequence and why, his evidence of user or non-user, the extent to which evidence of others to the contrary is challenged, and the submissions made about it, are relevant to the judgment of the Inspector on the sufficiency of user. Relevant too are the character of the path, and where it leads.

23. I accept Mr Buley's submissions as to the way in which the Estate put its case to the County Council and at the Inquiry: the focus was on the interruptions to the use, and on the absence of any intention to dedicate, rather than on sufficiency of use. This was mentioned as part of the law, although there was some evidence about what estate workers and others had not seen. There was no focus specifically on the sufficiency of use of A-C, even in the light of the blockages to F and G to C. There was none on the Early Years as a specific period, even in the light of the evidence as it had developed. I note also that HHJ Townend's closing submissions are focused on the case as I have understood it, since it is very largely about the absence of cross-examination on the user evidence, and the effect of the evidence of interruptions and signs. It does not focus on the Early Years or on A-C. In the absence of clear contrary evidence, I can assume that his submissions covered the case as it developed.

24. The principal issue, assuming for the moment in Mr Laurence's favour that the Inspector did have regard to the UEFs but did not give them any weight, is whether his conclusion on the Early Years in relation to route A-C is irrational, or wrongly treated the evidence of four witnesses as covering a longer period than it did, so that he has not addressed the sufficiency of use on a proper analysis of the only evidence on which he said he relied.

25. The evidence of the two witnesses which Mr Laurence submitted were all that the Inspector had to rely on, once he had excluded the UEFs, goes beyond their own individual use. They were not cross-examined, so their written statements can be taken as their evidence. I shall assume that there was no relevant oral elaboration. Mr Morris, a retired highways engineer, the witness named by the Inspector, lived in the area from 1982. He walked the many paths in the woods daily, including the routes in question at the Inquiry. His wife often went with him. He met many other walkers in his wanderings, and some of these would tell him about the many paths and features of the woods. There is no suggestion that he met other walkers only from 1990 onwards. It is not clear whether his comment that every path was obviously very well trodden "by many years of usage by...walkers" was true only from 1998, which seems unlikely to be what he meant, but in any event it relates back to a period which could readily cover the Early Years. There was no cross-examination or comment by the Estate on this. Mr Buley rightly points out that this evidence goes well beyond use by Mr Morris; it covers use by his wife and many other walkers, including in the period when he was a newcomer in 1982.

26. The other witness who gave oral evidence about the specific period was Mrs Rocke, a District Tribunal Judge and local authority solicitor with experience of representing her authority at Inquiries such as this

one. From 1972, when her parents bought a second home in the area, she visited at weekends and holidays. She walked in these and other woods with her family on a regular basis from that time on. Again she was not cross-examined on the frequency of her user and what she saw of others. It was not suggested to her, therefore, that her evidence did not cover all the routes in question. Mr Wood, the rights of way consultant who represented the Estate at the Inquiry, accepted in his witness statement for this case, that she had given oral evidence which covered the route A-C.

27. Mr Laurence was too dismissive of the relevance to this period of the evidence of HHJ Townend and Mr Roberts, the other two witnesses identified by Mr Wood as having given oral evidence covering A-C. True it is that HHJ Townend did not start using the paths himself until April 1990, but on his arrival in the area, he was told about the paths in the woods, and said that when he started using them "it was obvious to the eye that the said paths and many others were well and long established." It appears that his use of A-C was occasional, but from point C, he would have seen at least part of route A-C. Mr Roberts and his wife, friends of HHJ Townend and his wife, started visiting them in 1991 before moving to the area themselves in 1996. In 1991, the Townends showed them the "many well trodden paths", including those in question. When they moved there, they used the paths other than just as visitors. This is evidence that the route A-C was well used by 1990/1, not very long after the start of the relevant period. The clear implication is that use started well before that time.

28. There is a further point which the Inspector would have understood in his appraisal. Mr Laurence accepted that the Inspector could rationally conclude that, whatever the Estate's witnesses may have said or written about not seeing walkers, or not being aware that point A was being used to reach point C, there was a sufficiency of evidence from mid-1990 or so onwards, when on his analysis the evidence of user of A-C came from 3 and then 4 witnesses, (Mr Roberts and HHJ Townend following on from Mr Morris and Mrs Rocke). He accepted that it followed that that sufficiency of user from 1990 onwards did not result from the closure of the entry to the woods at point F in 1993, though it was the most commodious entry point, and its closure had led to some diversion to point G. It also followed that sufficiency of user in the Early Years was not prevented by the natural obstructions and difficulties to the A-C route. So there was no event or aspect of the character of the route which could account for user becoming sufficient in 1990 onwards though insufficient in the period 1987-1990. That is in my judgment relevant for the Inspector's judgment as to what the whole of the oral evidence considering route A-C showed.

29. Whilst it might seem odd that the Estate should have been thought to have left A-C unobstructed once they had adequately blocked off points F and G to C, unless they, embodying the reasonable landowner, could not have been aware of user sufficient to put them on notice of the assertion of rights between A and C, Mr Laurence's acceptance, which he maintained, that the issue related to the period 1987-1990, and that the evidence was sufficient thereafter, means that there was no material error by the Inspector in not considering that point in the light of his conclusions on the blocking of routes F and G-C. Nor were any contingent submissions addressed to him on it.

30. Taken as a whole, this evidence provides a rational basis for the Inspector's conclusion. But that is properly reinforced by the absence of any specific case that route A-C was different in user from routes F-C or G-C, or that the Early Years were areas he should concentrate on. This is a point which does not just go to the adequacy of reasons; it goes to the extent to which he needed more evidence to satisfy himself that there was sufficiency of user throughout the twenty year period, which there was.

31. I certainly do not consider that the Inspector's conclusion needed more extensive reasoning on this issue in view of the way in which the case was presented to him, as I have set out. The issue raised before me was not a principal issue in the case. Nor did he need to express any separate conclusion on the Early Years in the light of the way the case was presented.

32. I should add that I think that Mr Laurence is probably right that the Inspector had regard to but did not attach weight, or any significant weight to the UEFs. Perhaps this was because of the general reasons which Mr Laurence, who is very experienced in this area, as is the Inspector, gave about the problems with UEFs in general and with these in particular: the absence of plans for many, the lapse of time between the making of the statement and the marking on the plans of the routes in question, the "invitation" to mark all the routes on the maps, the contradictions between the map and form, and uncertainties about which of the various nearby entries, A, G or F, were being talked about. But I think that it is more likely that the Inspector was simply satisfied that on the oral evidence alone, which had not been challenged or explored in cross-examination, and which on sufficiency of user was not the real focus of the case anyway, he could reach the conclusion he did without looking for support from them. He might properly also have come to the conclusion that, whatever the UEFs did show, what the UEFs did not show was any positive evidence at all that there had been no user of A-C between 1987 and 1990. He may have been aware of a general substratum of support for his conclusion in the UEFs rather than even neutrality, but there was nothing in them to counter his conclusion.

33. In the light of those conclusions, it is not necessary for me to consider the UEFs in any further detail.

34. The issue between the parties in relation to the UEFs as evidence before me was the lateness of their introduction by the Secretary of State, who essentially countered that the Claimants, in making the point they did about the evidence, should have placed them before the Court anyway. Mr Laurence submitted that his case was confined to the contention that the Inspector considered them but placed no weight on them, on the proper construction of the IOD, and so they were not necessary. I considered them without ruling on admissibility. I shall only resolve that should it be necessary on any cost point.

35. I was troubled by the fact that, if such evidence were to be admitted, indeed if the events at the Inquiry were to be discussed, as inevitably became the case as the nature of the Claimants' case at the Inquiry became relevant, and their own evidence required conclusions as to what witnesses gave what evidence, the applicants had not been served with the papers, were not parties, yet might need the opportunity to respond. The Secretary of State is often not well placed to respond, and the County Council was not an active participant either at Inquiry or here. Both parties urged that I should reach my conclusions on a provisional basis, and then see where that left the notification of the applicants at the Inquiry. In the light of my conclusions, notification is not necessary. It appears however from CPR Part 8 that the Claimants were not obliged to serve the applicants, and so have breached no rule. In the absence of a Rule change, however, there is an evident risk that the applicants might find that the order which they had obtained, although benefiting the public generally, had been quashed, when there was relevant evidence or submission which they could have placed before the court. All I can say about that is that the parties who are served should consider whether notice needs to be given to the applicants in the light of the case, and serve them with the papers if that is thought necessary in the interest of justice. If in doubt, the parties can also seek the direction of the court, but well before the hearing. The applicants may not wish to attend, or to be represented, and cannot expect costs even if successful. But they should at least know what is going on, and what the issues are so that they can decide what action if any they wish to take. There was a risk that there would have had to be a last minute adjournment part way through the case, which no one wanted.

36. The application is dismissed.