Case Name: *Roxlena Ltd, R (On the Application Of) v Cumbria County Council* [2019] EWCA Civ 1639 (09 October 2019)

Full case: Click Here

Commentary: The Court of Appeal dismissed an appeal against the High Court's decision to dismiss a landowner's claim for judicial review of Cumbria County Council's authorisation of an order under the Wildlife and Countryside Act 1981 (the "Act") which added 34 footpaths to its definitive map and statement of public rights of way, as well as extended a bridleway over land owned by the appellant.

This case is essential reading for surveying authorities in terms of carrying out their duty to keep the definitive map and statement under continuous review pursuant to section 53 of the Act. It will also be of interest to those seeking to claim public rights of way and to landowners concerned about the potentially establishment of such rights over their land. The case concerned the approach which a surveying authority should take to justify the making of an order to add a footpath to its definitive map and statement of public rights of way under section 53 of the Act.

The order was authorised by the Council on the basis of satisfactory evidence being adduced to demonstrate 20 years of uninterrupted use, as required by section 31(1) of the Highways Act 1980 (known as presumed dedication). Section 53 of the Act requires local authorities to maintain a definitive map and statement recording all public rights of way in their areas and to keep these under continuous review. Section 53(2) provides that modifications must be made upon the occurrence of the events specified in section 53(3). These include the discovery of evidence which shows that a public right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates.

Four questions were considered in the case: (1) whether there was sufficient evidence to justify making the order for the footpaths; (2) whether the Council failed to discharge its duty to investigate alleged interruption of the use; (3) whether the Council had made a discovery of evidence within section 53(3)(c) of the Act; and (4) whether there was sufficient evidence to justify making the order for the bridleway.

In relation to (1), it was held that there are two stages to the statutory process: the making of the order and its confirmation. Under section 53(3)(c)(i) of the Act, there are two alternatives: either that the right of way subsists or is reasonably alleged to subsist. At the order-making stage, there is no need for the Council to also scrutinise the case for confirmation of the order by applying the balance of probabilities test which would be applied by an inspector at an inquiry. The effect of this would be to conflate the two stages. In sum, an "order may be made where the relevant allegation is reasonable, but not unless it is."

In relation to (2), it was held that the evidence of interruption of use within the relevant 20-year period did not have to be more deeply investigated that it was before the Council decided to make the order. The Council did not have to go behind the user evidence forms

and send letters to the 40 users who had said they did use the paths during the period, or a sample of those users, to ask whether they had inadvertently claimed to have done so. That evidence could reasonably be taken at face value at the order-making stage.

In relation to (3), section 53(2) of the Act provides that local authorities must update the definitive map and statement upon the occurrence of any of the events listed in section 53(3). In this case, the relevant event was set out in section 53(3)(c), namely the 'discovery…of evidence which (when considered with all other relevant evidence available…) shows…' any of the matters in section 53(c)(i)-(iii). In each case, the occurrence of the specified 'event' is not simply the 'discovery' of the evidence in the sense of its being physically found. It also requires the authority to consider that evidence, together with any other relevant evidence available to the authority which actually 'shows' one of the specified circumstances. Evidence discovered by somebody once – in the sense of being found for the first time – cannot, in that sense be discovered by that person on a subsequent occasion. However, that is not the say that the evidence, once discovered, but not so far considered by the authority, cannot be considered on the second occasion when it is submitted.

In relation to (4), there was sufficient evidence to justify extending the bridleway. As per (1), the crucial question was whether the allegation is a reasonable one which is not a high test. The fact that the allegation is based on primary documents rather than use evidence does not determine this; a reasonable allegation can properly be based on documentary material alone. It was not accepted that because the map showed a route that was not the claimed bridleway, the evidential basis for adding the stretch of bridleway to which the application related fell apart and that the allegation of the subsistence of the bridleway on that alignment could not be reasonable.

Case summary prepared by Victoria McKeegan