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| **Appeal Decision** |
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| **by Alan Beckett BA MSc MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 December 2021** |

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| **Appeal Ref: FPS/Q1770/14A/5** |
| |  | | --- | | * 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 Hampshire County Council (‘the Council’) not to make an Order under section 53 (2) of that Act. | | * The application dated 29 November 2019 was refused by the Council on 25 May 2021. | | * The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a public footpath between footpath 3 at SU 2747 2988 to the junction of footpaths 3 and 4 at SU 2768 2965 (as shown by the red line on the plan appended to this decision).  Summary of Decision: The Appeal is dismissed. | |
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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. The 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 case of *Dawes v Hawkins* (1860) [S.C. 29 L J C P 343].

**Background**

1. This appeal concerns the claim by the Appellant that a public right of way has come into being through long use over a line running between two points on West Tytherley footpath 3. Footpath 3 commences on The Village and runs in a generally south-easterly then easterly direction terminating on an access track to the north of Stride’s Farm. Footpath 3 was originally recorded in the definitive map and statement in 1953 and the Council submits that the definitive line of the footpath has not changed since that date and remains on the same alignment.
2. The Appeal is made in respect of a route which commences on that part of footpath 3 at Russell’s Cottage running north-easterly to the boundary of that property with adjacent agricultural land, then running south-easterly crossing two field boundaries to reconnect with footpath 3 at its junction with footpath 4 to the east of Church Farm House.
3. It is contended by the Appellant that the definitive line of footpath 3 had been obstructed by development at Church Farm in the late 1960s and that the Appeal route had been used by the public since that date. It is claimed that the alternative route should be recorded in the definitive map and statement.
4. The Council and the objector contends that the definitive line of footpath 3 at Russell’s Cottage to the south of the pond had been obstructed around 1995 with a new route to the north of the pond being provided by the landowner. The Council also contends that footpath 3 has also been obstructed as it crosses land belonging to Church Farm House with an alternative route being provided. The Council and the objectors submit that the use by the public of an alternative route due to the definitive line being obstructed is use in accordance with the principle established in *Dawes v Hawkins.* It is argued argued that such use does not give rise to a presumption of dedication as the use of an alternative route is use ‘of right’ not ‘as of right’.
5. It is not disputed that there has been use of the Appeal route since at least 1995 and it is not necessary for me to analyse the evidence of use which has been submitted.

Main Issue

1. The main issue in this case is whether a public right of way subsists or can be reasonably alleged to subsist over the Appeal route. In relation to that question is the applicability of the principle established in *Dawes v Hawkins* to the use by the public of the Appeal route as an alternative to the definitive line of footpath 3.

Reasons

1. In *Dawes v Hawkins* the Court held that use of an alternative route by the public during a period when the known public highway was obstructed did not give rise to a new public highway as use of the alternative route was in pursuit of the right of the public to deviate onto adjoining land whenever the owner of the soil unlawfully stops up the public highway.

*Photographic and other documentary evidence*

1. In 1965 Church Farm was sold to a company known as Coggan (1937) Ltd which subsequently (in around 1968) sought planning permission for the development of a building or buildings to serve as beef fattening sheds along with associated forage towers and effluent disposal. The Appellant contends that the east-west orientation of the beef shed, the three-phase electricity pole located on the north-east corner of the building and associated stock fencing obstructed the line of footpath 3 and forced path users onto the alternative line.
2. That the route of footpath 3 was obstructed by the development of the beef shed in 1968 or at any time until the sale of the farm and land in 1995 is disputed by the representatives of one of the former directors of Coggan (1937) Ltd who is the owner of the field to the north-east of Church Farm. It is submitted that footpath 3 was not permanently obstructed in 1968 or at any time thereafter until the owner of Russell’s Cottage erected fencing around the land he had bought from Coggan (1937) Ltd in 1995. Prior to the erection of that fence, the definitive line of footpath 3 had remained unobstructed across open fields running from Church Farm towards The Village on a line to the south of the pond which since 1995 has formed part of the garden of Russells Cottage.
3. There is evidence within the Council’s files of enforcement action being taken against the owners of the land crossed by footpath 3 at various dates during the 1980s with regard to the footpath being obstructed by wire fences and tied gates at field boundaries between Church Farm and Church Farm House. These records also show that building works at Russells Cottage in the late 1960s had a temporary impact upon the availability of the footpath. However, the bundle of documents submitted does not suggest that the Council sought to take enforcement action in relation to the layout of the buildings at Church Farm.
4. The parties have submitted undated aerial photographs of the site. Some of the photographs are said to pre-date 1976 by reference to the then occupants of Russells Cottage being shown in the photograph of the property and by the existence of the Fry’s Garden Machinery business being carried on at the Old Forge. None of these photographs show any obstruction to the definitive line of footpath 3 being present in the vicinity of the pond east of Russells Cottage or any structure which would have prevented access within the field between the pond and Russells Cottage.
5. This pre-1976 photograph also shows that the pond which is now incorporated within the garden of Russells Cottage was a feature in an otherwise open agricultural field. There is no evidence of fencing in the vicinity of the pond which would have prevented path users from following the definitive line of footpath 3 to the south of the pond and into the grounds of Russells Cottage.
6. The photograph of Church Farm from the same group of pre-1976 aerial photographs shows the existence of a concrete track to the north-east of the cattle unit which the objectors submit was constructed to prevent livestock congregating close to the new unit. The photograph shows the access track to have been gated at its northern end where it leads into the open field. Also visible are the uprights of a fence along the western side of the access track.
7. From this photograph it appears that the access track and the cattle unit is located at a lower level than the field to the east over which footpath 3 runs. It is not possible to determine whether the eastern side of the access track or the embankment to the field was enclosed by fencing at the time the photograph was taken.
8. The pre-1976 photograph appears to show a fence line running east from the walled garden of Church Farm House, but the photograph is not of sufficient quality to determine the position of any stile which may have been present in that fence line to provide access along footpath 3.
9. An aerial photograph of Church Farm dated as having been taken in 1991 was taken almost directly above the farm with the shadow cast by the feed silo showing to the south west. The shadow cast by the position of the sun also suggests that the concrete access track is located in a small cutting. The area within the vicinity of the cattle unit appears to be fenced or hedged on its northern and eastern sides with those features converging on what it likely to be the gate at the northern end of the access track which was shown in the 1976 aerial photograph.
10. The 1991 photograph also shows a fence running east from the north-east corner of the walled garden of Church Farm House, but it is not possible to determine the position of any stile which may have been present at that date to enable users of footpath 3 to cross the fence line. There is no fence shown around the pond to the east of Russells Cottage and the pond appears at the time of the photograph to be an unenclosed feature within a large grazing field.
11. In “*Pub Walks Around Southampton and Central Hampshire*” published in 1992, the author describes the line of footpath 3 along which users of his guide are directed. From The Village users following the self-guided walk are advised to “*pass right-handed of a shallow, tree fringed pond as indicated by the first arrowhead*”. This is indicative that at the time of publication, the definitive line of footpath 3 east of Russells Cottage was unobstructed by fencing.
12. A photograph dated as pre-1995 taken from within the grazing field looking west towards Russells Cottage shows that property to be segregated from the adjacent field by a post and rail fence with a stile clearly visible in the fence line to the north of the pond. The owner of Russells Cottage submits that prior to and at the time the photograph was taken, users of footpath 3 walked to the north of the pond before turning south-east towards Church Farm. However, there is nothing in this photograph to suggest that users of the path would have been prevented from following the definitive line of footpath 3 to the south of the pond at the time the photograph was taken. The pub walk described above indicates that the route to the south of the pond was available. The stile shown in the photograph appears to have been on the definitive line of footpath 3 where it crossed the fence at Russells Cottage.
13. The land and property at Church Farm owned by Coggan (1937) Ltd was sold as a number of individual lots as part of a liquidation sale in 1995. The cattle unit and a parcel of land to the north of the building was sold as Lot 3, with the paddock to the north and east forming Lot 2. The sale particulars for Lot 2 shows that it was offered for sale “*subject to a public footpath running from the western to the southern boundary, and due regard should be had to the provision of stiles*”. Despite the definitive line of footpath 3 also crossing what was offered as Lot 3, there is no indication within the sale particulars of that Lot of it being subject to a public right of way. The land to the west of Lot 2 which became an extension of the garden of Russells Cottage appears to have been sold by private treaty as it did not form part of the liquidation sale.
14. The Appellant provided a photograph with a date stamp of 14 February 1988 as evidence that the land to the north of the cattle unit had been fenced and the line of footpath 3 obstructed at that date. I have reservations about the veracity of the date of this photograph as it shows two men loading hay into a baler in the field to the west of the cattle unit; hay is not baled in February.
15. Furthermore, the objector identified the two men shown in the photograph as Reg and Mike Higgins, and that the land on which hay is being baled is that which was sold in 1995 to the owner of Russells Cottage. It is submitted that the individuals shown in the photograph had not worked on the land when it had been owned by Coggan (1937) Ltd. In addition, the fence shown surrounding the land to the north of the cattle unit corresponds to the perimeter of the parcel of land bought with Church Farm at the liquidation sale in 1995. The conclusion to be drawn from this photograph is that it does not date from February 1988 and is more likely to have been taken after the liquidation sale in 1995. Consequently, the photograph does not provide evidence that footpath 3 north of the cattle unit was obstructed prior to 1995.
16. Two photographs said to have been taken looking north from the forage tower are dated by reference to the housing development on the former garden machinery site at the Old Forge. This development was clearly undertaken after the liquidation sale of 1995 as the new fence line marking the extended boundary of Russells Cottage is clearly shown. The new fence line is shown to have a stile in the north-east corner to the north of the pond and not in a position which corresponds with the definitive line of footpath 3. Those using or seeking to use footpath 3 after the erection of this fence and stile would have been diverted away from the definitive line and onto an alternative route.
17. Photographs of Church Farm said to have been taken in 1996 show a digger undertaking earth moving works within the area of land to the north of the cattle unit sold as part of Plot 3. The photograph taken from within Plot 2 shows Plot 3 to have been fenced with no provision made for access along footpath 3 from the south-east or of a means by which path users could enter part of Plot 3 from the north-west. The photograph taken from within Plot 3 shows the existence of a field gate and stile in a new fence line which subdivides Plot 2.
18. The Appellant contends that the fencing shown around Plot 3 had been erected by Coggan (1937) Ltd prior to the liquidation sale; however the sale particulars indicate that the purchasers of the various Lots would be responsible for the fencing of what had previously been a large open field. It is likely therefore that the fences shown in the 1996 photographs had been erected by the purchaser of Plot 3. These photographs show that in 1996 the definitive line of footpath 3 in the vicinity of Church Farm had been obstructed by fencing.
19. There is little evidence as to the date when the line of footpath 3 to the south east of Church Farm was altered. There is evidence of enforcement action having been commenced in 1988 against the owner of Church Farm House in relation to tied gates preventing access along footpath 3 at the boundary between Church Farm House and Church Farm with the erection of a stile being recommended. Although the exact date is unknown it is evident that the gate and stile at this boundary had been repositioned at some time after 1988 with the result that an almost straight-line route between the Church Farm House land and Russells Cottage land became available. It may be that the periodic renewal of stiles or gates at the Church Farm House boundary to accommodate path users has further altered the used line over time.
20. An aerial photograph of the site dated 2006 shows the existence of fence lines in accordance with the land sold in 1995 with the position of stiles said to have been present in those fences highlighted; none of these stiles appear to be on the definitive line of footpath 3.

**Conclusions**

1. It is not possible to determine from either the 1976 or 1991 aerial photographs whether there was a means by which pedestrians following footpath 3 from the south-east towards Church Farm could make their way down the embankment at the cattle unit or across the fence on the western side of the access track. There is no record of enforcement action being taken against Coggan (1937) Ltd in relation to the fence and it may have been possible to follow the line of footpath 3 in the vicinity of the cattle unit between the date of its construction in 1969 and the liquidation sale in 1995.
2. However, if no such means of access was provided or the earthworks associated with the development of the cattle unit had rendered the definitive line of footpath 3 inconvenient, it is likely that path users would have deviated a short way from the definitive line to avoid the gated and fenced access track. Such a deviation away from the definitive line to overcome obstructions or impediments along the route would have been wholly in accordance with the principle established by *Dawes v Hawkins* during the period that the land was in the ownership of Coggan (1937) Ltd.
3. The available evidence also demonstrates that the definitive line of footpath 3 between Church Farm and Russells Cottage was available for use prior to the erection in or around 1995 of a new fence which marked the extended property boundary. A stile was erected at the northern end of this new fence by which pedestrians seeking to use footpath 3 could pass between the land belonging to Russells Cottage and the land offered as Lot 2 in the liquidation sale. This stile was not however on the definitive line and since around 1995 path users have had no alternative but to deviate away from the definitive line in order to continue their journey. Such deviation is again wholly in accordance with the principle established by *Dawes v Hawkins*.
4. The available evidence also suggests that since 1995 footpath 3 has also been obstructed by the fences erected to mark the boundary of Lot 3. No alternative means of access appears to have been provided by the purchaser and it appears that users have habitually followed a line over the land in Lot 2 to overcome those obstructions. Although the sale particulars for Lot 3 did not indicate that the land was crossed by a public footpath, this does not displace the conclusive evidence of the definitive map that one did.
5. The use of an alternative route by the public to overcome the obstructions found along footpath 3 as it crosses Church Farm House and Russells Cottage land does not, in my view, give rise to the existence of a new right of way on that alternative line, as the public have been deviating away from the definitive line to avoid obstructions thrown up along its course. The same principle would apply to any use of an alternative line over land owned by Coggan (1937) Ltd prior to 1995 if the works associated with the construction of the cattle unit had obstructed footpath 3.
6. The obstruction of footpath 3 through Plot 3 in or around 1995 by the purchaser of that plot could, in theory, give rise to an additional right of way over Plot 2 through long use from that date as Plots 2 and 3 were, and are, in different ownership; the *Dawes v Hawkins* principle would not apply in such circumstances. However, the continuation of the alternative route over both Church Farm House land and Russells Cottage land would not provide an ‘as of right’ means of accessing the route over Plot 2 used after 1995. Consequently, it would not be possible at common law for the used line across Plot 2 to mature into a public right of way as that route would be a cul-de-sac at both ends.
7. Use by the public of an alternative alignment to overcome obstructions placed in their path on the Church Farm House and Russells Cottage land is use in pursuit of a common law right to deviate around such obstructions on land in the same ownership. Such use is ‘of right’, not ‘as of right’ and cannot give rise to the dedication of the alternative route as a public right of way at common law.
8. As the used route over Plot 2 since 1995 would be a cul-de-sac at both ends, dedication of that route at common law would also not be possible.
9. In the circumstances of this case, as the claimed public right of way cannot subsist at common law, it is not reasonable for the Appellant to allege that such a right of way subsists. Consequently, I conclude that the Appeal should be dismissed.

**Formal Decision**

1. I dismiss the appeal.

Alan Beckett

Inspector

APPENDIX – Location plan (not to scale)

