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| **Order Decision** |
| Inquiry opened on 11 October 2022 |
| **by K R Saward Solicitor, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 11 November 2022** |

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| **Order Ref: ROW/3268788** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (‘the 1981 Act’) and is known as The Kent County Council (Footpath EE489 at Ripple) Definitive Map Modification Order 2020.
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| * The Order is dated 30 July 2020 and proposes to modify the Definitive Map and Statement (‘DMS’) for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
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| * There were two objections outstanding at the commencement of the Inquiry.
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| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. I conducted an unaccompanied site visit the day before the Inquiry opened. A further accompanied site visit was undertaken with representatives of the parties and Kent County Council, the Order Making Authority (‘OMA’), at the end of the second day of the Inquiry.
2. The Inquiry was scheduled for two days. Evidence was concluded on the second day, but there was insufficient time to hear closing submissions. With the agreement of the parties, the Inquiry was concluded remotely on 18 October 2022 by a virtual event hosted by the OMA. Invitations to join were extended to members of the public.
3. The Order follows a successful appeal to the Secretary of State under Schedule 14 of the 1981 Act. Notwithstanding that decision, made on 5 March 2020 (Appeal ref: FPS/W2275/14A/19), I shall consider the matter afresh on the totality of evidence before me including the submissions made at the Inquiry. I also emphasise that the tests differ for the making of an Order and for its confirmation. I return to this below.
4. As the Order was made on the direction of the Secretary of State, the OMA took a neutral stance at the Inquiry. The case in support of confirmation was promoted by the applicant, Mr Roger Chatfield, who was represented at the Inquiry by Counsel.
5. The statutory objectors are the current landowners, Ledger Farms Ltd and T.G. Claymore (UK) Ltd (‘TG Claymore’). By the time of the Inquiry, Mr John Ledger had died and no-one for the company appeared at the Inquiry or submitted evidence. Counsel for the objectors confirmed that he was instructed by TG Claymore only.
6. Another landowner, Ripple Farms Ltd, was also named in the application for a definitive map modification order (‘DMMO’). The applicant stated at the Inquiry that Ripple Farms Ltd is the current registered proprietor of the northern part of the land albeit Ledger Farms Ltd had claimed ownership. The OMA confirmed that all notices had been served upon both companies.
7. After the conclusion of evidence, I chaired a session at the Inquiry as a round table discussion with the advocates on matters of law being advanced by the parties.

Legal Context

1. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in section 53(3)(b). This provides that the DMS shall be modified following the expiration of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.
2. A higher threshold must be met to confirm an Order than was required when it was made. At the Schedule 14 appeal stage, the previous Inspector had only to be satisfied that it was reasonable to allege that a right of way subsists. The test of the evidence is now ‘the balance of probabilities.’ The Order was made by applying the lesser test.

**Main Issue**

1. The main issue is whether the evidence as a whole suffices to show that, on the balance of probabilities, the claimed route has been dedicated as a public path that should be recorded on the DMS.
2. The burden of proof lies with those who assert the existence of a public path.

***Background***

1. The northern end of the Order route commences off the road known as Coldblow opposite Coldblow Crossing at a point where it connects with existing public footpaths ED36 and EE443. It runs through woodland running parallel with footpath EE443 in a generally south-easterly direction for approximately 174m connecting with both footpath EE443 and existing bridleway EE442 outside the woodland at point B. From there, the Order route turns in a south-south westerly direction through woodland running broadly parallel with bridleway EE442. After 614m or so, the Order route exits the woodland to connect with existing footpath EE438 at point C. It then proceeds in a north-westerly direction through woodland to exit at termination point D to re-connect once more with footpath EE438.
2. The land affected by the Order route is formed of two plots in separate ownership. The northern plot is arable land with woodland, known as Coldblow Woods, to its northern and eastern boundaries (the woodland is also described in evidence as ‘Site B’). The southern plot (‘Site A’) was formerly a sports ground bounded by Coldblow Woods extending along its eastern and southern boundaries. For illustrative purposes, a copy of the Order Map is annexed (Annex A) on which I have marked in red points X-W-Y denoting the boundary between the two plots. These points were also referenced in evidence.
3. Both plots were owned by The Secretary of State for Defence (‘the MOD’) and used by the Royal Marines based at Walmer Barracks for sports, exercise and training. The northern plot was sold by the MOD to Mr Dennis Ledger in November 1978. After his death, Mr John Ledger (his son), became the registered proprietor in 1991. I gather the land now belongs to Ledger Farms Ltd.
4. The southern plot was similarly used by the Royal Marines until the late 1970’s but remained in MOD ownership until its sale at auction to Mr and Mrs Luckhurst in November 1992. TG Claymore acquired the southern plot in May 2012 and subsequently granted a lease to Ringwould Cricket Club.
5. In November 2012, the applicant lodged an application under section 15(3) of the Commons Act 2006 to register the entire site (i.e., both northern and southern plots) as a town or village green (‘TVG’). Following a public inquiry in June 2014, the appointed Inspector’s final report was published on 30 March 2015 (N.B. the report is erroneously dated March 2014) recommending refusal of the TVG application. Once that application failed, the applicant presented the DMMO application to the OMA on 17 May 2015. The applicant successfully appealed the Council’s decision to refuse the DMMO application on 26 February 2019 resulting in the Order which has been the subject of this Inquiry.
6. Although TVG’s are a separate regime to which a different statutory framework applies, evidence produced for the TVG Inquiry is considered highly significant by both sides and was reproduced for consideration in this Inquiry. The information produced at the TVG Inquiry included tested testimony from users of the woodland where the path is now claimed along with evidence from affected landowners. Given the proximity in time to this DMMO application, which also covers much of the same period as the TVG Inquiry, the Inspector’s report and material which informed it carries great weight in these proceedings.
7. As multiple references are made to the content of the TVG report, a copy of the plan relied upon by the TVG Inspector is also annexed (Annex B).

**Documentary evidence**

1. An extract of the Ripple Parish Map (1950) is produced which led to the existing public rights of way alongside three boundaries of the site being added to the DMS. It shows a red dashed line between points A to B running parallel with footpath EE443. The handwritten survey notes identify the surveyed footpath as lying between the fence and copse described as ‘The Firs’, which was completely overgrown by bushes and brambles. The notes record that the public had been using a path through ‘The Firs’ before highlighting that the footpath has now been cleared. This indicates that a path between A to B was in use whilst EE443 was overgrown. It does not shed much light on the Order route which otherwise relies upon user evidence.

**Legal Framework**

1. It is necessary for me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in section 31 of the Highways Act 1980 (‘the 1980 Act’), or by implied dedication at common law.
2. Under section 31 of the 1980 Act, there must have been use of the claimed route by the public as a footpath ‘as of right’ (meaning without secrecy, force, or consent) and without interruption, over a period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner/s during the 20 year period to dedicate the way for use by the public.
3. If the test for statutory dedication under section 31 fails or is inapplicable, then consideration turns to whether there has been dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated.

***Statutory dedication***

*Bringing into question*

1. Before a presumption of dedication can be inferred under statute, section 31(2) of the 1980 Act requires the relevant period of use *"to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by notice … or otherwise".*
2. For the right of the public to use the Order route to have been brought into question for the purposes of section 31(2), some action must have been taken, or an event occurred, which alerts at least some of those using the path that their right to do so is being challenged. There is not an exhaustive list identifying the means by which such a challenge can occur. Whatever means are employed must be sufficiently overt to bring that challenge to the attention of the public using the route.
3. Both applicant and objector agree that in late August 2012 barbed wire was stretched across the access points to the southern plot and signage erected saying: “*Ringwould Cricket Club No Trespassing”.* The objector (who put up the wire) gives the precise date as 27 August 2012*.* The wire would, in itself, have clearly signified to members of the public that entry was not permitted, at least to the southern plot. There followed in November 2012 the digging of a trench and creation of an earth bund between the northern and southern plots. Pits were also dug in the path running through the woodland. By that time the landowner had already made their intentions clear. The TVG application was made in November 2012.
4. Subject to the issue of Crown land (discussed below), the parties agree that the date of bringing into question for the southern plot is August 2012 giving a relevant period of August 1992 to August 2012. I concur.
5. The parties disagree on whether the route must be considered in its entirety in determining the date of bringing into question. The applicant submits that the acts of one landowner cannot bind those of another. Merely because public access was denied to the southern plot in August 2012 does not mean, says the applicant, that the different owner of the northern plot was similarly seeking to prevent public use.
6. I am invited by the applicant to apply the date of 17 May 2015 when the DMMO application was lodged to calculate the 20-year period for the northern stretch on the basis of section 31(7A) and (7B), and there being no earlier date identified.
7. The objector disagrees and maintains that the fencing of the southern plot suffices to call into question the right of the public to use the whole route as the application and use was for a single path.
8. My attention is drawn by the objector to the judgment in *Applegarth v SSETR* [2001] EWHC Admin 487 as authority that section 31(2) places no limit at all on the circumstances in which the public’s right may (otherwise than by an owner’s notice under section 31(3)) be brought into question. In particular it does not limit it to actions of the landowner. As stated by Justice Munby: “*Whether someone or something has ‘brought into question’ the ‘right of the public to use the way’ is, as it seems to me, a question of fact and degree in every case.”*
9. On this question, the objector also highlights paragraph 70 of *R (oao) (Godmanchester Town Council) v SSEFRA* 2008 1 A.C. 221 where Lord Scott of Foscote, after agreeing with the opinion of Lord Hoffmann on the interpretation of section 31(2), added: “*that the bringing of the public right into question could, in my opinion, be done not only by the landowner but also by a member of the public or by the local authority*.” The point made is that the bringing into question does not necessarily need to be by the affected landowner.
10. In this case, the effect of the southern plot being fenced was to prevent use, as a whole, of a single claimed path. The northern stretch could no longer be accessed from the south, as before. The use claimed is not for separate paths but a single continuous path, which so happens to be in dual ownership. At the time the wire was erected, the land was woodland without any division denoting the change in ownership. For all intents and purposes, it was one path.
11. The culmination of factors causes me to conclude that the installation of barbed wire preventing entry by the public to the southern plot sufficed to bring into the question the use of the public to use the path affecting the north plot also.
12. I conclude that the relevant 20-year period is August 1992 to August 2012.
13. Even if I were to take the view that there are separate bringing into question dates, it would still not be 2015. Within the TVG report, it is stated that Mr Ledger started to challenge walkers on Site B (being the woodland within the northern plot) in late October 2012 “*and the applicant accepts that ‘as of right’ use ceased in late October 2012*”. Mr Chatfield told this Inquiry that this information was wrong but it forms part of the ‘undisputed factual context’ section of the TVG report and would not have been included had it not been accurate. Thus, any other period would be October 1992 to October 2012. As it is, I see no reason to apply these slightly later dates.

*Crown land*

1. Having established the relevant 20 year period for statutory dedication, attention turns to the implications of Crown land. The 1980 Act does not apply to Crown land unless the appropriate authority and highway authority have agreed that the provisions shall apply (section 327(2)). Crown land includes land belonging to a government department, such as the MOD. Therefore, both plots were Crown land. There is no evidence or suggestion that any special agreement was in place for the 1980 Act to apply whilst the affected land belonged to the Crown.
2. Only the southern plot was Crown land during the relevant 20-year period of August 1992 to August 2012 applicable for statutory dedication, the land having remained in Crown ownership until November 1992 (the northern plot having been sold by the MOD much earlier).
3. According to the applicant, it is wrong as a matter of law to assert that the 20-year period required under section 31 cannot begin to run until the land ceases to be Crown land. It is submitted that section 31 is entirely prospective and as neither plot is Crown land today, there would be no infringement upon the Crown and the principle of Crown immunity is therefore redundant and inapplicable.
4. Reliance is placed by the applicant upon *BBC v Johns (Inspector of Taxes)* [1965] Ch.31 that *“[The Crown] is not bound by a statute which imposes obligations and restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.”* Further reference is made to the Court of Appeal judgment in *R (Black) v Secretary of State for Justice* [2016] QB 1060 at [3] that under section 327 of the 1980 Act, that Act does not apply to land which is currently Crown land unless the appropriate authority has acquiesced to its application.
5. Those legal authorities do not in my view assist the applicant’s case. Quite the reverse. They make clear that Crown land is not bound by statute, including the Highways Act 1980, unless the statute says to the contrary or there is acquiescence to its application. Neither exception applies. I see nothing in the wording of section 327(2) that assists the applicant’s argument.
6. The relevant 20-year period includes some 3 months when Crown immunity had applied to the southern plot. The applicant says this does not matter because the land no longer belonged to the Crown at the date of bringing into question. If the applicant is right, then section 31 applied during the period of MOD ownership between August to November 1992, yet that position was somehow reversed once the land was sold. Nothing within the 1980 Act or the cited authorities indicates that is possible.
7. The period of 20 years under section 31 is calculated retrospectively. Time begins to run against the landowner from the beginning of the period of 20 years calculated backwards. A full period of 20 years public use cannot be shown over the southern plot as public rights under section 31 could not be acquired until after the MOD disposed of the land in November 1992. Accordingly, section 31 does not apply to the southern stretch of claimed route.
8. In this eventuality, reliance is placed by the applicant, in the alternative, upon implied dedication at common law over the southern part of the Order route. At common law, it is possible for dedication to be presumed against the Crown and consideration can also be given to a period less than 20 years.
9. My conclusion with regard to the application of section 31 to the southern stretch does not preclude the consideration of statutory dedication for the northern stretch, which was sold by the MOD much earlier. Indeed, the parties agreed that there is no reason in principle why a single claimed route could not be partly dedicated by statute and the remainder dedicated at common law. Of course, that depends upon the facts and evidence.
10. I shall proceed to consider statutory dedication in the first instance for the northern stretch and the position at common law for the southern stretch. Consideration may subsequently turn to common law with regard to the northern stretch also should the tests for statutory dedication fail over the northern plot for other reasons.

**Reasons**

*Evidence of use by the public*

1. Notwithstanding that the applicant has argued statutory dedication for the northern plot between May 1995 to May 2015, I have found the relevant period to be August 1992 to August 2012 and shall consider the evidence for such period accordingly.
2. The DMMO application was supported by 54 user evidence forms (‘UEF’s’) from 55 users. Seven users (including the applicant) gave evidence at the Inquiry.
3. The objector suggests that it is telling that so few witnesses were willing to attest to their use in comparison to the hundreds who originally provided evidence as part of the TVG Inquiry. It is emphasised by the objector how the original claim was for lawful sports and pastimes across the entire site, being an entirely different type of use. The objector says that the DMMO application was opportunistic and based upon a confused reading of the TVG Inspector’s report.
4. Clearly, they are different regimes and the TVG application relied upon use of the land as a whole rather than use of any single path. Furthermore, the evidence put to the TVG Inquiry was of public use of the land for a variety of purposes. That is not to say a public path could not have become dedicated during that same period depending upon the nature, extent, and longevity of public use. Public paths and TVG’s can co-exist.
5. Of course, the TVG Inspector was not assessing the merits of a public right of way claim when saying (at paragraph 180(a)): “*I agree with those witnesses that the principal path in the woodland has all the characteristics of a public right of way. It is clearly defined, could be marked on a map, having a clear beginning, end and route. Use of this path, whether to access other land, the field in Site A, or generally, would in my view bring home to a landowner the assertion of a public right of way, and not a village green right*.” It was an observation which is helpful in terms of illustrating the likelihood of landowner awareness of public use of the path.
6. I read nothing into the Statement supporting the TVG application that “*no public footpaths run over this part of the land [being the northern plot]*” when none were recorded in the DMS.
7. Notably, a high per centage of the claimed use was by dog walkers rather than persons pursuing activities indicative of a wider leisure use. Most of those dog walkers claim use of the whole route. The evidence was only tested of a few, but there was clear and consistent evidence of use of a well-trodden and defined path running through the woods between points A-B-Y on the map at Annex A.
8. My attention was drawn to multiple other paths through the woodland. During my visits I observed various points along the Order route where other worn paths were available. I am mindful that the current day well-trodden tracks do not necessarily reflect those that existed in the past. Indeed, more paths may have appeared since the TVG and DMMO applications especially as there are no longer physical restrictions preventing public access to the woods.
9. Notably, the TVG Inspector conducted a site visit in June 2014. She records that on entering the woods from the north-eastern corner (i.e., point B), “*the walker is faced with two well-defined and well-used tracks; one running westwards parallel to footpath EE443, and another track running southwards within the woods running parallel to bridleway EE442. There are a number of less clear tracks in the woodland which tend to converge on a depressed crater, known as the ‘chalk pit’ or ‘bomb crater’…”.*  The TVG Inspector also discussed “*other more informal paths within the woodland*”. She describes one main path at the northern end where the woodland is narrow but in the approach to the ‘chalk pit’ (also within the northern plot) where the woodland increases in width, the paths multiply. The TVG Inspector concludes that these smaller paths would not appear to a landowner to be characteristic of public rights of way.
10. This undisputed record of the physical features of the site much closer in time to the date of bringing into question, confirms the presence of other routes but reinforces that the track from B to A and running southwards from B to C were those most likely to be in greater use. I daresay walkers did explore other paths and that is confirmed in evidence, for instance, in references to the former sports field which would have necessitated departure from the Order route. In live evidence, one witness was explicit in use of ‘other routes’, and another said they would explore the woodland. Witnesses referred to different entry points used from connecting paths and the combination of possible walks between the Order route points depending upon destination.
11. The TVG report does not support the objectors’ contention that walkers wandered through the woods rather than utilising the Order route. The TVG application was made on the basis of wider use of the woods but it is also evident that a ‘main path’ or ‘principal path’ (as described by the Inspector) existed between the points corresponding with Order map A-B-C.
12. The objector does not seek to impugn the credibility of the applicant’s witnesses but submits that there are inevitable weaknesses with the reliability of the evidence when trying to recall critical periods so long ago. It was also suggested that the UEF’s are almost too consistent and reflective of a co-ordinated approach which has evolved to suit following the unsuccessful TVG application. An applicant is almost in an impossible position if that line of argument is followed too rigidly. If the UEF’s were inconsistent then arguments of unreliability might be anticipated also.
13. When standard template forms are used with pre-populated points on a map, there is always an element of caution that must be exercised in assessing the reliability of the information. By their nature, UEF’s are not all encompassing and errors are plainly possible. Equally, it does not automatically follow that the content is unreliable. Clearly, where evidence is contested it is a question of weight to be applied. Tested evidence which stacks up will be expected to carry more weight than that which is untested.
14. In this instance, around 40 people completed UEF’s to say that they used the Order route throughout the 20-year period between August 1992 to August 2012. That is a high number. They are supported by 9 or so others claiming use over that period of between 3 and 16 years. Others claimed use starting earlier but continuing into part of the relevant period. Whilst memories fade and it can be difficult to remember precise dates, it is unlikely that so many could be mistaken over their use of the route. Those who gave oral evidence and were subject to cross-examination did not depart from their written UEF’s.
15. The picture emerging is of a popular walk through the woods along a well-worn

track through the northern plot which was the main path in use over the relevant 20 year period.

*Deviation*

1. The objector asserts that much of the user evidence should be put down to deviation from the established public rights of way. They quote Sauvain’s Highway Law in reliance on *Dawes v Hawkins* 1860 that: “*Acquiesce by adjoining landowners in a deviation from the highway onto their land has generally been found to be insufficient to establish a new right of way over that land, at least where they themselves have not obstructed the highway*.”
2. *Dawes v Hawkins* addressed public user on land adjoining a right of way which is referable to the way having been illegally obstructed or allowed to become foundrous. In that scenario, public user affords no reasonable evidence of a dedication over that adjoining land. In this case, there is no evidence of such since the 1950s.
3. *Trustees of British Museum v Finnis & others* 1833 is also cited by the objector that: “*If there was an old way near to a person’s land, and, by the fences decaying, the public comes on the land, that was no dedication of the land as a way*”.
4. All the witnesses attested to their use of the public paths as well as the Order route. They did not say their use of the Order route arose because of obstruction of those other paths. Bridleway EE42 runs along the adjacent field edge and is subject to regular ploughing. One witness said they would take the woodland walk if the bridleway was ploughed up and another waited until the bridleway had been walked down before use. A further witness would walk the bridleway regardless. There was recognition that walking a ploughed path is hard work but the evidence I heard was that people used the bridleway far less frequently than the Order route because they preferred the walk through the woods. It was better for dogs.
5. There were occasions when trees had fallen across both the woodland path and bridleway requiring a deviation but witnesses said they would be quickly moved.
6. Mr Ledger told the TVG Inquiry that existing footpath EE443 runs outside the woodland but he accepted that there is a clear path within the woodland. He had been in touch with Kent County Council about this footpath, but they would not become involved. He said that people have chosen to believe that the footpath [Order route A-B] is actually within the woodland because the neighbour in the north-east boundary has left EE443 to become rather overgrown for quite a long time, although he could not say how long. This point is unsupported by any evidence that A-B was utilised due to footpath EE443 being unavailable.
7. This is not a case of a route being used because a public path is unavailable due to obstruction or in poor condition, but a matter of a choice. Exercising preference does not in my view equate to exercising a right of deviation in the sense envisaged in *Dawes v Hawkins or Finnis*.

*As of right*

1. There is no suggestion that use of the northern plot was anything other than open and without consent. The objector says that the public use was by force. Force can include use in the face of continuing protest by the landowner. Mr John Ledger made a statutory declaration on 15 May 2013 for the TVG Inquiry referring to a whole host of issues arising from trespass and numerous measures taken by him over the years to prevent access. These included repeatedly barricading boundaries with tree trunks which would be removed, cut up or set fire and people climbing over bunds.
2. Such actions would clearly amount to ‘force’ but the location he gave was between the woodland and arable land rather than anywhere along the claimed route. Reference is also made to walkers being asked to leave as well as people with caravans and motorbikes. It is unclear whether Mr Ledger’s actions were directed at all use of the northern plot including the Order route, but his more recent landowner questionnaire indicates the reverse; that he was content for walkers to use the Order path. In the circumstances, I can only conclude that the use by walkers along the Order route within the northern plot was ‘as of right’.

***Whether any landowner demonstrated a lack of intention to dedicate***

1. A lack of intention to dedicate requires overt acts on the part of the landowner so as to show the public at large that there was no intention to dedicate the right. As per Lord Hoffman in *Godmanchester, ‘*intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* (1885) 10 App Cas 378, 386, to "disabuse [him]" of the notion that the way was a public highway.
2. To be protected from presumed dedication under statute, the landowner must take his first step to exclude the public within the 20-year period. It suffices that the situation has arisen at any time within that period. Time ceases to run against the landowner as from that point. Irrespective of when this occurs, the period that the statutory presumption requires will have been interrupted. If it starts running again, a full 20 years will be needed thereafter before the requirement will be satisfied. So, all the landowner need do is ensure that no 20-year period goes by without his taking overt acts to challenge the use of the way by the public.
3. Mr John Ledger was the landowner of the northern stretch from 1991 after his family acquired the site in the 1970’s. He completed a landowner questionnaire, date stamped 23 October 2018, in respect of the DMMO application.
4. In answer to the question ‘*Are you aware of public use of the claimed route?*’ he replied ‘*YES*’ and added: ‘*I am aware that the public are making general use of the wood*.’ He confirms that he disputes the application ‘*Because there is a perfectly good path on the outside and I have never given anyone permission to use it. I throw people out if they are misbehaving (anti-social behaviour).*’ He answers ‘NO’ to the question: ‘*Have you ever erected and maintained barriers or other works on the claimed route?*’ but adds that he has ‘*put barriers (earth bund) preventing access into the field from the woods’*. Mr Ledger confirms he never instructed anyone to deter public use and says: ‘*I am happy for the general public to make use of that bit of woodland’*.
5. These are not the comments of a landowner objecting to public use of his land unless individuals were ‘misbehaving’. It may be anticipated that any landowner would object to anti-social behaviour on their land. That is not the same as objecting to use by the public generally for the purposes of passing and re-passing on foot, as claimed. Mr John Ledger had maintained his objection to the claimed route up until his death in 2019, but I can only go on the available evidence. He was explicit that he had never given permission to anyone to use the path affecting his land. From his comments, he clearly acquiesced in the use by the public. Acquiescence in, or tolerance of use, would not prevent the user being ‘as of right’
6. This might seem a turnaround from Mr Ledger’s statutory declaration made in May 2013 in which he refers to asking people to leave the woodland and doing the same whenever he saw people on his land walking dogs. These comments concern the TVG application and his land as a whole. They contrast with Mr Ledger’s later answers in his landowner questionnaire relating specifically to the claimed path.
7. In Mr Ledger’s evidence to the TVG Inquiry (which the Inspector found to be reliable) he referred to contacting the Council about a footpath. This appears to be the Order route between A-B, but Mr Ledger did not say when or having taken measures to stop use. His concern appeared predominantly to be about people and motorbikes accessing his adjoining arable land via the woods which was why he had deposited slurry in the ‘chalk pit’.
8. The applicant stated that the bunds mentioned by Mr Ledger made no difference to access of the claimed route. This tallies with the bunds preventing access to the field from the woods. From the plans showing the location of the field, the presence of a bund between the field and woods would not affect use of the path. No mention was made of the bunds preventing pedestrian access to the woods via any of the entry points to the claimed path.
9. Whilst Mr Ledger’s evidence cannot now be tested, I attach most weight to the answers given in his 2018 landowner questionnaire because it is not only more recent than his statutory declaration and TVG appearance, but crucially, it is specific to the claimed route rather than use of the wider northern plot. Clear answers are given to specific questions about use of the path rather than the more generic information concerning use of the woodland and adjacent land.

*Conclusion on statutory dedication*

1. On balance and having regard to the totality of evidence, I am satisfied that the use by the public has been enjoyed as of right and without interruption for the full 20- year period under consideration over the northern stretch. There is insufficient evidence that the landowner demonstrated a lack of intention during this period to dedicate the route. Before arriving at an overall conclusion on whether dedication occurred, my attention turns to common law with regard to the southern plot.

***Common law – the southern plot***

1. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public accepted it.
2. The onus of proof is on the person claiming a way as public to show the facts, taken as a whole, are such that an inference can be drawn that there was an intention to dedicate the way as public. The onus is not on the landowners to prove a lack of intention to dedicate.
3. In *Godmanchester*, Lord Craighead stated that the common law has not laid down fixed rules as to what the owner may do to disabuse the public of the belief that the way has been dedicated for use by the public.
4. Inference of dedication depends on the facts. The use must be ‘as of right’ but a lesser period than 20 years may suffice. Case law has found that the more intensive and open the user, and the more compelling the evidence of knowledge and acquiescence, the shorter the period need be for dedication to be inferred.
5. In opening submissions, the applicant indicated that (if statutory dedication failed) reliance was placed on common law with regard to the period of use prior to November 1992 when the land was owned by the MOD. The MOD had been landowners since January 1937.
6. There is no suggestion of express dedication of the Order route (or any part thereof) as a public path. However, the objectors do argue that the Marines who occupied the site would not have had capacity to dedicate a public path.

*Capacity to dedicate - MOD*

1. It is the applicant’s case that the Marines on the land were fully aware of the public’s use of the track and did not challenge such use. It is uncontested that the use by the general public would have been brought home to the landowners during the time of MOD occupation and thereafter.
2. The objector suggests that the Marines did not have authority to acquiesce in any use by the public. I find this argument lacking in substance. I note correspondence from Mr Simpson, the Senior Estate Surveyor for the MOD, who had first-hand experience of the land in question. In a letter of 21 February 2013 to consultants enquiring about bye-laws at the site Mr Simpson states that the establishment has no file and the sale files of 1992 were destroyed in August 2006. Although sports activities had ceased during the latter years of MOD ownership, the site remained fenced. He opines that any use would have been by trespass.
3. Mr Simpson goes on to say in his letter of 15 April 2013 that the *“MOD has a complex arrangement of regulations and instructions covering property use, any other uses of this site would have been un-authorised and trespass*.” Quite what these regulations or instructions were, is unknown. The objector contends that they would have prevented acquiescence in public use of the land but the letter does not say that. There is no record of military byelaws affecting the site to restrict or prohibit public use of the land. The MOD Byelaws Review Team confirmed by email on 8 April 2019 “*it does not appear that any byelaws were ever made as the land was only sports fields”*.
4. Nothing has been drawn to my attention to cause me to conclude that there was any impediment to capacity to make an effective dedication at common law during the MOD’s ownership.

*‘As of right’ during MOD ownership*

1. In his letter of 15 April 2013, Mr Simpson states: “*Clearly all of the recreation ground was fenced during the 55 year use by MOD….”* and attaches his correspondence with the former Treasury Solicitors office in 1991 that the site was fenced and damaged.Indeed, the Treasury Solicitor said on 17 May 1991 (when the Marines were no longer present) that repairs were “*impractical and not cost effective, policing the site is outside the capabilities of the local unit and MOD pending disposal. Therefore, the public appear to have easy access and almost regard it a right to exercise dogs*.”
2. The TVG Inspector’s describes the southern plot as surrounded by military chain link fencing and there being no fencing between the woodland and sports-ground area. There were two vehicular accesses from Coldblow and a pedestrian gate at some point between W-Y on the plan at Annex A. This gate became dilapidated and hung open at some point during the 1980’s. During a major hurricane across Britain in 1987 a number of large trees fell and caused serious damage and breaches to the fencing. No longer using the land, the Marines carried out minimal (if any) repairs.
3. In a statutory declaration to the TVG Inquiry, a Mr Horne described climbing over the fence as a teenager in the early 1980s to gain entry to the sports ground and ‘muck around’ and only being there 10 or 15 minutes before being chased out by the Marines. The applicant points out that Mr Horne’s account cannot be correct because the Marines had already left the site in the late 1970’s. His dates may just be wrong. Regardless, as Mr Horne says the kids would ‘torment the marines a bit’, this might well explain why the Marines chased them from the grounds. That situation may be distinguished from other use by walkers asserting use.
4. Six witnesses who attended the Inquiry to give evidence knew the land prior to 1992. Witnesses who sometimes saw the Marines in the woods said the Marines might acknowledge their presence with a greeting but never asked them to leave. One witness told the Inquiry that their use probably started in 1972 as a child when dog walking daily in the woods, initially with their parents, and also playing in the woods with friends. The children would moderate their behaviour when they saw the Marines who never told them not to play there.
5. It is apparent from comments on the UEF’s which were repeated in oral evidence that many walkers assumed the Order route to be a public path because of the position of fingerposts and public path signage at some entry points. These signs are intended to denote the existing public footpaths and bridleway running broadly parallel but given the close proximity to the trodden path, it is understandable how that mistake could occur. What individuals thought or assumed is of no significance in terms of assessing whether their use was ‘as of right’. They either had consent or not. No evidence of consent is before me. Quite the reverse, Mr Simpson for the MOD asserted that public use amounted to trespass.
6. Given that the Marines engaged the public in conversation and had friendly interaction, there was clear awareness of the public use of the southern stretch without objection being raised against walkers. Likewise, there is no basis to conclude that the public use over this time was with the permission of the MOD. A licence to use land cannot be implied from mere inaction of a landowner with knowledge of the use to which his land is being put, as per Lord Bingham in *R v Sunderland Ex p. Beresford* [2004] 1 All E.R. 160.
7. There is no suggestion that use was exercised other than openly. Whether use was without force is less clearcut. As explained by the TVG Inspector, use will be by force or ‘*vi*’ if undertaken in the face of prohibition by the owner. This could take the form of signage and this is a point of conflict between the users and objectors. According to the objectors, various signs were displayed around the boundaries of the southern plot whilst it was owned by the MOD saying: “*MOD Property, No Admittance*”, “*Private Property: No Admittance: By Order of the MOD*”, “*MOD Property: Keep Out*” and “*No Trespassing*”.
8. In his statutory declaration for the TVG Inquiry, Mr Ledger (former owner of the northern plot) referred to a big sign on the gate on the road saying ‘MOD No Admittance’ but made no mention of signs near, what is now, the Order path. The applicant on the other hand contends that the signs merely said: “*MOD Property*”. This is also consistent with the recorded recollection of Mr Luckhurst, former owner of the southern plot, in his evidence to the TVG Inquiry and Mr Simpson’s expectations (as the MOD’s Senior Estate Surveyor) of typical MOD signage.
9. In evidence, Mr Fielding asserted that “*any sign saying MOD would be enough to scare any sane person off*.” To my mind, the presence of notices in the southern plot saying “*MOD Property*” would not clearly relay to the public that use of a path was prohibited (unless placed across the path, of which there is no indication). It would do no more than indicate to whom the land belonged.
10. During the Marine’s use of the site, the southern plot was fenced. Public access to the southern stretch was gained from the northern plot through a gate positioned between points W-Y ( see Annex A).

100.It is supposition on the objectors’ part that officers or staff managing the MOD site would have been under instruction to lock the gate from time to time or at least once a year. The objector thereby seeks to contend that by locking the gate, the use was permissive at other times and defeats the use being ‘as of right’. In *Beresford*, Lord Rogers could “*see no reason in principle why, in an appropriate case, the implied grant of a revocable licence or permission could not be established by inference from the relevant circumstances.”* That could include a gate being locked once a year, but in the absence of any evidence the gate was ever locked, I give this contention little weight. According to users, the gate was never locked and often left open. That is supported by numerous others in their UEFs.

*User evidence of MOD land*

101.It emerged in evidence that Mr Gill used to work with Mr Luckhurst who gave him permission to walk his land. Thereafter, his use was not ‘as of right’ but with landowner consent. Accordingly, I disregard Mr Gill’s evidence of use of the southern stretch during Mr Luckhurst’s ownership but have taken it into account over the period when the site belonged to the MOD.

102.The applicant, Mr Chatfield, claims use from 1982. He recalled a metal pedestrian gate within the woodland between W-Y, along the line of ownership division. The gate was ‘defunct’ and in an open position. There is consensus that around the late 1980’s the gate had disappeared although the gate posts remained. A witness whose use began in 1989, had no recollection of a gate, just dilapidated and neglected fencing.

103.At this Inquiry, Mr Chatfield spoke of how the gate ‘was liable to fall down’ and so he gave it a ‘wide berth’. He avoided the gate to then come back on the path. His DMMO application statement (at paragraph 7.3) says that the woodland track ran several yards to the west of where the gate had been. This is significant because the applicant’s own witnesses spoke of a different alignment.

104.Other witnesses, e.g., Ms Goodenough, Mr Oliver and Ms Young (whose use started in 1979, 1968 and 1965 respectively) told the Inquiry they walked through the gate which was never locked. They were able to describe the gate in some detail. From the applicant’s own account, the path must have moved in the 1980’s once the gate fell into disrepair before disappearing altogether. Therefore, the alignment which is claimed to have been dedicated at common law prior to 1992 appears not to be in the same position as that used when the gate and fencing remained. It raises uncertainty over which alignment users were actually taking in this vicinity from the early 1980’s.

105.If the position is considered prior to 1982 when the gate was not ‘defunct’, then two of the remaining five witnesses attending the Inquiry were children at the time who also referred to their use of the wider woodland.

106.Quite simply, there is insufficient clear evidence of use of a single route of such an intensity and over such a period of time to sustain an argument of dedication at common law at any point during MOD ownership and the claim must fail.

*Mr Luckhurst’s ownership*

107.I turn to the years that followed after Mr Luckhurst purchased Site A (the southern plot) on 2 November 1992.

108.Not all users were aware of the change in ownership and none who attended the Inquiry recollected the signs mentioned by Mr Luckhurst at the TVG Inquiry. He described painting new wording on a few old ‘MOD Property’ signs in 1993 which he thought said ‘Private Property: No Admittance’ but these signs were removed within a week. In his earlier statutory declaration of 15 May 2013 Mr Luckhurst said he thereafter put new signs up on trees but they were ripped down very quickly. He became so disheartened by signs being torn down over several months that he eventually gave up in late 1994. Several witnesses who provided statements are adamant there were no signs prohibiting access but that does not correspond with the undisputed factual context of the TVG report.

109.Mr Luckhurst told the TVG Inquiry that in 1993 he had arranged for barbed wire where there were breaches in the fencing and patched the MOD fencing with second hand galvanized link but any repairs were simply reopened within a few days. Having carried out some repairs Mr Luckhurst was eventually overcome by the financial and practical difficulties of securing Site A from trespassers. He gave up trying to repair fencing around early 1996.

110.Witnesses also say there were no fence repairs blocking access to the path. This is supported by the TVG Inspector who found that Mr Luckhurst “*never made any attempt to secure the access to Site A used by the vast majority of local inhabitants [carrying out leisure, sports and pastimes] i.e., between B and I”,* being points W-Y on the plan at Annex A. Photographs of green chain link fencing differing in shade from other fencing is supplied but these images reveal very little.

111.The applicant asserts that references by Mr Luckhurst to fencing continuing to be cut away related to fencing alongside Coldblow Road by motorcyclists attempting to access the former sports field. I find this plausible. The applicant acknowledges that fencing erected by the current landowner was cut post August 2012. As this was outside any period for my consideration, it has no effect on my findings.

112.Mr Fielding (objector) conceded under cross-examination that he had made an “overstatement” in his proof of evidence by claiming that the southern plot was fully fenced. He accepted that there were “multiple breaches” in the fencing and that Mr Luckhurst’s attempts to maintain the fencing were “feeble”, as so described by the TVG Inspector. When it was put to Mr Fielding that individuals had unfettered access to the land he replied: “physically yes, morally and visually no”.

113.Furthermore, the TVG Inspector concluded that: “*The objectors cannot, in my view, suggest that he [Mr Luckhurst] was doing everything consistent with his means and proportionate to the user to render use vi, had he really wished to keep people (as opposed to vehicles) out….One only has to compare his efforts to TG Claymore’s more recent (effective) efforts to see that it is indeed practical and feasible to secure Site A from trespassers*”.

114.The Inspector went on to say that Mr Luckhurst’s “*efforts (such as they were) were directed entirely to stopping vehicle trespass ….[and] he in fact consciously acquiesced in the use of Site A by walkers*…”. These comments were, of course, made in the context of a TVG claim and not in specific reference to the ‘main path’.

115.In the summary of his oral account, it says that after purchase Mr Luckhurst only went to the land on a few occasions and did encounter dog walkers. He did not challenge them, apart from one lady who he did not like personally. He accepted that there had been regular recreational use of the southern plot by local people during his ownership.

116.This summary of Mr Luckhurst’s approach to dog walkers is contradicted by his 2013 statutory declaration where he states: “*I did see dogwalkers on my land on two or three occasions. On those occasions I told them to leave. This was because I was concerned about claims of damages against me if the dogs attacked somebody. I specifically remember in 2007/2008 one lady for whom I had done work through my estate agent business was walking her dog on my land: I explained to her that she was trespassing and directed her to the footpath outside Site A*”. This provides clear sworn evidence that Mr Luckhurst did not agree to use of his land by dog walkers and actively took steps to stop it when encountered. I prefer this evidence as a more detailed first-hand account given on oath.

117.From both his sworn written evidence and oral testimony, there is reason to conclude that Mr Luckhurst had initially tried to fix fencing and erect signs to exclude public access. Even if those attempts did not suffice to render the public use *‘vi’* and were ‘feeble’ he had nevertheless taken steps to disabuse the public of the notion that public rights existed. That is reinforced in Mr Luckhurst’s statutory declaration that he told dog walkers to leave his land. These were not the actions of a landowner acquiescing in the use of his land between 1993 to 2007/08.

118.Other factors drawn to my attention during Mr Luckhurst’s ownership are addressed below.

*Planning applications*

119.In December 1997 Mr Luckhurst made a planning application to ‘repair the existing fence, erect new fences and provide a new vehicle access’. Whilst approved, the development was never carried out. Another planning application followed in November 1998 for land raising in the form of a raised boundary and verges to prevent unauthorised access. A third application for the construction of a ditch and bund was withdrawn but built anyway. Although the last application was made in an attempt to prevent future traveller and joyrider access, the objector says it was plainly an attempt to keep the public off the land.

120.The planning applications would have been advertised with site notices displayed but I do not consider that members of the public would have understood any of these applications to mean that the landowner objected to public use of the Order route on foot. Indeed, neither bund nor ditch had that effect and were plainly directed at a different type of use that had presented Mr Luckhurst with problems. Moreover, the fencing repairs might have prevented public pedestrian access depending upon detail and location but this is not apparent from the application description. Even if the fencing was for the whole site, it was never undertaken. The argument carries little weight against the claim.

*Effect of Gypsy and Traveller encampment*

121.It was undisputed at the TVG Inquiry that during 1996 Mr Luckhurst had sanctioned use of Site A (the southern plot) by a very small number of Travellers who were by all accounts ‘friendly’. However, by 1999, other Gypsy and Travellers moved onto Site A close to the wooded area without Mr Luckhurst’s consent and there was evidence of anti-social behaviour. The TVG report states that: “*All of the witnesses concurred that the 1999/2000 gypsies were hostile, or at least sufficiently intimidating so that a wide berth was desirable. The only exception appears to be Mr Gill*….”, who also gave evidence to this Inquiry. The Gypsy and Travellers “*had finally been removed at some point during the summer of 2000*”.

122.The objector suggests the presence of traveller encampments ‘deterred more than sporadic use’ of the woodland in the 1999-2000 period. The TVG application had failed in respect of the whole land on the basis that the applicant had not shown that user was by a ‘significant number’ of local inhabitants during 1999-2000 and that a TVG right was being asserted over that same period. In essence, a similar point is taken here that continuity in use of the route was broken.

123.Under cross-examination, Mr Fielding acknowledged that comments in his proof of evidence (at paragraph 54) that use of the route was very sporadic between 1999-2000 was not an accurate summary of the TVG Inspector’s report. In fact, the Inspector described how “*a few resilient users persisted to use the woodland (off-paths)*” but these instances were very sporadic. In other words, it was use of the woodland rather than the paths which was very sporadic. The report continues: “*any use during this time was far more likely, in my view, to have taken the form of use of the main path in the woodland”*’. The ‘main path’ is the route now claimed.

124.The TVG Inspector was not saying one way or another whether use of this main path continued during 1999-2000. She merely refers to ‘any’ use over this period was more likely to have been of the main path which went across both plots.

125.A helpful picture is given of the condition of the woodland over that time from the testimony of witnesses who appeared before the TVG Inquiry. There were reported problems from abandoned and burnt out cars, fly-tipping, lack of sanitation for the disposal of human and household waste with the wooded area ‘becoming littered with rubbish and plastic bags full of human excrement.’ This was confirmed by one witness who referred to large amounts of waste in the woodland including nappies.

126.The objector casts doubt on users continuing to use the path throughout this period of a year or so when there was an unauthorised Gypsy and Traveller encampment and the woods were in such a state. This Inquiry also heard how there were dogs running loose in the woods.

127.In the UEF’s, one user refers to being deterred from use of the route by the presence of travellers. Mr Chatfield insisted that he did not see any change in usage. He just put his own dogs on a lead. Another witness said she would walk the route every day the same except for ‘the middle’ to avoid the gypsies and their dogs and indicated they meant around points W-Y. Therefore, they were not walking the whole Order route.

128.The objector may suspect that the presence of the Gypsies had a greater impact on users than acknowledged, but the evidence before this Inquiry is of continuing use with some reduction. The objector suggests that user evidence is largely contradicted by the TVG Inspector who found that as a matter of fact and degree there was “*an interruption of the whole of the meadow area of Site A*” given the number of caravans through the period of around a year. That is incorrect. The TVG Inspector distinguishes (in that same paragraph 191) between the meadow and woodland and says: “*the woodland of Site A and the woodland of Site B are distinct areas which were unaffected by caravans and my finding in relation to interruption did not apply to those areas*.”

129.From what is before me, continuity of use of the Order route was not broken by reason of the Gypsy and Traveller encampment in 1999-2000 albeit the evidence overall indicates there was probably some reduction.

*Display of notices*

130.A photograph of a sign is produced, said to be taken in January 2012, and stapled to trees within thewoodland in late 2011 at various points saying:

“A POLITE NOTICE FROM THE LANDOWNER, YOU WILL BE PROSECUTED IF YOU ARE SEEN CARRYING OUT ANY OF THE FOLLOWING FELLING TREES/DAMAGING TREES/REMOVING WOOD/SHOOTING/RIDING MOTORBIKES/LIGHTING FIRES/CAMPING/DUMPING RUBBISH. UNLESS YOU HAVE SPECIFIC WRITTEN PERMISSION TO DO SO FROM THE LANDOWNER! FOR THOSE MEMBERS OF THE PUBLIC WHO DO CARE ABOUT THIS LAND PLEASE CALL THE NUMBER BELOW TO REPORT ANY VIOLATION OF THE ABOVE ACTIVITIES. VEHICLE REGISTRATION NUMBERS WOULD BE MOST HELPFUL.”

131.Mr Luckhurst remained the landowner at the time. The language used is expressed as a ‘polite notice’ to anyone causing damage to the land or otherwise carrying out the specified acts without consent. It makes plain that the landowner objects to certain actions by anyone entering the land. They are of a type that may generally be regarded as anti-social behaviour, if not an offence. It does not prohibit anyone walking within the woodland. The underlined text makes specific reference to ‘members of the public’. It thereby recognises public use of the land and calls upon their assistance to report unauthorised behaviour. No mention is made of any path and it appears to be directed at use of the woodland more generally.

132.The signage does not give explicit consent to use of the woodland. Nor in my view does it go far enough to imply revocable consent such that use could not be ‘as of right’. It signifies acquiescence by the landowner of use by the public of the woodland but by that time it was only a matter of months before Mr Luckhurst sold the land and Mr Fielding clearly demonstrated his opposition to public use.

133.Although there is a reasonable body of evidence of use during the Luckhursts’ ownership, I do not consider that the notoriety of use of the path was of such level throughout that time, or of such longevity, to suffice to discharge the heavy burden upon the applicant to demonstrate that dedication is inferred. Moreover, prior to the signs appearing in 2011 there is sworn evidence from Mr Luckhurst that on the occasions that he had seen dog walkers on his land, he had asked them to leave, as late as 2007/2008. He had thereby demonstrated lack of intention to dedicate. The erection of signage dating up to 1994, prohibiting public access to his land also runs contrary to Mr Luckhurst having acquiesced in use of the Order route.

*Conclusion on common law dedication*

134.The main thrust of the applicant’s case relies on dedication by the MOD by 1992. Whilst I find no reason to conclude that the Marines did not have capacity to dedicate at common law, or that use was other than ‘as of right’, I have significant concerns over the consistency in evidence over the route taken in the preceding years with evidence admitted that the alignment had changed. Furthermore, the tested evidence before the route change (i.e., pre-1982) is thin and not sufficiently reliable. I have found no subsequent period on which a claim of dedication at common law would be well-founded.

***Cul-de-sac path***

135.If the Order is confirmed on the basis of my findings for the northern section only, then it would result in a cul-de-sac path. The parties agree that there is no rule of law which would prevent a cul-de-sac route from becoming a public right of way. However, the objector argues that mere use of a cul-de-sac route leading to private land to which the public have no right of access does not amount to evidence justifying a finding that dedication has occurred. To support this stance, reliance is placed on *Attorney General v Antrobus* [1905] 2 Ch 188 as applied in *Rambler’s Association v SSEFRA* [2017] EWHC 716 (Admin).

136.In *Ramblers*, confirmation of the Order would have resulted in two disconnected cul-de-sacs in circumstances where the remainder of the route could not be established as a public highway at common law. In reference to Farwell J in *Antrobus*: *“There cannot be any prima facie right for the public to pass from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network or over which there is no other public right of use).*

*Furthermore, as Farwell J emphasised, the question is one of evidence in each case. In the absence of any express dedication or public expenditure on the way claimed, mere use by the public without more of a cul-de-sac in the absence of some particular point of attraction could not amount to evidence justifying a finding that dedication had occurred.”*

137.The facts in *Ramblers* concerned a route being used as a single journey traversing the whole length of path identified in the Order. Similarities may thus be drawn with this case.

138.The applicant drew my attention to the Consistency Guidelines which were published by the Planning Inspectorate and remain accessible online at GOV.uk which say: ‘In cases where a claimed right of way is in more than one ownership, and only one of the owners has demonstrated a lack of intention to dedicate it for public use, it should be considered whether it is possible that public rights have been acquired over sections of the way in other ownerships, even if this would result in cul-de-sac ways being recorded (*R on application of the Ramblers Association and SSEFRA and interested parties* 2008).’ Three points arise. Firstly, the Consistency Guidelines are not current, having been last reviewed in April 2016. Secondly, the 2008 Ramblers case mentioned was a consent order, not a judgment. Thirdly, the consent order pre-dates the 2017 *Ramblers* High Court judgment referenced above.

139.In *Moser v Ambleside UDC*, CA 1925 Lord Justice Atkin said: “*It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me that too wide a proposition. I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise.”*

140.Further, in *Norman v SSERA* [2006] EWHC 1881 (Admin), Justice Collins said “*there is no reason why a public footpath should not exist, albeit it is a cul-de-sac. On the other hand, if it runs to no apparent purpose and to no destination which obviously would need some public access, that seems to me to be a factor which is capable of being material when an issue is raised as to whether there has indeed been an intention to dedicate for public use*”.

141.The path in this case has not been used with a termination point in the woods which people reached before re-tracing their steps. The only purpose to go to point W was to carry on the journey to Point C. Presumably this is why the DMMO application was made for a single continuous path. Indeed, users referred to freely walking between the two plots along one path. Certainly, once the gate had gone at some point in the 1980’s there would have been nothing to distinguish one land holding from the other.

142.The objector says that the termination point does not qualify as a place of popular resort for the purposes of dedication of a cul-de-sac route. The applicant has not disagreed. I have considered whether there might be argument that the woodland itself is a place of popular resort, but the path would end abruptly in the middle of the woods. It would not be a destination point or object of a journey. There would be no right to continue into the private land beyond, the TVG claim having failed.

143.If the Order is confirmed for the northern stretch only, it would not result in an isolated highway. There is a right of entry off the highway at the northern end to connect directly with point A, and point B connects with footpath EE443. Whilst the applicant maintains that there is an available exit point at Y onto bridleway EE442, no link between those points was originally claimed and is not shown in the Order or map. I am not currently satisfied there is sufficient evidence that this was one of the ways in which the route was actually used over the relevant 20-year period. It poses the question why the applicant would at such a late stage of proceedings maintain that the path exited at point Y, if not before. That is particularly so when care had been taken to claim points A,B,C and D which do connect with existing public paths.

144.I have also taken into account that users joined the claimed path from both entry points A and B. I do not discount the possibility that a public right of way exists on foot between these two points but that is not the evidence presented which has focussed upon the Order route A-B-C-D. The evidence currently before me is not of a path passing between A-B with users stepping outside the woodland upon reaching B and crossing the line onto EE42 or EE43 to continue their journey. Rather, the evidence is of users going from A to B and onto W without joining an existing public path from B. Equally, as things stand, I have insufficient clear evidence over the relevant period of users entering at point B to connect with the highway beyond point A.

Conclusion

145.A case has been made out under section 31 of the 1980 Act supporting the exercise of public rights over a 20-year period for the northern stretch of the Order route prior to the date of bringing into question in August 2012. However, there is insufficient evidence of implied dedication at common law for the southern stretch. If the Order was confirmed it would result in a cul-de-sac path. Given the particular circumstances of this case, where a single path has been claimed as used, I am unable to find that the Order route has been dedicated as a public path as a whole.

146.Having regard to these and all other matters raised, I conclude that the Order should not be confirmed.

**Formal Decision**

147. I do not confirm the Order.

*KR Saward*

INSPECTOR

**APPEARANCES**

|  |
| --- |
| **For the applicant:**Mr O’Brien O’Reilly Of Counsel, instructed by Kent Law  Clinic  |
|  who called: Roger ChatfieldSteve Bailey  Maurice Gill Nicola Hook Janet Goodenough Malcolm Oliver Margaret Young |   Applicant Local resident Local resident Local resident Local resident Local resident Local resident |

|  |  |
| --- | --- |
|  |  |
| **Objectors:** Mr Stedman Jones Of Counsel, instructed by T.G. Claymore (UK) Ltd  who called: Nicholas Fielding Controlling shareholder, T.G. Claymore (UK) Ltd**DOCUMENTS submitted at the Inquiry**  |
|  |  |

1. Single electronic bundle compiled by the applicant’s Solicitor

2. Summary proof of evidence – Nicholas Fielding

3. Roger Chatfield evidence questionnaire in support of village green application

 dated 12 November 2012

4. Ms J.M. Goodenough evidence questionnaire in support of village green

 application dated 7 November 2012

5. Mrs Nicola Hook evidence questionnaire in support of village green application

 dated 3 November 2012

6. Margaret Young evidence questionnaire in support of village green application

 dated 7 November 2012

7. Maurice Gill evidence questionnaire in support of village green application dated

 7 November 2012

8. Stephen Bailey evidence questionnaire in support of village green application

 dated 23 November 2012

9. Statement of Roger Chatfield dated 28 April 2014

10. Statement of Maurice Gill dated 28 June 2013

11. Statement of Margaret Young dated 2 February 2014

12. Further Statement of Margaret Young dated 6 April 2019

13. Applicant’s opening submission

14. Extract of Definitive Statement

15. Network copy of Definitive Statement with amendments since publication in

 2013

16. Closing submissions for the objectors

17. Closing submissions for the applicant

18. *Applegarth v SSETR* [2001] EWHC Admin 487

19. *R (oao) (Godmanchester Town Council) v SSEFRA* 2008 1 A.C. 221

20. *Dawes v Hawkins* 1860

21. *Trustees of British Museum v Finnis & others* 1833

22. *R v Sunderland Ex p. Beresford* 2004 1 A.C. 889

23. *BBC v Johns* 1965 Ch. 32

**ANNEX A: Copy of Order map with points X-W-Y added for illustrative purposes**



**COPY – MAP NOT TO ORIGINAL SCALE**

**ANNEX B: Copy of the TVG map**



**COPY – MAP NOT TO ORIGINAL SCALE**