Status: Positive or Neutral Judicial Treatment

ICLR

*674 Oxfordshire County Council v Oxford City Council and another

House of Lords

24 May 2006

[2006] UKHL 25

[2006] 2 A.C. 674

Lord Hoffmann , Lord Scott of Foscote , Lord Rodger of Earlsferry , Lord Walker of Gestingthorpe and Baroness Hale of Richmond

2006 March 27, 28, 29, 30 April 3; May 24

Commons—Town or village green—Registration—Land used by local inhabitants for sport and recreation for more than 20 years—Whether requirement for use to continue until date of registration—Whether registration conferring rights of user on inhabitants—Whether bringing land within scope of pre-existing legislation applicable to greens—Whether permissible for registration authority to amend application for registration— Commons Registration Act 1965 (c 64), ss. 13, 22 (as amended by Countryside and Rights of Way Act 2000 (c 37), s. 98)

In 2002 the applicant, a resident of an area where the city council owned land, sought registration of the land under section 13 of the Commons Registration Act 1965[1] as a "town or village green" within the meaning of section 22 of the Act (as amended by section 98 of the Countryside and Rights of Way Act 2000), which allowed registration as a "class c" green of land on which the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years and, by the section 98 amendment which came into force on 30 January 2001 by the substitution of the original definition by a new section 22(1A) , "continue to do so". The application, which stated that the land had become a town or village green by 1 August 1990, was opposed by the city council, which wished to build houses on the site. The applicant later sought to amend the application by excluding certain areas.

The county council, as registration authority, sought rulings on a number of issues on which it considered it required the assistance of the court before it determined the application. On questions as to what, if any, rights or statutory obligations would take effect over the land on registration so as to limit the landowner's ability to use the land, the judge ruled (i) that where land was registered as a class c green the local inhabitants enjoyed the rights ordinarily incident to such land and (ii) that land so registered fell within the scope of pre-existing legislation applicable to town or village greens. On questions as to when the 20-year period ran to, the judge ruled (iii) that the words "continue to do so" in section 22(1A) meant continuance to the date of application, (iv) that where, however, land had become registrable as a green before 30 January 2001 the requirement for the use to be continuing did not apply, so that (v) the applicant could seek to prove a 20-year user other than one immediately preceeding the application. As regards the procedure of the registration process, he ruled (vi) that the applicant was not entitled to amend her application so as to exclude certain areas, but (vii) the registration authority had power to treat the application as relating to 20 years ending at a different date to that specified on the form and (viii) could register only a part of the land included in the application. The judge also gave guidance as to whether (ix) land could be registered as a green if only partly accessible and (x) use of public rights of way over the land might count as qualifying user.

***675**

On appeals by all parties the Court of Appeal varied the judge's order by holding on issue (i) that registration of a class c green did not imply any formal legal right to its use, whether by the public in general or by any particular group and, on issues (iii) to (v), that "continue to do so" in section

22(1A) required user to continue to the date of registration rather than the application and that section 22(1A) governed all applications for registration made after the commencement date of the 2000 Act. The Court of Appeal also held on issue (vi) that in appropriate cases the registration authority had power to amend an application for registration but otherwise affirmed the judge's order.

On appeals by all parties—

Held (1) allowing the applicant's appeal on issue (i), that (per Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe) registration gave rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes, such rights extending (Lord Scott of Foscote dissenting) to sports and pastimes generally and not merely that use which had been the basis for registration, the landowner retaining the right to use the land in any way which did not interfere with those rights (post, paras 50–51, 69, 104, 114, 124).

(2) Dismissing the city council's appeal on issue (ii), that (per Lord Hoffmann, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe) registration had the effect of bringing the land within the scope of the 19th century legislation applicable to town or village greens (post, paras 56, 69, 114, 124).

(3) Allowing the applicant's appeal on issue (iii), that section 22(1A) required the use necessary for registration as a town or village green to continue only to the date of application, save that (per Lord Scott of Foscote) if the application was made reasonably promptly and in response to action taken by the landowner or others to obstruct continued use by the relevant inhabitants, the use was to be taken to have continued to the date of application; but, dismissing her appeals on issues (iv) and (v) (Baroness Hale of Richmond dissenting), that section 22(1A) governed all applications for registration made after the commencement date of the 2000 Act and, since the register was conclusive and prevented the coming into existence of greens after the enactment of the 1965 Act without registration, the applicant could not claim that the land had acquired village green status before the coming into force of section 22(1A) (post, paras 42–44, 69, 109–110, 113, 114, 116, 124, 143, 147).

(4) Dismissing the county council's appeals on issues (vi) to (viii), that the procedure for registration was intended to be relatively simple and informal and the registration authority was to be guided by the general principle of being fair to those whose interests might be affected by its decision; that it followed that if no prejudice would be caused or any prejudice could be prevented by an adjournment, the authority had power to allow amendments to an application and could also, without any amendment to the application, register only that part of the land which had been proved to have been used for the necessary period (post, paras 61–62, 69, 111, 114, 124, 144, 147).

(5) That since the question whether a certain type of user would satisfy the statutory definition in section 22(1A) would depend on the facts of the individual case, it would be inappropriate for the appellate committee to make any rulings on issues (ix) and (x) (post, paras 68–69, 102–103, 114, 124, 147).

Decision of the *Court of Appeal [2005] EWCA 175; [2006] Ch 43; [2005] 3 WLR 1043; [2005] 3 All ER 961 varied* .

The following cases are referred to in their Lordships' opinions:

***676 *677**

Abbot v Weekly (1666) 1 Lev 176

Abbott v Minister for Lands [1895] AC 425, PC

Bell v Wardell (1740) Willes 202

British Amusement Catering Trades Association v Westminster City Council [1989] AC 147; [1988] 2 WLR 485; [1988] 1 All ER 740, HL(E)

Brocklebank v Thompson [1903] 2 Ch 344 ***676 *677**

Caerphilly County Borough Council v Gwinnutt (unreported) 16 January 2002 , Judge Moseley QC

Chandler (Victor) International Ltd v Customs and Excise Comrs [2000] 1 WLR 1296; [2000] 2 All ER 315, CA

Delaney v Staples (trading as De Montfort Recruitment) [1992] 1 AC 687; [1992] 2 WLR 451; [1992] 1 All ER 944, HL(E)

Dyce v Lady James Hay (1852) 1 Macq 305, HL(Sc)

Edwards v Jenkins [1896] 1 Ch 308

F (Mental Patient: Sterilisation), In re [1990] 2 AC 1; [1989] 2 WLR 1025; [1989] 2 All ER 545, CA and HL(E)

Fitch v Fitch (1797) 2 Esp 543

Fitch v Rawling (1795) 2 H Bl 393

Forbes v Ecclesiastical Comrs for England (1872) LR 15 Eq 51

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112; [1985] 3 WLR 830; [1985] 3 All ER 402, HL(E)

Gouriet v Union of Post Office Workers [1978] AC 435; [1977] 3 WLR 300; [1977] 3 All ER 70, HL(E)

Hall v Nottingham (1875) 1 Ex D 1

Hammerton v Honey (1876) 24 WR 603

Hampshire County Council v Milburn [1991] AC 325; [1990] 2 WLR 1240; [1990] 2 All ER 257, HL(E)

Humphreys v Rochdale Metropolitan Borough Council (unreported) 18 June 2004 , Judge Howarth

Lancashire v Hunt (1894) 10 TLR 310; 11 TLR 49, CA

Lockwood v Wood (1844) 6 QB 50

Mercer v Denne [1904] 2 Ch 534 ; *[1905] 2 Ch 538, CA*

Millechamp v Johnson (1746) Willes 206 , note (b)

Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931

Mounsey v Ismay (1863) 1 H & C 729; (1865) 3 H & C 486

New Windsor Corpn v Mellor [1975] Ch 380; [1975] 3 WLR 25; [1975] 3 All ER 44, CA

Pyc (J A)(Oxford) Ltd v United Kingdom [2005] 3 EGLR 1

R v Norfolk County Council, Ex p Perry (1996) 74 P & CR 1

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)

R v Suffolk County Council, Ex p Steed (1995) 70 P & CR 487 ; *(1996) 75 P & CR 102, CA*

R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76 (Admin); [2002] 2 PLR 1

R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)

R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2003] EWHC 2803 (Admin); [2004] JPL 975

R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin); [2004] 1 P & CR 573

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800; [1981] 2 WLR 279; [1981] 1 All ER 545, CA and HL(E)

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438, HL(E)

S (Hospital Patient: Court's Jurisdiction), In re [1996] Fam 1; [1995] 3 WLR 78; [1995] 3 All ER 290, CA

Turnworth Down, Dorset, In re [1978] Ch 251; [1977] 3 WLR 370; [1977] 2 All ER 105

Virgo v Harford (unreported) 11 August 1892 , Willis J

Wainwright v Home Office [2001] EWCA Civ 2081; [2002] QB 1334; [2002] 3 WLR 405; [2003] 3 All ER 943, CA ***677**

Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97, HL(E)

The following additional cases were cited in argument:

Banér v Sweden (1989) 60 DR 128

Beaulane Properties Ltd v Palmer [2005] EWHC 817 (Ch); [2006] Ch 79; [2005] 3 WLR 554; [2005] 4 All ER 461

Central Electricity Generating Board v Clwyd County Council [1976] 1 WLR 151; [1976] 1 All ER 251

Cooper v Hubbuck (1862) 12 CBNS 456

Dyfed County Council v Secretary of State for Wales (1989) 59 P & CR 275, CA

Fairey v Southampton County Council [1956] 2 QB 439; [1956] 3 WLR 354; [1956] 2 All ER 843, CA

General Estates Co Ltd v Ministry of Housing (1965) 194 EG 201

Massey v Boulden [2002] EWCA Civ 1634; [2003] 1 WLR 1792; [2003] 2 All ER 87, CA

Mellacher v Austria (1989) 12 EHRR 391

Merthyr Mawr Common, In re [1989] 1 WLR 1014; [1989] 3 All ER 451

Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA

Paterson v Provost of St Andrews (1881) 6 App Cas 833, HL(Sc)

R v Badger (1856) 25 LJ (NS) 81

R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354; [1999] 3 All ER 231, CA

R v Shorrock [1994] QB 279; [1993] 3 WLR 698; [1993] 3 All ER 917, CA

R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 153 (Admin); [2004] Env LR 828 ; [2004] EWCA Civ 1580; [2005] 1 WLR 1267, CA

R (Whitmey) v Commons Comrs [2004] EWCA Civ 951; [2005] QB 282; [2004] 3 WLR 1342, CA

Seal v Chief Constable of South Wales Police [2005] EWCA Civ 586; [2005] 1 WLR 3183, CA

Shears Court (West Mersea) Management Co Ltd v Essex County Council (1986) 85 LGR 479

Smith v Barnham (1876) 1 Ex D 419

Stretch v United Kingdom (2003) 38 EHRR 196

Tehidy Minerals Ltd v Norman [1971] 2 QB 528; [1971] 2 WLR 711; [1971] 2 All ER 475, CA

Wyld v Silver [1963] Ch 243; [1962] 3 WLR 841; [1962] 3 All ER 309, CA

APPEAL from the Court of Appeal

These were appeals, by leave of the House of Lords (Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Carswell), by (1) Catherine Mary Robinson, the applicant for registration as a town or village green of land owned by Oxford City Council, (2) Oxford City Council as landowner objecting to the registration and (3) Oxfordshire County Council, as registration authority, against parts of the order of the Court of Appeal (Peter Gibson and Carnwath LJJ and Blackburne J) whereby, on appeals by the three parties, the Court of Appeal had upheld five and varied five rulings made by Lightman J *[2004] Ch 253* on the application of the registration authority, by a claim form dated 11 June 2003 naming the city council and the applicant as defendants, prior to the determination of the registration application.

The facts are stated in the opinion of Lord Hoffmann.

***678**

Douglas Edwards and *Jeremy Pike* for the applicant. By section 22 of the Commons Registration Act 1965 , land which was not a village green on 2 January 1970 but which has been used for sports and pastimes for a period of 20 years after that date will acquire "class c" town or village green status even if no application has been made to register it as such under the Act: see *R (Whitmey) v Commons Comrs [2005] QB 282* , para 26. The Act, so far as class c greens are concerned, provides both the qualifying basis by which land "becomes" a class c green and the mechanism for registration of land that has become a class c green but these are separate and distinct processes. The former, in effect a process of statutory prescription (see *Tehidy Minerals Ltd v Norman [1971] 2 QB 528* and *Mills v Silver [1991] Ch 271*), means that 20 years' post-1970 use will in itself create a green. Thus the applicant can succeed on the basis that the land became a green in 1990. It is not necessary for her to meet the requirement in the amended section 22(1A) definition, introduced by section 98 of the Countryside and Rights of Way Act 2000 with effect from 30 January 2001, that the use is "continuing". If the 2000 Act does have retrospective effect that would be contrary both to the common law presumption against retrospectivity and to section 16(1)(b) of the Interpretation Act 1978 .

In cases where the amended section 22 does apply, qualifying use must continue to the date on which the use of the green is brought into question either in the form of an application for registration or by the commencement of court proceedings for a declaration that the land is or is not a green: see *R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975* ; *New Windsor Corpn v Mellor [1975] Ch 380* and *Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931* .

When land has become a class c green the local inhabitants thereafter have a right to use that green. Parliament, in making provision for class c greens, would have had in mind the procedures provided for by the Prescription Act 1832 and the Rights of Way Act 1932 , both of which provided new statutory mechanisms for creation of easements and other private and public rights: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 351–353. In neither Act was it expressly provided that rights were created by operation of the new statutory process but it is generally accepted that those Acts created rights akin to the rights which would have been acquired through the common law process which the statutory procedures were to supplement: see *Cooper v Hubbuck (1862) 12 CBNS 456* and *Fairey v Southampton County Council [1956] 2 QB 439* .

The rights are vested in the inhabitants of either a locality or, following the coming into force of the 2000 Act, a neighbourhood within a locality. A landowner will therefore be in a position to appreciate in what definable group of individuals rights over his land are vested. The rights are to indulge in lawful sports and pastimes, the same rights as are enjoyed over class b greens: see *R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102* , 114–115. Use is not limited to the particular use or range of uses which took place during the qualifying period.

The penal legislation contained in section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876 (39 & 40 Vict c 56) applies to class c greens. Offences under section 12 must be wilful (see *Smith v Barnham (1875) 1 Ex D 419*) but wilful does not include action ***679** carried out under a mistake or in a genuine belief that there was a right to carry out that action: see *R v Badger (1856) 25 LJ (NS) 81* . An offence under section 29 , which provides that interference with a green is a public nuisance, will apply only where the individual knew or reasonably ought to have known that the consequences of his actions would be a nuisance: see *R v Shorrock [1994] QB 279* .

Charles George QC and *Philip Petchey* for the city council. The purpose of the 1965 Act, so far as town and village greens were concerned, was primarily to create a register of what land there was within the totality of classes a, b and c. It is a reasonable inference that further legislation was to follow to cover both management issues and the question of what (if any) rights were to be exercisable over the land which was finally registered: see *Hampshire County Council v Milburn [1991] AC 325* , 341; *New Windsor Corpn v Mellor [1975] Ch 380* , 392; *R v Suffolk County Council, Ex p Steed (1995) 70 P & CR 487* , 493–495 and Hansard (HL Debates), 9 February 1965, cols 85, 90–91, 95.

The 1965 Act does not confer any right to use of any of the three classes of greens. The provision for the creation of rights in the Prescription Act 1832 and the Rights of Way Act 1932 does not assist in determining whether registration of a class c green leads to the creation of rights. Customary rights are not public rights (see *Wyld v Silver [1963] Ch 243* , 272 and *Dyce v Lady James Hay (1852) 1 Macq 305*) and the Act says nothing about the inhabitants of any specified locality having rights conferred. A statute should not be read as interfering with property rights unless it contains plain words to that effect: see *Halsbury's Laws of England* , 4th ed reissue, vol 44(1) (1995), paras 1456, 1464.

Nor does the 1965 Act extend the protection of the 19th century penal legislation to class c greens. The provisions of the 1857 and 1876 Acts placed significant limitations on landowners preventing agricultural use or development. The phrase "town or village green" used in the 19th century legislation referred to land over which customary rights of recreation could be strictly proved. It is not permissible to extend the meaning of that phrase to cover class c greens brought into being after 1965 so that the owner is by registration deprived of the beneficial use of it: see *Gadsden, The Law of Commons* (1988), paras 13.40, 13.42 and *Halsbury's Laws of England* , 4th ed reissue, vol 6,(1991), para 528, n 1. There is a presumption in favour of the strict construction of penal statutes: see *Massey v Boulden [2003] 1 WLR 1792* , para 18.

The creation of rights and the application to class c greens of the 19th century penal legislation is also incompatible with the right of a landowner not to be deprived of his possessions: see article 1 of the First Protocol to the Human Rights Convention ; *Beaulane Properties Ltd v Palmer [2006] Ch 79* , paras 208–209 and *JA Pye (Oxford) Ltd v United Kingdom [2005] EGLR 1* , paras 55–57, 69–75. Even if a landowner is not in these circumstances deprived of his possessions, such regulation is more than merely control of the use of the land and is not justified: see, for example, *Stretch v United Kingdom (2003) 38 EHRR 196* , para 36.

Even before the 2000 Act the only registrable class c greens were those where the use was continuing at the date of registration, as is the case with registration of rights of common: see *Central Electricity Generating Board v Clwyd County Council [1976] 1 WLR 151* , 157. To hold that the relevant 20-year period ends at the date of application for registration would require a purposive interpretation of the Act to prevent a landowner, alerted to the application, from taking steps to prevent use continuing as of right. Since the coming into force of the 2000 Act all applications to register class c greens are governed solely by its provisions, which require continuance of the use until registration.

Petchey following. Absent special features, use of land for walking can give rise only to a prescriptive right of way, public or private, and does not constitute use for lawful sports and pastimes for the purpose of registration of a new class c green. This is so even with regard to walking with a dog,

which might roam freely rather than remain on the footpath: see *R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573* , paras 103–104. Such use is only capable of counting towards the establishment of a footpath: see *Dyfed County Council v Secretary of State for Wales (1989) 59 P & CR 275* .

George Laurence QC and *Ross Crail* for the county council. The Court of Appeal erred in law in holding that a registration authority determining an application for registration of land as a town or village green has jurisdiction to consider alternative cases to that originally stated in the application form. The registration authority must act on the basis of that form. To imply a power to allow amendment of the form, or to consider alternative cases to that stated in the form without amendment, is inconsistent with, and cannot be accommodated within, the legislative scheme set out in the 1965 Act and the Commons Registration (New Land) Regulations 1969 (SI 1969/1843).

The authority cannot arrogate to itself a jurisdiction which is not conferred by the 1969 Regulations. These provide for a single notification of interested parties and advertisement followed by a single exchange of evidence/representations. They do not provide for a repetition of that procedure on the basis of a change in the area claimed or a different set of circumstances. Nor can the authority consider whether land falls to be registered as a green independently of an application for its registration. The role of the authority is strictly to act in response to a particular application made in accordance with the regulations. Sullivan J was wrong, in *R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573* , paras 132–137, to state that the application does not have to specify the locality or neighbourhood the inhabitants of which are claimed to have used the land for sports and pastimes. The courts have concurrent jurisdiction to decide whether land is a green. See the *Whitmey case [2005] QB 282* and compare *Shears Court (West Mersea) Management Co Ltd v Essex County Council (1986) 85 LGR 479* . A person claiming a declaration that land is a green in court proceedings would have to state and prove his case and observe procedural rules.

The addition of land to the town/village green register by a registration authority is a quasi-judicial function in which the authority adjudicates upon a lis between applicant and objectors, the burden of proof resting throughout on the applicant. It is not an administrative function in which the authority can play a proactive inquisitorial role with the aim of getting the register "right" irrespective of how the application is presented. Technical rules are both necessary and appropriate.

***681**

Jonathan Karas and *James Maurici* for the Secretary of State for the Environment, Food and Rural Affairs intervening. Customary rights take effect as local law: see *Halsbury's Laws of England* , 4th ed, reissue (1998), vol 12(1), para 601. They are exercisable by members of a locality, not by members of the public, and were historically treated not as public rights but as quasi-easements over the land of another enforceable in an action for private nuisance: see *Brocklebank v Thompson [1903] 2 Ch 344* . Thus even prior to the 1965 Act, town and village greens were still considered as pieces of land over which inhabitants of a town or village rather than the public at large enjoyed customary rights of recreation: see Report of Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462), p 276.

The lawful activities which could be relied on to establish the customary right included maypole dancing (see *Abbot v Weekly (1666) 1 Lev 176* and *Hall v Nottingham (1875) 1 Ex D 1*), cricket (see *Lancashire v Hunt (1894) 10 TLR 310; 11 TLR 49*), musketry (see *New Windsor Corpn v Mellor [1975] Ch 380*) and recreation generally (see *Fitch v Rawling (1795) 2 H Bl 393*). While the rights of inhabitants over a green limited landowners' rights, there is no case of establishment of rights which wholly excluded the landowner from his property or prevented him from doing anything, provided he did not interfere with the enjoyment of the inhabitants: see *Paterson v Provost of St Andrews (1881) 6 App Cas 833* . The landowner's rights are only subject to those of the inhabitants of the locality: the rest of the world may be excluded. He can prevent the inhabitants from using the land otherwise than for reasonable recreation.

There is nothing in the 1965 Act to indicate that a further stage of legislation was contemplated to deal with the question of what (if any) rights were to be exercisable over the land which was registered. Rather the Act intended that land which became a green would carry with it the rights for inhabitants of the locality to enjoy lawful sports and pastimes generally: section 22 . The nature of the lawful activity is limited by the nature of the land in question and the "neighbour" principle as found in the context of the law of nuisance.

The 19th century legislation did not confine the meaning of the words "town and village green" to land

which was recognised as such at the date of the legislation itself. Since the introduction of class c provides a prescriptive method for establishing the existence of a green because of the inadequacies of the common law, there is no reason for treating such a green, when established, differently from a green which could have been established at common law, for the purposes of the 1857 and 1876 Acts.

As to article 1 of the First Protocol , use of property may be restricted without any requirement for compensation, provided that the use occurs in accordance with the law and is proportionate: see *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2005] 1 WLR 1267* and *Banér v Sweden (1989) 60 DR 128* . However, this is not a case of deprivation of property. The city council's property rights, while curtailed, do not disappear. The land could be used by the council to provide recreational facilities and so is not incapable of any beneficial use. It is within the margin of appreciation of governments to provide for recreation: see *Mellacher v Austria (1989) 12 EHRR 391* , paras 48, 53. *Stretch v United Kingdom 38 EHRR 196* does not provide any ***682** support for the city council's claim of breach of article 1 of the First Protocol .

The qualifying period, on the natural meaning of the original wording of section 22(1) of the 1965 Act, is any 20-year period of use ending after 1 August 1970, so that land might become a green without the landowner knowing. Since the insertion of section 22(1A) , providing that the use must be continuing, the qualifying period is 20 years' use up to the date of application or the date on which the right of the relevant inhabitants is brought into question. To require use to continue until the date of registration would make a nonsense of the Act. As to land which had "become" a green within the original definition but was not registered as such before the 2000 amendment came into force, the presumption against retrospectivity and section 16 of the Interpretation Act 1978 will apply and section 22(1A) will have no application.

The purpose of the 1969 Regulations is to provide a mechanism for bringing before the registration authority the question whether any land has become a town or village green. The authority is only obliged to consider the evidence and submissions before it and is under no obligation to undertake a wider-ranging inquiry. The rules must be interpreted flexibly when the court considers the consequence of non-compliance: see *R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354* , 362 and *Seal v Chief Constable of South Wales Police [2005] 1 WLR 3183* , paras 32–34.

Edwards in reply. Although the role of the registration authority is constrained by the evidence before it (see *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , para 2) the authority must be allowed some flexibility since applications are usually made by members of the public, and an error that could be corrected without prejudice to third parties should not be fatal to the application: see *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] 2 PLR 1* , para 82.

In so far as Parliament intended a second stage of legislation to follow the 1965 Act, that would only have been in respect of vesting of ownership of unclaimed common land, public access to common land and management of common land. That the 1965 Act, unlike the 1832 and 1932 Acts, does not use express words to create rights is not in point. All three Acts were intended to overcome difficulties in relying on the common law, and parallels may properly be drawn between them in terms of whether rights are created.

There is nothing in the 1965 Act as originally enacted requiring the 20-year use to continue until the date of application: land "becomes" a green by meeting the requirements of the section 22(1) definition. Under section 22(1A) land "becomes" a green on application and qualifying use should continue to that date.

Recreational walking may amount to the assertion of a right of way or of a right to use the land as a green. Walking (with or without dogs) is a popular contemporary pastime and there is no reason why it should be excluded from the range of lawful sports and pastimes which may contribute to land becoming a green.

Crail in reply. *R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354* and *Seal v Chief Constable of South Wales Police [2005] 1 WLR 3183* are not in point because they concerned ***683** failures to comply with procedural requirements concerning the making of an application. Specifying an area, date or locality which the evidence does not support is not a mere procedural defect. There must be limits on how far the authority can go to rescue the applicant from that kind of mistake consistently with performing its quasi-judicial function in what are essentially

adversarial proceedings.

George QC in reply. Parliament's intention was to make provision for statutory schemes for the management and improvement of common land. Much of the legislation defined "commons" as including greens: see section 15 of the Commons Act 1899 and section 336(1) of the Town and Country Planning Act 1990 .

Prior to the 1965 Act, what made land a customary town or village green was its being (i) a green, predominantly grass, (ii) in or adjoining, and serving the inhabitants of, a town or village (iii) subject to customary recreational rights. The combined effect of (i) and (ii) would exclude land which was, say, a beach or wood or farmland/downland in the countryside: see *Lancashire v Hunt 10 TLR 310* and *Bell v Wardell (1740) Willes 202* . As to (iii), it required more than a single lawful sport or pastime. It is apparent from its language that the 19th century legislation could not have applied where the custom was one which could co-exist with significant activities of the owner. Following the 1965 Act (iii) is no longer applicable but land which does not qualify under (i) and (ii) is non-registrable. Thus the Trap Grounds are not registrable.

The Secretary of State has not identified any mechanism within the 1965 Act or the 19th century legislation whereby the fact of land becoming a class c green makes the land subject to rights or protected by legislation. To subject the land to such rights and legislation would involve judicial creativity not permitted under accepted canons of statutory construction and section 3 of the Human Rights Act 1998 .

Use of the land for lawful sports and pastimes must continue to the date of final registration: see *In re Merthyr Mawr Common [1989] 1 WLR 1014* , 1022–1023.

Karas , in reply, referred to *General Estates Co Ltd v Ministry of Housing (1965) 194 EG 201* .

Their Lordships took time for consideration.

24 May. LORD HOFFMANN

The Trap Grounds

1 My Lords, this appeal arises out of an application on 21 June 2002 by Miss Catherine Robinson, who lives in North Oxford, to register the Trap Grounds as a town or village green under the Commons Registration Act 1965 . The site as it is today does not fit the traditional image of a town or village green. Mr Vivian Chapman, a member of the Bar expert in the law of commons and greens, described it in a report on the application which he wrote for the registration authority, the Oxfordshire County Council:

> "The Trap Grounds are nine acres of undeveloped land in North Oxford. They lie between the railway to the west and the Oxford Canal ***684*** to the east. About one third... is permanently under water... This part... is usually called 'the reed beds'. [They] are inaccessible to ordinary walkers since access would require wading equipment. The other two thirds ['the scrubland']... are much drier and consist of some mature trees, numerous semi-mature trees and a great deal of high scrubby undergrowth, much of which is impenetrable by the hardiest walker... The scrubland is noticeably less overgrown at the southern end and there is a pond and wet areas in the central eastern part of the scrubland. Throughout the dry parts of the scrubland there are piles of builders' rubble, up to about a yard high, which are mostly covered in moss and undergrowth. The Trap Grounds are approached from the east by a bridge... over the canal. From the bridge a track, known as Frog Lane, leads along the northern edge of the reed beds and gives access to a circular path around the scrubland. Off this circular path there are numerous small paths through the undergrowth. Some peter out after a few yards. Some lead to small glades and clearings. I estimate that a total of about 25% of the surface area of the scrubland is reasonably accessible to the hardy walker."

2 Not idyllic. But town and village greens are in theory survivals from the mediaeval past, established by immemorial local customs dating back to before the accession of Richard I in 1189. When counsel for the landowner in *Mounsey v Ismay (1863) 1 H & C 729* protested that the fields on which the inhabitants of Carlisle claimed a custom of holding horse races in May were arable land, Martin B

replied, at p 733: "It must be assumed that the custom has existed since the time of Richard the First; and why may it not have been reasonable in the then state of the land?" The Trap Grounds no doubt looked very different before they were cut off, first by the 18th century canal and then by the 19th century railway, from the great north Oxford common of Port Meadow. In those days Frog Lane was called My Lady's Way and led across the Meadow to the nunnery at Godstow where Charles Dodgson and Alice Liddell picnicked and fair Rosamund, mistress of Henry II, lies buried.

Village greens

3 The traditional village green is a creation of the literature of sensibility in the late 18th century. The green at Auburn in Goldsmith's *The Deserted Village* (1770) is the best example; a place where:

> "toil, remitting, lent its turn to play,
>
> And all the village train, from labour free,
>
> Led up their sports beneath the spreading tree!
>
> While many a pastime circled in the shade,
>
> The young contending as the old survey'd;
>
> And many a gambol frolick'd o'er the ground,
>
> And sleights of art and feats of strength went round;
>
> And still, as each repeated pleasure tired,
>
> Succeeding sports the mirthful band inspired..."

4 No doubt there were, and perhaps are, village greens like that, but the law took a more prosaic view of the matter. It was not particularly concerned with the spreading tree and the ancient turf but simply with ***685*** whether there was an immemorial custom for inhabitants of a parish, borough or similar locality to use the land for sports and pastimes. As Martin B said, the custom had in theory to date from before 1189, but such antiquity could be inferred from proof that the inhabitants had in fact used the land for such purposes for a long period in the past. The inference could be rebutted only by showing that it was impossible for such a custom to have existed in 1189.

5 The early cases do not use the term "village green". In *Abbot v Weekly (1666) 1 Lev 176* a custom that "the inhabitants of the vill, time out of memory, & had used to dance there at all times of the year at their free will, for their recreation" was held to be a good custom. In *Fitch v Rawling (1795) 2 H Bl 393* the custom was to use some land at Steeple Bumpstead in Essex for "all kinds of lawful games, sports and pastimes... at all seasonable times of the year". As *Halsbury's Laws of England* has said in successive editions (for example, 1st ed (1908), vol 4, para 1247): "the essential characteristic of a town or village green is that by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation."

6 In *Mounsey v Ismay 1 H & C 729* (horseracing on arable land on Kingsmoor, outside Carlisle), *Virgo v Harford (unreported) 11 August 1892* (noted in *Hunter, The Preservation of Open Spaces* (1896), pp 181–182) (football, rounders and cricket on 65 acres of open land on a hill outside Walton-in-Gordano in Somerset) and *Lancashire v Hunt (1894) 10 TLR 310* (cricket and other games on 160 acres of Stockbridge Common Down) the courts upheld recreational customs on land which bore no resemblance to the village green at Auburn.

7 The first instance to which we were referred of the use of the term "village green" in a case or statute was in section 15 of the Inclosure Act 1845 (8 & 9 Vict c 118), which provided that "no town green or village green shall be subject to be inclosed under this Act". The Act offered no definition and Mr Woolrych, in his notes on The New Inclosure Act (1846) said that the term did not refer to all the "grassy plains" on commons which were "known by the name of greens" but only to the "little patches" which "adjoin a town or hamlet and are used in the nature of easements by the inhabitants". There is no authority on the point but it seems likely that, on what would now be called a purposive construction, "town green or village green" would have been construed as Woolrych suggested,

namely as any land upon which the local inhabitants enjoyed customary rights of recreation. The purpose of inclosure under the Act was after all to extinguish manorial rights of common over the land inclosed, so that it could be at the free disposal of the owner, but the Act did not extinguish customary rights: see *Forbes v Ecclesiastical Comrs for England (1872) LR 15 Eq 51* . It was therefore logical to exclude land subject to customary recreational rights from the inclosure procedure.

8 The increase in the urban population in the 19th century made the preservation of open spaces a matter of great public concern. Near the large cities the traditional use of commons for depasturing animals declined and their principal use became the recreation of the people. This use was threatened by owners who recognised no interests in the land apart from those of a declining band of commoners and their own. The House of ***686** Commons *Select Committee on Open Spaces near the Metropolis* (1865) (HC Parliamentary Papers vol VIII 259) asked why long use of the commons by members of the public for recreation should not give rise to public rights. Why should Hampstead Heath not be the village green of London? The answer was that the law recognised only local customs. Rights of recreation could be established for the benefit of a parish or a town, but not for the public at large. London was too big. As Lord St Leonards LC said in *Dyce v Lady James Hay (1852) 1 Macq 305* , 309, a claim for all the Queen's subjects "to go at all times upon the... appellant's property... for the purpose of recreation" was "a claim so large as to be entirely inconsistent with the right of property".

9 The Select Committee said in its Second Report (1865) (HC Parliamentary Papers vol VIII 355, 579) that this rule was illogical: it appeared to "rest upon no very intelligible principle". But the judges and writers insisted on applying it strictly. In *Hammerton v Honey (1876) 24 WR 603* , 604, Sir George Jessel MR rejected a claim to rights of recreation over Stockwell Green on the ground (among others) that the evidence did not show that use of the green was confined to inhabitants of Stockwell:

> "If you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom."

10 In the same year as *Hammerton v Honey* Mr Charles Elton of Lincoln's Inn wrote a pamphlet on the bill which became the Commons Act 1876 (39 & 40 Vict c 56), in which he said, at pp 16–17, by way of riposte to those who held the same views as the Select Committee:

> "There have been some proposals of late years to extend the doctrine of village greens in a very curious way. It was thought that the commons and open fields around London might be secured as public greens by setting up a kind of national-local custom of rambling and playing at games-such as football and donkey-races,-and so the payment of compensation to private owners might be evaded by a legal fiction."

11 Mr Elton had written a sustained attack on the same heretical doctrine in his *Treatise on Commons and Waste Lands* (1868), pp 281–301. The strictest application of the locality rule was in *Edwards v Jenkins [1896] 1 Ch 308* , in which Kekewich J held that the inhabitants of the contiguous Surrey parishes of Beddington, Carshalton and Mitcham could not have a customary right of recreation over land in Beddington. One parish, one custom. In *New Windsor Corpn v Mellor [1975] Ch 380* , 387 Lord Denning MR thought that Kekewich J had gone too far. "So long as the locality is certain, that is enough." But there is no doubt that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass.

The Royal Commission

12 The Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462) drew attention (in para 19) to the deterioration in many town and village greens: ***687**

> "Unhappily, although many exquisite greens and small village commons do exist, reality all too frequently falls short of imagination. 'Too often, however,' it has been said 'village greens are neglected and become rank with unmown grass and weeds, or trodden bare, used as dumps for rubbish and disfigured with litter.' So far from being untouched, they may find the hand of the 20th century lying heavy on them."

13 The commission recommended (at para 404) that

> "as the last reserve of uncommitted land in England and Wales, common land [an expression which the commission used to embrace both commons and town and village greens] ought to be preserved in the public interest."

The principal mechanism for preservation was to be a register, maintained by county and county borough councils, which would be a definitive record of all common land and town and village greens. Most of the report is about commons, but three of its references to town and village greens should be noted. (a) There was to be a register of common rights (because "rights exercisable over [commons]... are as variable as their origin": para 128) but no register of rights exercisable over greens. The purpose of greens was simply to "serve the needs of the local inhabitants for exercise and recreation in attractive surroundings": para 368. (b) Many village greens in fact originated not in customary rights but in allotments set aside for recreation in inclosure awards. The commission said (para 373) that there was "no advantage in perpetuating these distinctions" and that local authorities should be able to maintain such allotments as village greens. (c) The commission said that there were "probably very few villagers who will not know what they mean by 'their green' "and thought that such a claim would seldom be questioned: para 369. But if it was challenged, "the burden of proof would in all probability put them to considerable difficulty and expense". This was presumably a reference to the rule that a customary right for the inhabitants of a locality to use land for "lawful sports and pastimes" must have been exercised since before 1189.

14 In order to deal with these three points, the commission proposed (in para 403) a definition of a town or village green:

> "Any place which has been allotted for the exercise or recreation of the inhabitants of a parish or defined locality under the terms of any local Act or inclosure award, any place in which such inhabitants have a customary right to indulge in lawful sports and pastimes and in a rural parish any uninclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes during a period of at least 20 years without protest or permission from the owner of the fee simple or the lord of the manor."

15 Certain points about this proposed definition should be noted. First, there was to be a single concept of a village green, with a definition which could be satisfied in three different ways. Land allotted for recreation under the Inclosure Acts or similar statutes was to be assimilated to customary village greens. Secondly, customary village greens were defined simply as ***688** land in which the inhabitants of a parish or defined locality "have a customary right to indulge in lawful sports and pastimes". Following the earlier case law, there was no restriction by reference to the size or character of such land. Thirdly, the proposed third limb, allowing 20 years use as of right as an alternative to proof of custom since 1189, was to be confined to rural parishes and to land "wholly or mainly surrounded by houses or their curtilages". The commission obviously felt some concern about allowing any land whatever to become a deemed village green after 20 years use by local inhabitants for sports and pastimes. They may have foreseen cases like *R (Beresford) v Sunderland City Council [2004] 1 AC 889* or, indeed, this case, and thought that such land should not become a village green merely because the owner had neglected it for over 20 years.

16 Besides relieving local inhabitants of the burden of proving immemorial custom, the Royal Commission wanted to encourage local authorities or parish councils to claim village greens rather than leaving it to individual initiative. So they recommended that if a local authority or parish council formally claimed land as a town or village green, it should be provisionally registered and title should thereupon vest in the local authority. That would enable the local authority immediately to maintain the green as if it had been acquired under the Open Spaces Act 1906 and make by-laws for its management: para 372. Anyone with an interest in the land could then object to the provisional registration and have the objection determined by a commons commissioner but otherwise it would become final.

The 1965 Act

17 The recommendations of the Royal Commission were largely, though not entirely, adopted in the 1965 Act. Section 1(1) provided for the registration of common land, town or village greens and rights of common. An application to register in proper form would be followed as of course by a provisional registration which would be publicly notified. If there were no objections, the provisional registration would become final. Otherwise, objections and disputes would be determined by commons commissioners and the provisional registrations confirmed or expunged accordingly. By section 4(6), applications for provisional registration had to be made before a prescribed date, which for most people was 2 January 1970. By section 1(2), after another prescribed date which, in the event, was 31 July 1970: "(a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered..."

18 In *In re Tumworth Down, Dorset [1978] Ch 251*, 260–261, Oliver J suggested in passing that this simply meant that the land was not *deemed* to be a village green but did not exclude the possibility that it actually was. The same opinion was expressed by Pill LJ in *R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102*, 112–113. But this would not in my opinion be in accordance with the scheme of the Act. I think that the effect of non-registration was to extinguish such rights of recreation as may have existed by custom or statutory allotment and were registrable on the appointed day.

19 On the other hand, by section 10, the registration of land as common land or as a town or village green was to be "conclusive evidence of the matters registered, as at the date of registration". So the register was to be definitive, both positively and negatively: registration was conclusive ***689** evidence that on that date it was a town or village green and non-registration was conclusive evidence that it was not.

20 In its definition of a "town or village green" for the purposes of the Act, section 22 departed from the recommendation of the Royal Commission. The conclusive presumption arising from upwards of 20 years use was not confined to rural parishes or land surrounded by houses or their curtilages:

> "(1) In this Act, unless the context otherwise requires... 'town or village green' means land
>
> [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or
>
> [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or
>
> [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

(I have inserted into this definition the letters by which the alternative grounds upon which land may qualify for registration are usually designated).

21 The Act did not vest the ownership in all town and village greens in the local authority. If anyone could satisfy a commons commissioner that he was the owner of the soil, he would be registered as owner. It was only in cases in which no one could prove that he was owner that the land vested in the local authority, which became entitled to manage the green as if it was a public open space: see section 8(4).

New town or village greens

22 Section 13 provided for events happening after the register had become final:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where—
>
> (a) any land registered under this Act ceases to be common land or a town or village green; or
>
> (b) any land becomes common land or a town or village green; or
>
> (c) any rights registered under this Act are apportioned, extinguished or released, or are

varied or transferred in such circumstances as may be prescribed..."

23 Pursuant to section 13 , the Minister of Housing and Local Government made the Commons Registration (New Land) Regulations 1969 (SI 1969/1843) ("the New Land Regulations").Regulation 3(1) provided for applications to register land which had become common land or a town or village green after 2 January 1970, the last date on which land which was already common land or a town or village green could have been originally registered. The notes appended to the Regulations gave examples of how land could become a town or village green after 2 January 1970. One was "by the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years". The regulations provided a simple procedure for such applications. There was a form of application to be sent to the registration authority, (regulation 3(7)), of which notice was required to be published, posted upon the land and sent to the land owner and other interested parties: regulation 5(4) . Objections were to be sent to the applicant, who was to be given an opportunity to deal with the points which they raised and any grounds on which the registration ***690*** authority considered that prima facie the application should be rejected. No procedure for adjudicating upon the applications and objections was prescribed.

Proof of user

24 The registration of village greens which had come into existence by virtue of 20 years user as of right was at first restricted by the decisions of Carnwath J and the Court of Appeal in *R v Suffolk County Council, Ex p Steed (1995) 70 P & CR 487* ; *75 P & CR 102* which held that user "as of right" meant that the people indulging in sports and pastimes on the land must have believed that they were exercising a right claimed by the inhabitants of a particular locality. This requirement was, I think, intended to be, and was in practice, very difficult to satisfy. As in the case of the metropolitan commons in the Victorian era, people who went upon open land in urban areas for recreational purposes tended to think (in so far as they thought about the matter at all) that they were exercising a general public right.

25 In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , however, your Lordships' House rejected the requirement of a subjective state of mind by people using the land and thereafter, as Carnwath LJ observed in this case *[2006] Ch 43* , 61 registration of new village greens became "an area of unusually vigorous legal activity". Once 20 years' user had been established, the only substantial hurdle which the applicant for registration had to overcome was, as it had been in the Victorian cases on customary greens, proof that the user had been by the inhabitants of a defined locality. This requirement was relaxed by the House in the *Sunningwell case [2000] 1 AC 335* , 357—358 only to the extent of saying that not all the users needed to be inhabitants of the locality in question. It was sufficient that the land was used "predominantly" by such inhabitants.

The amendment of section 22

26 Soon after the decision in the *Sunningwell* case, the question of town and village greens was raised in Parliament. This was in the debates on the bill which became the Countryside and Rights of Way Act 2000 . No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the only question raised in debate was whether the locality rule did not make it too difficult to register new village greens. In your Lordships' House, Baroness Miller of Chilthorne Domer described the need for the users to be predominantly from the local community, defined by reference to a recognised ecclesiastical parish or local government area, as a "loophole" in the 1965 Act which "allows greens to be destroyed" (Hansard (HL Debates) 16 October 2000, col 865). The Government was sympathetic and introduced a suitable amendment which was adopted at the report stage (Hansard (HL Debates) 16 November 2000, col 513). This became section 98 of the 2000 Act, which amended section 22 by substituting a new third limb of the definition (class c):

> "(1A) Land falls within this subsection if it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of ***691*** any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either—
>
> (a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

No period has yet been prescribed under paragraph (b).

27 "Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975* that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities".

28 I mention for the sake of completeness that a new Commons Bill which repeals and replaces the 1965 Act is now before Parliament.

The inquiry

29 I come next to the procedure which was followed in this particular case. Although the New Land Regulations do not prescribe any particular method of adjudication, registration authorities in difficult cases tend in practice to engage the services of a member of the Bar to conduct a non-statutory inquiry with a view to advising the authority on the facts and the law: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 348. This procedure is sanctioned by a number of judicial decisions and in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975* , 986–987 Sullivan J decided that in some cases fairness would make an oral hearing not merely an option but a necessity. Mr Vivian Chapman, who had also been the inspector in the *Sunningwell* case, held an inquiry and produced a report. There was only one objector: the city council, as owner of the land.

30 Miss Robinson's original application had been to register the whole of the Trap Grounds, including the submerged reed beds. At the hearing she applied to amend the application to exclude the reed beds and a ten-metre strip on the west boundary of the scrubland, on which the county council wanted to build an access road to a new school to the south. Mr Chapman decided that he (or the registration authority in whose name he was acting) had power to allow an amendment but refused leave on the ground that the owner of the land (the city council) was entitled to have the status of the whole application land determined and not be faced with the possibility of a later application in respect of land which had been excluded.

31 The application form prescribed by the regulations contains the question (in part 4): "On what date did the land become a town or village green?" Miss Robinson, apparently on the strength of a publication by the Open Spaces Society, *Getting Greens Registered* (para 59) wrote "1 August 1990". This was calculated as 20 years after the period for original registration had expired. At the inquiry, however, it became clear that she was relying on the period of 20 years before the date of her application for ***692** registration on 21 June 2002 and Mr Chapman dealt with the application accordingly.

32 Mr Chapman found that the scrubland had been proved to have been used for lawful sports and pastimes for more than 20 years before the date of application and recommended to the county council that it should be registered as a village green. But the reed beds and Frog Lane had not been so used and should be excluded from the registration.

The county council's response

33 The county council then appears to have sought a second opinion on some of the legal points which had arisen. Mr George Laurence QC advised that the 20-year period could be any 20-year period ending after 1 August 1970 and before the date of the application and that an applicant must decide which period she wants to rely on. If she could not prove that it became a green by the date specified in the application, it must be rejected and she could not rely on evidence of use at a later date. He also advised that the authority could register part of the land specified in the application only if it was "not substantially different" from the application land.

34 Mr Chapman, sent this advice for comment, adhered to his recommendation. In his opinion, the relevant 20-year period was, even before the 2000 amendment, the period before the date of the application. Miss Robinson's answer to part 4 of the form (1990) was therefore, in law, a mistake. But the mistake had caused no prejudice to the city council, which had agreed that 20 years before 2002 was the relevant period and had conducted its case accordingly. Mr Chapman also rejected the opinion that the authority could not register a part of the land specified in the application, saying that it must have power to register a smaller area. It would be pointless to require a new application.

Application for declarations and directions

35 In view of this conflicting advice, the registration authority applied to the court for directions. It decided that it should also ask for rulings and guidance on various other matters relevant to both whether the land should be registered and what the consequences of registration would be. As a result, Lightman J was faced with an application for ten rulings: (i) whether the relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c town or village green; (ii) whether land which had become a class c green fell within the scope of section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876 ; (iii) a ruling as to the meaning of the words "continue to do so" in section 22 of the 1965 Act, as amended, for which purpose the court was asked to rule whether (in the absence of regulations made under the section), the lawful sports and pastimes had to continue to (a) the date of the application to register, or (b) the date of registration, or (c) some other, and if so what, date; (iv) a ruling as to whether all applications for registration of land as a class c green made on or after 30 January 2001 automatically engaged (and engaged only) the amended definition in section 22 of the 1965 Act; (v) a ruling as to whether the application might as a matter of law succeed on the basis that the land had become a green on 1 August 1990, or whether (subject to (vi) below) an application which specified in the *__693__ application form a commencement date for the green that was earlier than the date immediately preceding the date of the application had to fail; (vi) a ruling as to whether the county council had power to treat the application as if a different date (namely a date immediately preceding the date of the application) had been specified in the application as the commencement date for the green, and to determine the application on that basis; (vii) a ruling as to whether, as a matter of law, it was open to the county council to permit the application to be amended so as to refer to some lesser area, and if so, according to what criteria; (viii) a ruling as to whether, as a matter of law, it was open to the county council (without any such amendment being made) to accept the application in respect of, and to register as a green, part only of the land included in the application, and, if so, according to what criteria; (ix) guidance as to how the county council had to approach the application in the light of (a) the evidence in relation to user of the main track and subsidiary tracks, and (b) the fact that some of the land was not reasonably accessible; (x) guidance as to the relevance of the existence or potential for the existence of public rights of way. (We are told that the request for what became rulings (i) and (ii) were added during the hearing at first instance at the suggestion of the judge, who took the view that the answers would inform his approach to what became rulings (iv) and (v).)

36 Lightman J made declarations in response to each of these questions. Each of the parties appealed against one or more of these rulings and the Court of Appeal, in a judgment given by Carnwath LJ, allowed the appeal in respect of some of the declarations and dismissed it in respect of others. All parties appeal to your Lordships' House.

What is a village green?

37 In *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , 917, para 92, my noble and learned friend, Lord Walker of Gestingthorpe, said that the registration of a ten-acre grass arena in an urban area as a town or village green "may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended". Others may also feel a visceral unease at the lack of resemblance between the land registered in that case (and sought to be registered in this one) and the "traditional" village green whose passing was lamented by Goldsmith in 1770. Perhaps, one might feel, the concept could be narrowed by importing into the definition some of the qualities which are associated with the ordinary use of the term defined-what might be called an "Auburn test", not expressly stated in the definition but implied from the choice of the words "town or village green".

38 My Lords, it is true that in construing a definition, one does not ignore the ordinary meaning of the

word which Parliament has chosen to define. It is all part of the material available for use in the interpretative process. But there are several reasons why I think that it would be unwise for your Lordships, at any rate without full argument, to embark upon the process of introducing some elements of the traditional village green into the statutory definition.

39 First, your Lordships will observe that the question of whether the Trap Grounds failed, by reason of their current character, to qualify as land capable of becoming a town or village green was not among the ten questions on which the parties sought rulings from the House. It was not discussed in ***694*** any of the printed cases. Secondly, this is not surprising because there is no authority, either at common law or on earlier statutes which used the term "village green", in which such a restricted meaning was applied. Thirdly, any restriction derived from the ordinary meaning of "village green" must apply to all three limbs of the definition, but the Royal Commission plainly thought that all land with customary rights of recreation (such as Stockbridge Common Down) would fall within class b. Fourthly, Parliament must have been alerted to the width of the definition by the Royal Commission's proposed restriction for class c greens but chose to define them without restriction. Fifthly, even if Parliament had not noticed in 1965, the subsequent practice of the very learned commons commissioners and the courts would have shown how the definition operated. On 19 May 1977 Mr C A Settle QC, as commons commissioner, registered as falling within the statutory definition some rocks at Llanbadrig, Ynys Mon, which had been used by the inhabitants of the locality to moor boats while engaged in the pastime of boating. On 24 May 1976 the Chief Commissioner Mr Squibb ordered registration of land which the local authority wanted to use for housing purposes but upon which there was a custom of having an annual Guy Fawkes bonfire. No doubt there are other examples in the archive of decisions of the commons commissioners. In *New Windsor Corpn v Mellor [1975] Ch 380* , the Court of Appeal confirmed the registration of a car park in Windsor as a customary (class b) green. Sixthly, Parliament in 2000 showed no unease at the way registration was operating. Seventhly, if Parliament thinks that the definition needs to be narrowed, it will have an immediate opportunity to do so. Eighthly, the terms of the proposed Auburn test would be inherently uncertain. To say that the registration authority will recognise a village green when it sees one seems inadequate.

40 My Lords, I therefore turn to the issues raised by the ten points on which declarations or guidance were sought. They may be divided into four groups. The first concerns the 20-year period: when must it have ended? The original definition did not specify. The 2000 amendment says "and continuing" but does not say until when. The second group concerns the effect of registration. Do the local inhabitants obtain any rights and is a registered green protected by Victorian legislation enacted to prevent nuisance and encroachment on town and village greens? The third group raises some procedural questions about the form of applications and the powers and duties of the registration authority and the fourth group seeks guidance on the correct approach to certain kinds of evidence about user.

The 20-year period

41 Section 22 as originally enacted said that land which the inhabitants of the locality have used for sports and pastimes "for not less than 20 years" was a village green. It did not specify when that period should end. In *New Windsor Corpn v Mellor [1975] Ch 380, the Court of Appeal* thought that it meant 20 years before the passing of the Act. In *Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931* , 938 Harman J thought it meant 20 years before the date of the application for registration: see also *R v Norfolk County Council, Ex p Perry (1996) 74 P & CR 1* , 5 (Dyson J) and *Caerphilly County Borough Council v Gwinnutt (unreported) 16 January 2002* (Judge Moseley QC). But Mr Edwards, who appeared for ***695*** Miss Robinson and Mr Laurence, who appeared for the registration authority, said that as the definition did not specify any terminal date, it meant any period of 20 years. On the expiry of a 20-year period of user, the land became a village green. If it had become a green before 1970 and had not been registered, it would be deemed by section 1(2)(a) not to have been a village green on the appointed day. But any 20-year period expiring after the appointed day would do.

42 The amended section 22 , with the addition of the words "and... continue to do so", plainly cannot be satisfied by any period of 20 years. It must be a period continuing until a given date, although, as I shall explain, the precise date is controversial. So one might have thought that the question of whether one could have taken any 20 years under the old law was now academic. But Mr Edwards says that if the land became a green under the old law, it would have remained a green thereafter.

Once a village green, always a village green. It could not be retrospectively deprived of that status by the amendment of the definition in 2000. Lightman J agreed *[2004] Ch 253* , 283, paras 66 -67.

43 In my opinion it is unnecessary to decide when the 20-year period under the old law would have expired because the argument that it would have "become a village green" is a misreading of sections 13 and 22 of the 1965 Act. Section 22 defines a village green for the purposes of the Act. When section 13 speaks of amendment of the register when land "becomes" a village green, it means that by reason of events which have happened after 1970, the land now satisfies the definition. That makes it registrable. But, because the register is conclusive, it does not become a village green until it has been registered. The Act was a Commons Registration Act , not an act to change the substantive law of commons and village greens, although, as Carnwath LJ pointed out, the effect of the conclusive presumption in section 10 , read with section 22 , may be to create rights in respect of land to which they would not have attached without registration. But one purpose of the Act was to enable buyers of land and other members of the public to ascertain from the register whether land was common land or a village green. It would defeat that purpose if unregistered greens could come into existence after the appointed day. I agree with Carnwath LJ's analysis *[2006] Ch 43* , 72–73, para 100:

> "The 1965 Act created no new legal status, and no new rights or liabilities other than those resulting from the proper interpretation of section 10. Since that section only takes effect in relation to any particular land on registration, there is no legal basis for treating that land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant if it was not registered as such."

Continue until when?

44 Since 2001, then, the land must satisfy the definition as amended by the 2000 Act. The inhabitants must "continue" to use the land for sports and pastimes. Continue until when? Carnwath LJ said that user had to continue until the date of registration. But that would mean that any well-advised landowner, on receipt of an application to register, would erect ***696** barbed wire or take other steps to prevent the user from continuing, or at any rate continuing as of right. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975* , 991 Sullivan J said, accurately as it seems to me, that such a construction would make nonsense of the Act. Carnwath LJ *[2006] Ch 43* , 71, para 94 did not accept that his construction was "so obviously unreasonable or contrary to the legislative intention that it must be rejected". He gave three reasons for adopting it. First, the Secretary of State had power to prescribe a different period. But that seems to me neutral as to what the default position should be. Secondly, the history of the 1965 Act gives "no support for a broad interpretation of the provisions for new greens". That sounds like an attempt to refight the battle of Sunningwell green. Thirdly, a construction which made dedication of a new green in effect voluntary at the time of registration would "help to provide an answer to possible human rights objections". As I shall explain, I do not think that there are valid human rights objections. I would therefore reject the Court of Appeal's construction as irrational. In my opinion the correct date is that of the application. That appears to be assumed by clause 15(2)(b) of the Commons Bill now before Parliament.

Does registration create any rights?

45 Questions (i) and (ii), which raise the questions of whether the registration creates any rights and whether the registered land will be a town or village green for the purposes of the Victorian statutes, are not of immediate concern to the county council. Such questions will arise only once the land is registered and the county council is functus officio. I share the concern of my noble and learned friends, Lord Scott of Foscote and Baroness Hale of Richmond, that the House should not make declarations of abstract propositions of law. But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so. If it does create rights or fall within the statutes, they will not be able to use the land in a way which wholly excludes the local inhabitants from using it for any sports or pastimes whatever. Accordingly, the city council have a real and immediate interest in having the question resolved and there is an appropriate contradictor, namely Miss Robinson. In the circumstances I consider that it would be a proper

exercise of the House's discretion to answer questions (i) and (ii) and, as there has been no objection by anyone, I think that your Lordships should do so.

46 Section 1(1) of the 1965 Act provides that land which is a town or village green shall be registered. Section 3(1) says that there shall be a register of town or village greens and that regulations may require or authorise a registration authority to note on the register "such other information as may be prescribed".Section 10 provides that registration as a town or village green shall be "conclusive evidence of the matters registered". In the case of a town or village green, the registration states simply that the land is a green. No other information is prescribed.

47 What rights does registration create? In *New Windsor Corpn v Mellor [1975] Ch 380* , 392 Lord Denning MR said that registration "confers no rights in itself. All is left in the air". Lord Denning said that the explanation was that "Parliament intended to pass another statute dealing ***697** with these and other questions on common land and town or village greens." If there was delay passing such a statute, Lord Denning said he would be "tempted to infer" that Parliament intended that land registered as a town or village green should be available for sports or pastimes for the inhabitants. Browne LJ, at p 395, said he agreed that without further legislation, registration conferred no rights on the public.

48 It is by no means clear that Parliament contemplated further legislation about rights over village greens. Section 1(3)(b) contemplated further legislation on the vesting of unclaimed common land, but subsection (3)(a) appears to regard the provisions for the vesting of unclaimed town and village greens (section 8(4)) as sufficient. Section 15(3) contemplates further legislation affecting the exercise of rights of common, but there is no suggestion of further legislation about rights over village greens. Nor does Hansard throw much further light on the question. There are several references to registration being a "first stage" and to a later measure "for the better management and improvement of common land" (2nd reading debate, 6 February 1965, col 90) but no indication of what might be done about village greens.

49 So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending commons commissioners round the country on a useless exercise. If the Act conferred no rights, then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court. There would have been no point in the conclusive presumption in section 10 . Another possibility is that registration conferred such rights as had been proved to support the registration but no more. So, for example, if land had been registered on the strength of a custom to have a bonfire on Guy Fawkes Day, registration would confer the right to have a bonfire but no other rights. But this too would make the registration virtually useless. Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.

50 In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell case [2000] 1 AC 335* , 357 a – c .

51 This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides. *Fitch v Fitch (1797) 2 Esp 543* was a sequel to *Fitch v Rawling 2 H Bl 393* , in which the custom of playing cricket on land at Steeple Bumpstead had been established. The evidence was that the defendants had ***698** trampled the grass which the owner had mowed, thrown the hay about and mixed some of it with gravel. Heath J said, at p 544:

> "The inhabitants have a right to take their amusement in a lawful way. It is supposed, because they have such a right, the plaintiff should not allow the grass to grow; there is no foundation in law for such a position. The rights of both parties are distinct, and may

> exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded..."

52 The judge, at p 545, asked the jury to decide "whether the defendant had entered the close in the fair exercise of a right, or in an improper way" and the jury found for the plaintiff.

53 Mr George, who appeared for the city council, submitted that there was a general presumption against interference with property rights without clear words. (He also relied upon the Human Rights Act 1998 , to which I shall return later). But the primary purpose of the 1965 Act, as applied to town and village greens, was not to create new rights which override those of the owner. It was to create a register of town and village greens which would include all land over which statutory or customary rights of recreation existed or probably existed. That would protect both the interests of the local inhabitants (so that public open spaces were not lost with the fading of memory) and also the interests of owners and buyers of land, who could clear their titles and rely upon the register, without being surprised by claims of public right of which they had been unaware. For this purpose, it was in my view a necessary implication that land conclusively presumed to be a village green should be subject to the rights which the statute treated as creating a village green, namely the right to indulge in sports and pastimes. This was the opinion of Pill LJ in *R v Suffolk County Council, Ex p Steed 75 P & CR 102* , 114--115, Dyson J in *R v Norfolk County Council, Ex p Perry 74 P & CR 1* , 7 and Lightman J in this case. I agree.

The Victorian statutes

54 Section 12 of the Inclosure Act 1857 recited that it was expedient to provide "summary means of preventing nuisances" on town and village greens and land allotted for recreation. Therefore:

> "If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof [pay a fine]."

55 Further provision for the protection of town and village greens was made by section 29 of the Commons Act 1876 :

> "an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better ***699*** enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section 12 of the Inclosure Act 1857 , he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned."

56 The first question is whether the effect of section 10 of the 1965 Act is to apply these statutes to land registered as a town or village green. I agree with Lightman J and the Court of Appeal that it does. There is no special definition of a town and village green in the 1857 or 1876 Acts which might suggest that when section 10 of the 1965 Act said that registration was to be conclusive evidence of the matters registered, and the matter registered was that the land was a village green, Parliament did not intend that it should be a village green for the purposes of the 1857 and 1876 Acts.

57 There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended

to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in *Fitch v Fitch 2 Esp 543* . This was accepted by Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573* , 588. In that case the land was used for "low-level agricultural activities" such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not. Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application. I have a similar difficulty with para 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council (unreported) 18 June 2004* , in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the section 22 definition.

Human rights

58 Mr George submitted that a system of prescription by which land could after 20 years user become subject to recreational rights and the Victorian statutes was inconsistent with the human right of an owner of land not to be "deprived of his possessions" except on the restricted grounds allowed by article 1 of the First Protocol to the Convention on Human Rights . Section 3 of the Human Rights Act 1998 therefore required the 1965 Act to be construed in a way which did not produce such an inconsistency. ***700*** The way to achieve this result was to read section 10 as conferring no rights and as not applying the Victorian statutes.

59 Before a court has to resort to section 3 , it must first decide that an ordinary reading of the statute would be inconsistent with Convention rights. But I do not think that the construction I have suggested would infringe any of a landowner's rights. (I ignore the fact that the city council is a public authority, since obviously the statute must have the same meaning whoever owns the land.) In support of this argument, Mr George relied principally upon the recent decision of the European Court of Human Rights in *J A Pye (Oxford) Ltd v United Kingdom [2005] 3 EGLR 1* . The court there held (by a majority of 4 to 3) that the extinction of an owner's title to registered land by adverse possession was a deprivation of property which could not be justified. But that case is readily distinguishable. The European Court stressed two matters: first, that the applicant's rights over the land were entirely extinguished and, secondly, that title was transferred by operation of law to another private individual. The first made it a "deprivation" and the second made it difficult to justify as a control of "the use of property" in the general interest. In the present case, first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration in the 1965 Act was introduced to preserve open spaces in the public interest.

Questions of procedure

60 It will be remembered that these proceedings began because Mr Laurence and Mr Chapman disagreed over whether Miss Robinson should have been allowed to prove user for a period different from that specified in part 4 of her application form. That particular question has been resolved by the answer which your Lordships have given to the question of substantive law, namely that the relevant definition was that specified in section 22 as amended in 2000 and that the only period upon which Miss Robinson could have relied was a period of upwards of 20 years ending with the date of her application. At the inquiry it was recognised, not least by the city council, that the statement on the application form that the land had become a green in 1990 was out of date and wrong and that it was best to ignore it.

61 There remain, however, more general questions about the power of the registration authority (acting by its inspector) to allow amendments to the application form and to register an area of land different from that originally claimed. It is clear from the New Land Regulations that the procedure for registration was intended to be relatively simple and informal. The persons interested in the land and the inhabitants at large had to be given notice of the application and the applicant had to be given fair

notice of any objections (whether from the land owner, third parties or the registration authority itself) and the opportunity to deal with them. Against this background, it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared. I agree with the approach taken by ***701*** Mr Chapman and the general remarks of Carnwath LJ *[2006] Ch 43* , 73--75. In case there should be any doubt, I add two footnotes. First, there is no rule that the amended application must be for substantially the same land as the original application. If it relates to a larger or different piece of land, the inspector or registration authority may well think that fairness requires republication of a new application. But the matter remains one for the exercise of their discretion. Secondly, the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.

62 I also agree with the Court of Appeal that the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period. It is hard to see how this could cause prejudice to anyone. Again, I add that there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed.

Evidentiary matters

63 The statutory question is whether "a significant number" of the inhabitants of a locality or a neighbourhood have "indulged in lawful sports and pastimes as of right". The question as to what is meant by "as of right" was considered by the House in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* . So was the question of what "sports and pastimes" may be taken into account. The present question concerns what counts as indulging in such sports and pastimes "on" the land: must the "significant number" of inhabitants have set their feet everywhere on the land and must such activity be exclusively referable to indulging in sports and pastimes rather than exercising or creating rights of way?

64 In the present case, Mr Chapman's findings of fact were that "the scrubland has been used throughout the 20-year period to a material extent for informal recreation by local people". This was established by the evidence and furthermore:

> "Standing back and applying common sense, it seems highly probable that such a disused and unprotected open area on the edge of a densely populated part of Oxford would be used by local people for dog walking, children's play and general informal recreation... The character of the scrubland has changed over the 20-year period in that it has become more overgrown with maturer vegetation. There have always been beaten tracks across the scrubland, but it has always been possible to leave the tracks and wander generally over the land, and many users have done so."

65 Mr Chapman dealt with the questions on which guidance was sought under questions (ix) and (x) at the end of his report. First, on the significance of footpath use:

> "The city council argues that the evidence of recreational user of the Trap Grounds amounts to user of defined routes for the purpose of passage and not to general recreational user of the whole site. With regard to Frog Lane, I consider that this is a good point. Frog Lane, ***702*** according to the evidence, has predominantly been used as a route for access to and egress from the scrubland rather than for its own intrinsic recreational qualities. This is consistent with its history as a road to the nunnery and latterly to the breakers' yard. Its very name suggests that use has been as a right of way rather than as a town or village green. However, I do not consider that this analysis holds good for the scrubland itself. It is true that, at present, there is a main track which circles the scrubland. However, this track appears to be a relatively recent creation... Further, there is strong evidence that many users do not stay on the main track but wander onto subsidiary tracks and enter the various glades and clearings which are to be found within the scrubland. I do not consider that the user of the scrubland by local people can realistically be characterised as the exercise of a right of way along a

defined route."

66 Secondly, Mr Chapman dealt with the inaccessibility of a good deal of the scrubland:

> "The city council argue that the scrubland is now so overgrown that the majority of it is inaccessible and that this in itself precludes registration as a green. As noted above, my estimate is that about 25% of the total area is reasonably accessible, the rest consisting of trees and scrub. In my view, the question whether land has become a town or village green cannot be determined by a mathematical assessment of the amount of the land which is open to recreation... Where the recreational use is informal and consists of activities such as walking, with or without dogs, children's play, exploring and watching wild life, I do not see why much more densely vegetated land should not be capable of being subject to recreational rights, either by custom or prescription. In my view, it is necessary to look at the words of the statutory definition and to ask whether the scrubland, considered as a whole, is land which falls within that definition. In my view, the evidence proves that the recreational use of the scrubland is, and has been over the relevant 20-year period, sufficiently general and widespread, by way of use not only of the main track but also of minor tracks, glades and clearings, to amount to recreational use of the scrubland viewed as a whole."

67 This is not an application for judicial review of Mr Chapman's decision and your Lordships are not invited to express a view on whether, on the facts, he was entitled to reach the conclusions which he did. For my part, in the absence of an inspection or at least photographs of the site, I would be very reluctant to do so. If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.

68 Instead, your Lordships are invited to provide guidance on the correct approach to the evidence. But I share with Carnwath LJ a reluctance to offer what would amount to the equivalent of a planning policy statement from the Office of the Deputy Prime Minister. Lightman J made a number of sensible suggestions about how such evidence might be evaluated and the judgments of Sullivan J likewise contain useful common sense observations; ***703*** for example, on the significance of the activities of walkers and their dogs (*R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573* , 598–599). But any guidance offered by your Lordships will inevitably be construed as if it were a supplementary statute. There is a clear statutory question: have a significant number of the inhabitants of a locality or neighbourhood indulged in sports and pastimes on the relevant land for the requisite period? Every case depends upon its own facts and I think that it would be inappropriate for this House in effect to legislate to a degree of particularity which Parliament has avoided.

Disposal

69 I would therefore allow Miss Robinson's appeal against the rulings of the Court of Appeal on issues (i) and (iii) and restore the declarations of Lightman J to the effect that (issue (i)) registration would give rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the land and (issue (iii)) for the purposes of section 22 as amended, the use for sports and pastimes has to continue until the date of the application. I would dismiss her appeal against ruling (iv) (that applications after 30 January 2001 had to satisfy the amended definition of a town or village green) and ruling (v) (that she could not succeed on the basis that the land had become a green on 1 August 1990). I would dismiss the city council's appeal against the ruling on issue (ii) (that the land on registration would be subject to the 1857 and 1876 Acts). I would dismiss the county council's appeal against the rulings on issues (vi) (that the registration authority could ignore the date specified on the application form as the date on which the land became a green); on issue (vii) (that the registration authority could allow the form to be amended) and issue (viii) (that the authority could, without amendment of the application, register a part of the land claimed). I would not answer questions (ix) and (x) further than indicated in this opinion.

LORD SCOTT OF FOSCOTE

Introduction

70 My Lords, this is an unusual and difficult case, raising difficulties both of substantive law and of procedure. The difficulties all relate, in one way or another, to the effect of the Commons Registration Act 1965 , as originally enacted and as amended by section 98 of the Countryside and Rights of Way Act 2000 , and the 1969 Regulations made thereunder. I have had the great advantage of reading in draft the opinion of my noble and learned friend, Lord Hoffmann, and I very gratefully adopt his luminous exposition of the factual and legal background to the issues that arise on the appeals.

Town or village greens

71 There is, however, one important matter of background on which I would respectfully take issue with the view expressed by my noble and learned friend and concurred in by a majority of your Lordships. The issue is as to what would have been understood by Parliament and by the public generally prior to the enactment of the 1965 Act by the expression "town or village green" and, consequently, how the definition of "town or village green" in section 22(1) of the 1965 Act should be applied. The issue has not ***704** been addressed by counsel who have appeared on this appeal, but, none the less, I do not think your Lordships can avoid forming a view on it, as indeed my noble and learned friend has done, for the meaning to be attributed to the expression has a heavy bearing on the answers to be given to some of the questions that have arisen in this case.

72 Lord Hoffmann has concluded that the expression "town or village green" prior to the 1965 Act would have been regarded as applicable to any land that by long custom had become subject to the right for local inhabitants to use it for some form of recreation. Hence, section 15 of the Inclosure Act 1845 : "no town or village green shall be subject to be inclosed under this Act...", and section 12 of the Inclosure Act 1857 which says that:

> "If any person wilfully cause any injury or damage to any fence of any such town or village green... wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes or rubbish or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green... or to the interruption of the use or enjoyment thereof as a place for exercise and recreation..."

that person shall be guilty of an offence, and section 29 of the Commons Act 1876 :

> "an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance..."

would apply to all such land whether or not the land answered to the normal understanding of what a town or village green was. In none of these Victorian Acts was the expression defined. In each of these Acts the meaning of the expression could not have been other than a meaning corresponding to that normal understanding. The *Concise Oxford Dictionary* , 9th ed (1995), offers as one of the several possible meanings of the word "green" the following: "a piece of public or common grassy land (village green)". This, I suggest, corresponds with what the normal understanding of the expression "town or village green" would have been and with the understanding of the expression that the legislators who passed the Victorian statutes to which I have referred would have had.

73 There are several old cases where a customary right to conduct a recreational activity was established over, or discussed in respect of, land to which these Victorian statutes could not possibly have been intended to apply. (1) *Millochamp v Johnson (unreported) 12 February 1746* (see Willes 202, 205n), was a case in which the court accepted the possibility in law of a customary right to use a particular field for recreation but limited to "legal and reasonable times of year" so as not to allow the user to deprive the landowner of all profits of the land (nb the adjective "reasonable" appears in the note to *Bell v Wardell (1740) Willes 202* but in a reference to the case by Kelly CB in *Hall v Nottingham (1875) 1 Ex D 1* , 3 the adjective "seasonable" is substituted). (2) *Mounsey v Ismay (1865) 3 H & C 486* was a trespass case. One of the defences was that the free men of the city of

Carlisle had ***705*** acquired by 20 years' prescriptive user the right on Ascension Day each year to hold horse races on the land in question. The defence failed, Martin B holding that the right to have a race meeting could not be claimed under the Prescription Act 1832 (2 & 3 Wm 4, c 71). But he said, obiter at p 495, that it was "perfectly clear that such a right as is here set up can only exist by custom" and, at pp 498–499, that a customary right to run horse races would be "a lawful one at common law". The right to have a race meeting once a year on someone else's land could not possibly justify describing the land as a town or village green. (3) Lord Hoffmann has referred in para 6 of his opinion to *Virgo v Harford (unreported) 11 August 1892* in which a customary recreational right to play various games on 65 acres of open land on a hill in Somerset was apparently upheld. The notion that this land would have been understood to be a town or village green seems to me absurd. (4) *Lancashire v Hunt (1894) 10 TLR 310* provides an equally (or more) extreme example of the point. The owner of Stockbridge Common Down in Hampshire applied for an injunction to prevent a local trainer from exercising and training his race horses over the 160 acres-odd of the common. The trainer claimed that he had a customary right to train his horses over the common. Wright J held that this customary right had not been established by the evidence but that the inhabitants of the borough did have the right to ride their horses for recreation over any part of the 160 acres. In a second action heard at the same time the owner of Stockbridge Common Down sought to restrain the inhabitants of Stockbridge from using the common for meetings, fêtes and cricket matches. Here, too, the defence was based on custom. It was said that the inhabitants had a customary right to use the down for those purposes. This defence prevailed. The reporter of the case made the following comment, at p 312:

> "It will therefore be seen from Wright J's decision in the two actions respectively that-(a) so long as that judgment stands the lord of the manor of Stockbridge will have in future a definite right to prevent racehorses from being trained on Stockbridge Common Down; but (b) that he will not, any more than formerly, be able to stop the inhabitants of Stockbridge using the common down as a recreation ground in the same way and for the same purposes as village greens are usually enjoyed by the villagers."

It is to be noticed that the reporter did not comment on the absurdity of referring to the 160 acres of downs as a village green. No one, in my respectful opinion, could have supposed that the references in the Victorian statutes to village greens were applicable to the 160-acre Stockbridge Common Down. (5) In *Mercer v Denne [1904] 2 Ch 534* a customary right for fishermen in the parish of Walmer to spread their nets to dry on the land of a private owner at all times seasonable for fishing was held by Farwell J to be a good and valid custom. The customary right claimed was not a right for recreational purposes but for the purposes of the fishermen's trade as fishermen. However, the principles applied by Farwell J to the question whether the custom claimed was a good one were the same principles as those which had been established in the customary recreational rights cases, many of which he cited.

74 These cases demonstrate, in my opinion, that a customary right for local inhabitants to use someone else's land, of whatever description, for a ***706*** recreational purpose could be acquired, pre the 1965 Act, by evidence of user from time immemorial provided that the custom were sufficiently certain and were reasonable in itself. The custom would become, in effect, a local common law for the place to which the custom extended (see Tindal CJ in *Lockwood v Wood (1844) 6 QB 50* , 64 cited by Farwell J in *Mercer v Denne [1904] 2 Ch 534* , 551). The customary rights thus acquired might be limited by the nature of the user that had given rise to them. Thus, for example, the riding of horses over Stockbridge Common Down since time immemorial could not have given rise to a customary right to hold fêtes and play cricket matches on the common, and vice versa. A customary right for local inhabitants to course hares over the stubble fields of the lord of the manor could, I imagine, have been acquired by an exercise of that right since time immemorial. But the right to course hares over the fields after they had been ploughed and planted or to enjoy other recreative activities over the fields could not have been thereby acquired.

75 Another way of making the same point is to observe that the residual rights of the landowner to make profitable use of the land subject to the customary rights must surely depend on the nature of the user that has created the rights. In some cases the landowner's residual rights might be negligible. In other cases the landowner's ability to use the land might be restricted only for a limited period of the year. All would depend on the nature of the customary right that had been established. And there would be many types of land over which customary rights of one sort or another might be established which no one could suppose would be subject to the various prohibitions imposed by the Victorian statutes on town and village greens.

76 It follows, in my opinion, that, pre the 1965 Act, the fact that a piece of land was subject to a customary right of recreation would not, by itself, have sufficed to allow the land to be described for legal purposes as a town or village green, e g for the purposes of the Victorian statutes. Something more would have been needed. There is, as Lord Hoffmann has said (para 7 of his opinion), no authority on the point but I am unable to accept that a purposive construction of the expression "town or village green" in the Victorian statutes would have led to the 160 acre Stockbridge Common Down, or a mountainside down which people skied in winter snow, or a dense wood in which people wandered to pick bluebells or search for mushrooms or for other dalliance, being so categorised.

77 In my opinion, the "something more" would have been a quality in the land in question that would have accorded with the normal understanding of the nature of a town or village green, namely, an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities.

78 The Report of the Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462) makes some, not very many, references to town and village greens. Three of these are mentioned by Lord Hoffmann in para 13 of his opinion. For my part I can see no reason to suppose that the commissioners had in mind anything other than greens as normally understood. Lord Hoffmann notes, in sub-paragraph (c), the commissioners' comment that there were "probably very few villagers who will not know what they mean by 'their green' ". I respectfully agree with ***707*** this comment which, to my mind, goes to confirm that the commissioners had in mind normal traditional town or village greens.

79 Section 22(1) of the 1965 Act defined "town or village green" as meaning:

> "land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

As Lord Hoffmann has observed, this definition brought together the two categories of land that, pre the Act, constituted land over which local inhabitants might be entitled to rights of exercise or recreation and then added a third, the so-called class c, namely, land on which the inhabitants "have indulged in such sports and pastimes as of right for not less than 20 years". The important question for present purposes is whether this definition justifies classifying as a town or village green any land on which any form of lawful recreation is either the subject of a customary right or has been indulged in by the local inhabitants for at least 20 years. My instinctive reaction is to say that the definition was not intended to turn into a village green land subject to the exercise of customary rights that would not, pre the Act, have been regarded as a village green. The 160-acre Stockbridge Common Down was not, in my opinion, a town or village green before the enactment of the 1965 Act and did not become one afterwards. The landowner who owned arable land that, before the 1965 Act, had been subject to a customary right to course hares in the autumn would not after the enactment have found that he was the owner of a town or village green. And the addition of class c could not, in my opinion, have been intended to alter the status of land that had not previously been a town or village green or to turn into a town or village green land that had never previously been so regarded. The addition of class c was intended, in my opinion, in complete agreement on this point with Lord Hoffmann, to enable general recreational rights over town and village greens, as popularly understood, to be established without the necessity of proving user since time immemorial. Proof of 20 years' user as of right, a formula borrowed from the Prescription Acts, would do.

80 However, unfortunately, at least in my view, cases since 1965 have led to the registration as town or village greens of land that did not remotely correspond to a town or village green in the normally understood sense. Some of these cases have been referred to by Lord Hoffmann (para 39 of his opinion). There was a case in 1977 in which some rocks at Llanbadrig, Ynys Mon, which had for upwards of 20 years been used by the local inhabitants to moor their boats was registered as a town or village green. In a case in 1976 a piece of land in Barnet on which for at least the past 20 years a Guy Fawkes bonfire had been held as of right was registered. No other evidence of use of the land for sports and pastimes is mentioned in the short report of the Chief Commons Commissioner. But the land was known as "Bittacy Green" which certainly suggests such use and suggests that the nature of the land was consistent with it being a town or village green. If, however, all that had happened was that for the previous 20 years plus the local inhabitants had once a year as of right enjoyed a Guy Fawkes bonfire on the ***708*** land, it does not seem to me that the statutory criteria were satisfied.

And, in the course of counsels' submissions in the present appeal, reference was made to a quarry which, having been used for 20 years plus by the local inhabitants for recreational activities, was registered, in reliance on class c, as a town or village green.

81 It is, in my opinion, an error in construction of section 22(1) to suppose that any land, whatever the degree of divergence between the character of the land and a town or village green as normally understood, can be registered as a town or village green either in reliance on class b or in reliance on class c of the statutory definition. I do not think the problem would ever arise in relation to class a for I imagine that any land allocated by an inclosure award for general exercise and recreational purposes, would have been already or would soon have become a predominantly grassy area.

82 In *Bennion, Statutory Interpretation* , 4th ed (2002), p 480, under the side-heading "Potency of the term defined", the author says:

> "Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court. It is impossible to cancel the ingrained emotion of a word merely by an announcement."

The author gives a number of examples from decided cases which illustrate, convincingly in my opinion, his point. The two cases which seem to me particularly pertinent are *British Amusement Catering Trades Association v Westminster City Council [1989] AC 147* , where Lord Griffiths, at p 157, construed the term "cinematograph exhibition" as excluding video games because the use of the term immediately brought to mind a film show, and *Delaney v Staples (trading as De Montfort Recruitment) [1992] 1 AC 687* , in which Lord Browne-Wilkinson in construing the definition of "wages" in the Wages Act 1986 said, at p 692, that "it is important to approach such definition bearing in mind the normal meaning of that word".

83 My Lords, I would apply the same approach to construction of the definition of "town or village green" in section 22(1) of the 1965 Act, or, for that matter, to construction of "town or village green" in the Victorian statutes to which I have referred. I do not believe it can be correct to insist on a literal application of the section 22(1) definition so as to apply it to land that no one would recognise as a town or village green.

The rights of user over town and village greens

84 The dispute between the parties as to whether there are any, and if so what, rights of user over class c town and village greens would fall away if the literal construction of section 22(1) were set aside and, as I would regard it, a more sensible construction, based upon the normally understood characteristics of a town or village green, were adopted instead. It is relevant to notice that the class c addition to the previous means by which land may have become a town or village green was based upon the language of prescription. Prescriptive user for the requisite period entitles the prescriber, or the general public if public rights of way are being obtained, to a right commensurate with the prescriptive user. Prescriptive user of a path on foot may give a right of way on foot, prescriptive user of the path with a horse may lead to a bridleway, or with vehicles to a right of way with vehicles. It is ***709*** a basic principle of prescriptive use that the user "as of right" that has continued for the requisite period becomes a user "of right". There seems to me every reason to suppose that the 20 years' user contemplated by section 22(1) was intended to lead to the same consequence as prescriptive user, namely, the acquisition of rights commensurate with the nature of the user. This would match up class c with class b, where the user that had created the customary right would become the permitted user pursuant to that customary right.

85 It is only if the literal construction of section 22(1) preferred by a majority of your Lordships is adopted that the "rights" issue becomes difficult. If it is correct that any 20-year "as of right" recreational use of any type of land justifies categorising the land as a town or village green, then it becomes necessary to ask what rights are thereby created over the town or village green? Why should a landowner's tolerance of a yearly Guy Fawkes bonfire on his land lead to the local public acquiring much broader, and more intrusive, rights over the land, rights that the landowner might well not have tolerated? But if there has been general recreational use of a parcel of mainly open grassy land that has continued as of right for 20 years plus, no problem arises. Mr Edwards, counsel for Miss Robinson, said that one single type of activity would not suffice to qualify land as a town or village

green. But I would go further. The reference in section 22(1) to "lawful sports and pastimes" is, in my opinion, a reference of generality. If, throughout the 20-year period the land were used for whatever lawful sports and pastimes the users chose, the requisite generality would be present. A management problem might arise if a new sport began to be played posing problems for other users of the land. User for the new sport might be unlawful if it presented unacceptable dangers to other users of the green but it would not necessarily be unlawful vis-...-vis the landowner. He could complain only if his residual rights in respect of the green were interfered with but, if the green were the typical town or village green, those rights would be likely to be negligible.

Human rights

86 The implications of article 1 of the First Protocol to the European Convention on Human Rights and the Human Rights Act 1998 to the acquisition by land of town and village green status under class c of section 22(1) were raised by Mr George on behalf of the city council. He referred your Lordships to the recent decision of the Strasbourg court in *J A Pye (Oxford) Ltd v United Kingdom [2005] 3 EGLR 1* . A loss by a landowner of rights over his land brought about by the operation of a statutory prescription provision and the expiry of the relevant prescriptive period would, I feel bound to accept, prima facie engage his article 1 of the First Protocol right "to the peaceful enjoyment of his possessions". But, in my opinion, notwithstanding the Strasbourg court's decision in *Pye* , and having taken account of that decision (see section 2(1)(a) of the 1998 Act), the operation of the statutory prescriptive provision in section 22(1) brings about a deprivation of the landowner's rights that is, in the judgment of Parliament, in the public interest. The purpose of the statutory prescriptive provisions in our domestic law is, as Lord Hoffmann put it in the *Sunningwell case [2000] 1 AC 335* , 349, to "prevent the disturbance of long-established ***710*** de facto enjoyment". Who could doubt that that is in the public interest?

87 If, however, as I understand to be your Lordships' view, land can become a town or village green under class c, or for that matter under class b, on account of some long standing but limited recreational use (e g yearly Guy Fawkes bonfires) and then, after registration as a town or village green under the 1965 Act, the local public thereby become entitled to use the land for any "lawful sports and pastimes", it is easy to see that the fact of registration may seriously limit the ability of the landowner to continue to enjoy the land in the manner in which he had enjoyed it during the prescriptive period. The public interest in thus increasing the rights of the local public over and above their "long established de facto enjoyment" and correspondingly reducing the residual rights of the landowner is hard to discern. So if it is right that a limited recreational use can qualify the land, upon registration, for use for any and all "lawful sports and pastimes" (see section 22(1)), a potentially serious problem regarding the landowner's article 1 of the First Protocol rights could, in my opinion, arise.

88 There is a further point about human rights where, as in the present case, the landowner is a local authority, to which I should draw attention. The city council acquired the land from St John's College and, I imagine, sections 122 and 123 of the Local Government Act 1972 apply to the land. Section 122(2A) (added by amendment under the Local Government, Planning and Land Act 1980) allows a local authority owner of "open space" land, which includes land "used for the purposes of public recreation", to appropriate the land to other uses. And section 123(2A) gives a local authority power to dispose of the open space land provided certain specified statutory procedures are followed (see the general discussion on these provisions in paras 27 and 28 of the opinion I gave in *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , 900).

89 The question whether these statutory powers allow a local authority such as the city council to appropriate open space land for housing use and then to dispose of the land free from any recreational rights of the local inhabitants whether or not the land has been registered as a town or village green remains for judicial decision. The purpose of the statutory powers I have referred to would, in relation to open space land that had been registered under the 1965 Act, be pointless if the local authority could not do so. It seems to me arguable that these statutory powers do enable local authorities to use town and village greens for housing purposes and to remove the land from the clutch of the 1857 and 1876 Victorian statutes as well as from the 1965 Act. The relevance of all this for present purposes is that if the city council does have power under the 1972 Act to dispose of the Trap Grounds for housing purposes whether or not the land in question is a town or village green, the city council would suffer no obvious detriment if the Trap Grounds were to be registered as a town or village green and any potential human rights point based upon that registration would evaporate.

90 In the light of the matters I have been discussing it is interesting to look again at the facts of the Bittacy Green case. It appears from the decision of the Chief Commons Commissioner, Mr George Squibb QC, that the piece of land on which the annual Guy Fawkes bonfire had been held was a relatively small part of a larger parcel of land that had been acquired in 1952 ***711*** by Hendon Borough Council, the predecessor of the London Borough of Barnet. Mr Squibb records, in the second page of his decision, that:

> "In 1970 the council was minded to cease to use the land for the purposes of public walks and pleasure ground and to appropriate it for housing purposes. Since the land was an 'open space', as defined in section 22(1) of the Town and Country Planning Act 1962 , because it was used for the purposes of public recreation, it was necessary to make an appropriation order, confirmed by the Secretary of State for the Environment, under section 73 of that Act. This order, the London Borough of Barnet (Sanders Lane Housing Area) Appropriation Order 1970 , provided that other land should be provided in exchange and that the appropriated land should be discharged from the rights, trusts and incidents to which it was previously subject. The 1970 Order did not, however, apply to all the land comprised in the register unit. There was excluded from it a triangle of land, which still remains open and outside the curtilages of the houses which have been built on the remainder. In my view, the effect of this Order was to discharge the part of the land used for housing from the right to indulge in lawful sports and pastimes on it..."

The function of the court

91 There is one final problem, a procedural problem, that I want to mention before turning to the 10 specific issues on which the county council seek rulings and guidance. The problem arises out of the nature of some of the relief sought. The background to the commencement of the proceedings can be shortly stated. Miss Robinson, a resident in North Oxford, applied to register the Trap Grounds as a town or village green on the ground that "local residents had used it for lawful pastimes as of right (without obstruction, permission, stealth or force) for an unbroken period of 20 years..." and continued to do so. The city council, the landowner, objected to the application. They want to use the Trap Grounds, or some part, for housing development. The county council appointed Mr Vivian Chapman to inquire into the facts relevant to Miss Robinson's application and to advise them. Mr Chapman duly conducted a non-statutory inquiry and having done so presented the county council with a detailed report advising that a part of the Trap Grounds qualified for registration and should be registered as a town or village green. But the county council then received advice from another expert in this field, Mr George Laurence QC, their counsel on this appeal, which in some important respects conflicted with the advice given by Mr Chapman in his report. The county council then commenced these proceedings in order to obtain rulings on the several points regarding the effect of the 1965 Act, as amended, and the 1969 Regulations made thereunder, that Miss Robinson's application and the conflicting advice they had received appeared to them to raise.

92 Paras (i) to (viii), inclusive, of the relief sought under the county council's re-amended CPR Pt 8 claim form sought rulings on legal issues. Paras (ix) and (x) sought guidance on certain factual matters relevant to Miss Robinson's application. The paragraphs are set out in para 35 of Lord Hoffmann's opinion. It will be apparent that what was sought from the High Court was a fairly comprehensive essay on the legal effect of the 1965 ***712*** Act, as amended, and the 1969 Regulations. The proceedings did not constitute a judicial review application attacking any part of Mr Chapman's report, although it would, in my opinion, have been open to the city council to have sought leave to make such an application. The county council could have formed its own view about the conflicting advice it had received from Mr Chapman and Mr Laurence, have dealt with Miss Robinson's application accordingly and have left it to the contestants, Miss Robinson and the city council, to attack, if so advised, the manner in which the application had been dealt with or the decision that had been reached, or both. If that course had been taken by the county council the issues for decision by the High Court, and on appeal by the Court of Appeal and this House, would have been formulated by the attack or attacks in question. The High Court would not have been presented, nor would the Court of Appeal or your Lordships, with the examination paper that these proceedings have set. I do not wish to be over-critical of the county council's disinclination to come to a decision on Miss Robinson's application until all the legal issues which seemed to them to arise had

been judicially resolved, but I do wonder whether all the ten paragraphs of declaratory relief sought in this case can be brought within the legitimate boundaries of the courts' jurisdiction to grant such relief.

93 Lord Diplock said in *Gouriet v Union of Post Office Workers [1978] AC 435* , 501 that:

> "the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

In *Zamir & Woolf, The Declaratory Judgment* , 2nd ed (1993), para 3.007, the author, Lord Woolf, refers to *Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800* and *Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112* as providing "good examples of courts being prepared to grant declarations at the extreme end of their supervisory jurisdiction". In the former case the issue was whether a circular issued by the Department of Health and Social Security had mis-stated the law regarding termination of pregnancy by medical induction. The well-known *Gillick* case involved an allegation that a departmental circular about the legality of prescribing contraceptives for girls under the age of 16 was erroneous in law. In both these cases the issue for decision was clearly defined.

94 In the great majority of cases about registration of town or village greens to which your Lordships have been referred the case has come before the court on an application for judicial review of a decision on registration already taken by the registration authority (see e g the *Sunningwell case [2000] 1 AC 335* , the *Beresford case [2004] 1 AC 889* , *Ex p Steed 70 P & CR 487* , the *Alfred McAlpine Homes case [2002] 2 PLR 1* , the *Laing Homes case [2004] 1 P & CR 573* and the *Cheltenham Builders case [2004] JPL 975*). The only town or village green registration case previous to the present case that came before the court for a ruling before any decision had been taken by the registration authority that I have been able to discover is *Caerphilly County Borough Council v Gwinnutt (unreported) 16 January 2002* , a case decided by Judge Moseley QC. The applicant borough council ***713** was the registration authority but had an interest in the land in question being developed as an industrial estate. The council took the view, very understandably, that this interest made it inappropriate for it to discharge the quasi-judicial function of deciding whether to accede to the application to register the land as a town or village green. So it made an application asking the court to determine the issue as to registration. Judge Moseley commented in his judgment that the procedure adopted had "received the implicit endorsement" of this House in *Hampshire County Council v Milburn [1991] 1 AC 325* , but he was plainly puzzled about the legitimacy of asking the court to decide an issue that the applicant council had a statutory duty to decide. He said this, in para 8 of his judgment:

> "In those circumstances what is the function of the court? In my judgment it can (1) determine any issue of law or construction submitted to it. Its determination on that issue must necessarily be final because there is only one correct answer to any such question, being the answer which the court provides and (2) provide guidance to the council as registration authority on the basis of the facts presented to it for its consideration. That guidance however in my view cannot possibly be final because after judgment the council may take into account other information available to it when it finally disposes of the application."

95 It seems to me likely that the county council's procedure in the present case, asking for various rulings on points of law and for guidance as to the approach it should take to some of the facts, was borrowed from the cited passage from Judge Moseley's judgment. Be that as it may, I do not think the *Caerphilly* case, where the council had, in effect, recused themselves and had no alternative but to ask the court to decide the registration issue, should be regarded as a precedent of general application.

96 Lightman J in the present case, referring to the procedure the county council had adopted, drew comfort, as Judge Moseley had done, from *Milburn's case [1991] AC 325* . In *Milburn's* case the owner of two parcels of land which, with other land, had been registered as common land, had applied for the land to be removed from the register. The issue was whether certain conveyancing transactions had had the result in law that the two parcels had ceased to be common land. The county council, as registration authority, asked the court to determine whether they should accede to the deregistration application. Millett J, at first instance, made a declaration that they should. In a

leap-frog appeal this House allowed the appeal and held that they should not. There was no attention paid, either in the arguments of counsel or in the opinion delivered by Lord Templeman, concurred in by the other members of the appellate committee, to the propriety of the procedure that had been adopted. Nor, in my opinion, need there have been, for the sole issue in the case was the legal effect of the conveyancing transactions which were said to have deprived the parcels of land of their character as common land.

97 I would accept that if there is an issue of law that needs to be decided before a decision can be made on a registration, or deregistration, application, the registration authority can refer the issue of law to the court for a ruling. And the court may, if in its discretion it thinks it right to do so, make a declaration accordingly. But the propriety of a registration authority asking the court to give a ruling on an issue of law in which it has no interest ***714*** as registration authority or in any commercial respect and that does not need to be decided in order for a decision to be reached on a pending registration, or deregistration, application seems to me to be highly dubious. Each of the first five of the declaratory rulings sought by the county council in the present case raises an issue of substantive law. The propriety of the county council asking the court to give these rulings depends, in my opinion, on the rulings being necessary for a decision to be taken by the county council on Miss Robinson's registration application. The rulings sought by paras (i) and (ii) cannot, in my opinion, pass this test. (At the end of para 35 above, Lord Hoffmann has explained the circumstances in which those rulings came to be added to the county council's original list.)

98 The criteria for registration of land as a class c town or village green, as set out in the 1965 Act in its original form and as amended, direct attention to the user of the land. The criteria do not require any investigation into what rights of user the inhabitants of the relevant neighbourhood or locality will have after registration. There is no present issue regarding the post-registration rights and such future issue as may arise, if and when registration takes place, will be an issue between the relevant inhabitants, of whom Miss Robinson will be one, and the city council. The county council would not be a necessary party to litigation instituted to resolve the issue.

99 The same point applies, even more strongly, to the ruling sought by para (ii). Whether the Victorian statutes, to which I have already referred, apply to a class c town or village green has no conceivable relevance to the registration issue. It was, in my respectful opinion, impermissible for the county council to ask the court to give what is, in effect, an advisory opinion on an issue that has not yet arisen and, if and when it does arise, will not concern the county council in its registration authority role or in any other capacity.

100 The rulings sought in paras (iii), (iv) and (v), on the other hand, do relate to issues of law that can be represented as necessary to be resolved on Miss Robinson's registration application.

101 Paras (vi), (vii) and (viii) relate to procedural issues that have arisen and that the county council, as registration authority, needs to deal with before reaching a decision on the registration application.

102 As to paras (ix) and (x), which seek the court's guidance as to how the county council should deal with certain factual matters, it seems to me quite inappropriate for the county council to seek, or for the court to give, "guidance" of this sort. The county council, as registration authority, must make up its mind how to deal with the facts thrown up by Mr Chapman's report. They have a quasi-judicial role under the 1965 Act and must discharge it to the best of their ability. Trustees, if they do not know what to do, can ask the court to tell them or, alternatively, they can surrender their discretion to the court and ask the court to exercise it for them. The county council's procedure in the present case in seeking the paras (ix) and (x) guidance, and Lightman J's response, seem to me, if I may respectfully say so, to be assimilating the county council's role as registration authority to that of trustees. I would, for my part, deprecate this.

103 For the reasons I have endeavoured to explain Lightman J should, in my opinion, have declined to entertain the county council's requests made ***715*** in paras (i), (ii), (ix) and (x) and, for the same reasons, the Court of Appeal should, in my opinion, have set aside the declaratory relief granted by the judge under these paragraphs. What should your Lordships now do? My noble and learned friend, Lord Hoffmann has said, in para 45 of his opinion, that because the city council want to build houses on the Trap Grounds, or to sell the land for housing development purposes, they (the city council) have "a real and immediate interest" in obtaining answers to the questions raised in paras (i) and (ii), namely, whether registration of the Trap Grounds as a class c town or village green would create rights to enable the local inhabitants to use the land for lawful sports and pastimes and would subject the land to the various prohibitions imposed by the Victorian statutes on town and village greens. My

noble and learned friend has concluded that in these circumstances it would be a proper exercise of the House's discretion to entertain the request for rulings under paras (i) and (ii). Moreover Lightman J at first instance and Carnwath LJ in the Court of Appeal have supported their respective rulings with careful argument and the correctness of them has been debated before your Lordships. My Lords, there seems to me, if I may respectfully say so, a good deal of force in the view that in these circumstances the House should give answers to the questions raised by these two paragraphs. But, having regard to the cogent arguments put forward by my noble and learned friend, Baroness Hale of Richmond, whose opinion I have had the advantage of reading in draft, and having regard also to the opinion of this House expressed by Lord Diplock in the *Gouriet case [1978] AC 435* , 501 (cited in para 93 above), the answers should be limited to those that are strictly necessary and that are not in any way dependent on facts not yet known or not in evidence. On that footing I must now deal with the ten paragraphs of relief sought under the county council's re-amended Part 8 claim form.

The ten issues

104 Issue (i). Para (i) asks whether the "relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c town or village green". The point of this question is that it has been contended that a class c registration simply settles the status of the land (see section 10 of the 1965 Act) and that the local inhabitants do not thereby obtain any rights of recreation over the land. The obtaining of these rights, it was contended, was intended by Parliament when enacting the 1965 Act to await further legislation which would confer the requisite rights, legislation that is still being awaited. If these contentions are right, the registration of the Trap Grounds as a class c town and village green would confer no rights on Miss Robinson and the other local inhabitants. The development of the Trap Grounds for housing purposes would interfere with no rights that Miss Robinson and the others can claim. My Lords I am in full agreement with what Lord Hoffmann has said about these contentions in paras 47, 48 and 49 of his opinion. I agree that the effect of registration under the 1965 Act of a class c town or village green is to confer on the local inhabitants rights of recreation over the land and I agree that a declaration so stating could, in the particular circumstances of this litigation, properly be made, or upheld, by your Lordships.

105 But I do not agree that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' ***716** user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he has been able to use the land during that 20-year period. I do not accept that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field. I do not understand how anyone can suppose that that is what Parliament had in mind in 1965. And if registration of land as a class c town and village green were to bring about a diminution of the landowner's property rights, not simply by establishing the local inhabitants' right to go on doing what they had been doing for the last 20 years but by depriving the landowner of the right to go on doing what he had been doing for the last 20 years, there would, in my opinion, be a very real question as to the compatibility of such a legal regime with the landowner's rights under article 1 of the First Protocol to the Convention.

106 While, therefore, I agree with Lord Hoffmann that registration of the Trap Grounds as a class c town or village green would entitle the local inhabitants to recreative rights of user over it, those rights would, in my opinion, be commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes. For instance, clay pigeon shooting is a popular lawful sport or pastime. Would clay pigeon shooting be permissible on the Trap Grounds if registration took place? It presumably would be if clay pigeon shooting had taken place reasonably regularly over the 20-year period. Or what about archery contests? Those walking their dogs would have to be warned to keep out of the way. In my opinion any sort of declaration that went beyond the very limited form of declaration to which I have referred at the end of para 104 above would be a misuse of the discretionary power to give declaratory relief. It would not settle any current issue. If, after registration, some recreative activity were to take place on the land to which the city council or some local inhabitants objected, there would be an issue for decision and a declaration settling the issue could be made. These proceedings are not the proper occasion for settling issues that have not yet arisen.

107 Issue (ii). Para (ii) asks whether land which has become a class c town or village green falls

within the scope of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 . The answer depends on which approach to construction of section 22(1) is right. If the approach I have advocated were to be accepted, the meaning of "town or village green" in those Acts would be no different from the meaning of "town or village green" in the 1965 Act. The only difference would be the additional, class c, means by which land might become a town or village green. In that case a class c green would, in my opinion, fall within the scope of the two sections. But, since a majority of your Lordships favour the literal construction of section 22(1) , land is capable of becoming registered as a town or village green notwithstanding that it is not land to which either of the two sections has been or would have been at any time applied e g arable land over which customary recreative rights are enjoyed or the rocks at Llanbadrig, Ynys Mon, to which local inhabitants moor their boats (see ***717*** Lord Hoffmann's opinion, para 39). An "always speaking" approach to the construction of statutory provisions is only permissible if there can be a reasonable certainty that the legislative intendment underlying the statutory provision would envelop the new situation that had developed (see *Victor Chandler International Ltd v Customs & Excise Comrs [2000] 1 WLR 1296* , 1304, para 32). How can that certainty be present in relation to class c if the literal approach to construction is adopted? An arable field may become a town or village green and ploughing of the field by the landowner would then be barred by section 29 of the 1876 Act. The manuring of the field, too, would be barred by section 12 of the 1857 Act. The notion that this would have intended by the legislature cannot, I respectfully suggest, be maintained.

108 As to the propriety of your Lordships making a declaration on this issue, a declaration that the Trap Grounds would, on registration, become subject to the two Victorian statutes will not settle the question whether the city council's housing development intentions for the land will be frustrated. That question will not be answered until the scope of a local authority's statutory powers to appropriate open space land to housing purposes and its ability then to sell the land for housing development free from town or village green restraints has been judicially determined. That being so, I can see no good reason why the House should, in relation to issue (ii), depart from the practice endorsed and recommended by Lord Diplock in the *Gouriet case [1978] AC 435* , 501.

109 Issue (iii). Para (iii) seeks a ruling as to the meaning to be attributed to the words "continue to do so" in section 22 of the 1965 Act, as amended. This issue is addressed by Lord Hoffmann in para 44 of his opinion with which, with one slight qualification, I am in complete agreement. I agree that the amendment introduced by the 2000 Act does not require that the user of the land for sports and pastimes continues until registration and, I agree that, prima facie, the user must continue up to the date when the registration application is made. If, however, 20 years' appropriate user having passed and while the user is still continuing the landowner bars the user, a more or less immediate application to register the land in response to the landowner's action would, in my opinion, suffice. But if the barring of the user were not responded to reasonably promptly, the continuance criterion introduced by the 2000 Act would not be able to be satisfied. My reason for this slight qualification is that an applicant for registration is quite likely, before making the application, to attempt to stir up neighbourhood support or to obtain suitable evidence from local inhabitants. The landowner is quite likely to hear of this and a race to see who could act first, the landowner in barring the use of the land or the applicant in making the application, would not be satisfactory. The requirement of continuance needs, I think, to be approached in a commonsense fashion. Has the previous public user fallen into disuse is, in my opinion, the right question to be asked.

110 Issues (iv) and (v). I agree with Lord Hoffmann for the reasons he has given in para 43 of his opinion that the amended section 22 applies to all registration applications made after the 2000 Act came into effect and that the land in question becomes a town or village green on registration.

111 Issues (vi), (vii) and (viii). These questions are dealt with by Lord Hoffmann in paras 59, 60 and 61 of his opinion and I am in entire agreement ***718*** with his answers to the questions raised and his reasons for them. I would like, particularly, to emphasise my agreement that a registration authority should be guided by the general principle of being fair to those whose interests may be affected by its decision.

112 And, finally, there is the guidance sought by issues (ix) and (x) in relation to the factual matters referred to. I would, for my part, for the reasons I have given, prefer to express no view at all on these factual matters. It is for the county council to weigh the evidence, consider whether it satisfies the criteria for registration of the Trap Grounds as a town or village green prescribed by section 22(1) of the 1965 Act, correctly construed, and come to a decision accordingly. If the city council or Miss Robinson wish to challenge the decision on any points of law, they may then do so.

Disposal

113 For the reasons I have given: (1) on issue (i) I would allow Miss Robinson's appeal against the ruling of the Court of Appeal but set aside the declaration of Lightman J and make the limited declaration referred to in para 104 above; (2) on issue (ii) I would allow the city council's appeal against the ruling of Lightman J, concurred in by the Court of Appeal, and decline to answer the question posed; (3) on issue (iii) I would allow Miss Robinson's appeal against the ruling of the Court of Appeal and restore Lightman J's declaration but with the addition to the declaration of the words "and so that if an application is made or legal proceedings are commenced reasonably promptly after and in response to action taken by the landowner or others to obstruct the continued indulgence as of right by the relevant inhabitants in lawful sports and pastimes, the said indulgence shall be taken to have continued to the date of the application or the commencement of the legal proceedings"; (4) on issues (iv) and (v) I would dismiss Miss Robinson's appeal against the Court of Appeal's ruling (allowing the city council's appeal against Lightman J's ruling on these issues); (5) on issues (vi), (vii) and (viii) I would dismiss the county council's appeal; (6) I would not answer issues (ix) and (x) and would set aside the "guidance" declarations made by Lightman J.

LORD RODGER OF EARLSFERRY

114 My Lords, I have had the advantage of considering the speeches of my noble and learned friends in draft. For the reasons Lord Hoffmann gives, I would dispose of the appeal as he proposes. I also have sympathy with the reservations about the nature of the relief sought which my noble and learned friends, Lord Scott of Foscote and Baroness Hale, have expressed, but, like Lord Hoffmann, I would answer questions (i) and (ii). I simply wish to add a short comment on one particular aspect of the case.

115 Before doing so, I should confess that, like Lord Walker of Gestingthorpe, my feeling at the end of the hearing of the appeal was that it would be desirable, if reasonably possible, to interpret the definition of "town or village green" in section 22 of the Commons Registration Act 1965 ("section 22") in a manner that would confine its application in the case of village greens to areas which were, more recognisably, the kinds of area which readily come to mind when the expression is used-in other words to "traditional" village greens. But the terms of the definition in section 22 present a formidable obstacle to such an approach, an obstacle which it ***719*** would be legitimate to surmount only if the House could be satisfied that it was necessary to do so in order to give effect to the intention of Parliament. Despite Lord Scott's arguments, having studied the speech of Lord Hoffmann, I cannot actually be sure that Parliament intended the provision to have this narrower scope. Moreover, the potentially wide implications of the definition became apparent, at the latest, in the decision of the House in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* in June 1999. It is striking that, when subsequently amending the definition by enacting section 98 of the Countryside and Rights of Way Act 2000 ("section 98"), Parliament did not use the opportunity to restrict its scope in this way. At present there is a Bill before Parliament dealing with some of the same subject matter. Again, it contains no measure to narrow the definition in section 22 so as to limit it to more "traditional" village greens. But if, having taken account of your Lordships' speeches in the present appeal, Parliament wished to change the definition in this way, a suitable amendment could doubtless be introduced.

116 My Lords, for the reasons given by Lord Hoffmann, I am satisfied that an area does not become a village green unless and until it is registered. It follows that I would reject Mr Edwards's submission that, before section 22 was amended by section 98 , an area of ground on which the inhabitants of a locality had indulged in sports and pastimes as of right for 20 years or more had ipso facto become a village green. The position was, rather, that once that period had elapsed it was open to an interested party to apply to have the register of town and village greens amended to include an entry for the area in question. The applicant would not have needed to show that the inhabitants were continuing to indulge in the sports and pastimes when the application was made.

117 Section 98 came into force on 30 January 2001, two months after the 2000 Act received the royal assent: section 103(2) . As the House now holds, under the amended version of section 22 , anyone applying to have the register amended had to show either (a) that the inhabitants continued to indulge in the sports and pastimes at the date of his application or (b) that they had ceased to do so for not more than a prescribed period. Since no period has ever been prescribed for the purposes of paragraph (b), the operative paragraph is (a).

118 Miss Robinson lodged her application after 30 January 2001 but on the basis that the area had become a village green in 1990. Her counsel, Mr Edwards, contended, however, that the amendment to section 22 did not apply "retrospectively" and so, where the period of 20 years had been completed before section 22 was amended, an applicant still did not need to prove that the inhabitants were continuing to indulge in the sports and pastimes at the date of the application. An applicant such as Miss Robinson could rely on section 22 in its unamended form.

119 Although the issue was presented as one of the retrospective effect of section 98 of the 2000 Act, that is to ignore its true nature. I refer to, without repeating, the lengthy observations on this topic in my speech in *Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816* . Put shortly, there is nothing in the 2000 Act to rebut the powerful presumption that section 98 ought not to be understood as affecting the substantive law in relation to events taking place before it came into force: *Wainwright v Home Office [2002] QB 1334* , 1345, para 27 per Lord Woolf CJ. In any event, despite the ***720** language he used, that was not really the point Mr Edwards was making. The true question raised by his submission is whether section 98 applied generally or applied only to situations which arose after it came into force, with the result that the unamended version of section 22 continued to apply to other cases. If section 98 applied generally, then the amended version of section 22 applied, for the future, to situations which were already underway when it came into force.

120 In effect, Mr Edwards was arguing that section 98 did not apply generally but applied only to situations where the relevant activities of the inhabitants occurred after 30 January 2001. Accordingly, for an indefinite period of decades or more into the future, in making an application based on activities before that date, an interested party could rely on the unamended version of section 22 . Down all those decades, as he accepted, two different systems would operate in parallel, one which required the applicant to prove the continuation of the sports and pastimes and one which did not. I would reject the submission.

121 First, there is nothing in section 98 or in any other provision of the 2000 Act to limit its application in this way. Moreover, Mr Edwards's interpretation would mean that Parliament had chosen to postpone the operation of the amendment indefinitely in what might well be a significant number of cases. He did not advance, and I am unable to see, any reason why Parliament would have intended that the new policy which it was enacting should not apply to all applications made after section 98 came into force. Indeed, the administrative and other complications of operating two different systems afford powerful reasons for supposing that Parliament would have intended that there should be only one.

122 The position might have been different if it could be said that the amendment to section 22 prejudicially affected a vested right of the applicant. But, by the time the amendment to section 22 took effect, the applicant had not applied to have the register amended. Like others in a similar position, she simply had a right to apply which she had not yet exercised. And, since the purpose of legislation is to alter the existing legal situation, there is no presumption that it will not alter rights which individuals have, but have not exercised: cf *Abbott v Minister for Lands [1895] AC 425, 431, per Lord Herschell LC* . On the contrary, like everyone else, those interested in having the register of village greens amended ran the risk that sooner or later Parliament might intervene to change the law regarding such applications. That, and nothing more, is what happened when Parliament enacted section 98 and amended section 22 : applicants found that they now had to meet an additional requirement before they could have the register amended. No question of vested rights arises.

123 I am accordingly satisfied that section 98 applied generally and that the amended version of section 22 applied to situations which were already underway when section 98 came into force, including situations where an application was made after that date on the basis of the inhabitants' activities before that date. Therefore the amended version of section 22 applied to Miss Robinson's application. It is unnecessary to express any view on the rather different issue of applications which had been made but which had not been determined when section 98 came into force.

***721**

LORD WALKER OF GESTINGTHORPE

124 My Lords, I have had the privilege of reading in draft the opinion of my noble and learned friend, Lord Hoffmann. I am in full agreement with his opinion and I would dispose of the appeal as he proposes. I add a few words of my own on the question of "what is a village green?" discussed in paras 37–40 of Lord Hoffmann's opinion.

125 In *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , 917, para 92, I expressed some unease at a result which appeared to stretch the concept of a town or village green close to the limit of what Parliament is likely to have intended. I have felt a similar, but rather stronger, sense of unease about the prospect of the recognition as a town or village green of all or part of the land to which Miss Robinson's application relates-an over-grown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in north-west Oxford.

126 This intuitive feeling gets some support from legal principle in that a town or village green has traditionally been classified as a sub-set of a larger class, that is land over which inhabitants of a neighbourhood enjoy customary rights, sometimes recreational, sometimes non-recreational (as in *Mercer v Denne [1904] 2 Ch 534 (Farwell J),[1905] 2 Ch 538 (Court of Appeal)*).

127 In *Lancashire v Hunt (1894) 10 TLR 310 (Wright J), 11 TLR 49 (Court of Appeal)* , the case about "a cricket match or fete" held on Stockbridge Common Down, counsel argued (at p 311), not that the down was a village green, but that there was a right to use the down " *in the same way as* villagers had a right to enjoy and use a village green" (emphasis supplied) and Wright J is reported (at p 312) as having accepted that submission. The Court of Appeal dismissed the appeal without comment on this aspect of the case. Other customary rights hover on the verge of recreation, such as a right for parishioners (but not the general public) to walk across parkland to attend the parish church (*Brocklebank v Thompson [1903] 2 Ch 344*). The construction of the statute proposed by Lord Hoffmann would, as he recognises (para 49), put all customary recreational rights into a single one-size-fits-all category.

128 Nevertheless the cumulative force of the eight points set out in para 39 of Lord Hoffmann's opinion appears to me to be irresistible. In enacting the Commons Registration Act 1965 Parliament deliberately chose not to adopt the narrower definition proposed by the Royal Commission. In enacting the Countryside and Rights of Way Act 2000 Parliament (while amending the statutory definition in other respects) did not consider it appropriate to narrow its scope by reference to the area or character of the land in question. Parliament now has the opportunity to re-visit this topic again if it thinks fit. It is not for your Lordships' House to intervene in the legislative process.

BARONESS HALE OF RICHMOND

129 My Lords, town and village greens are not just picturesque reminders of a bygone age. They are a very present amenity to the communities they serve. The village green in Scorton, in the North Riding of Yorkshire, is a perfect example. Most of it is contained within a three-foot high old stone wall and raised to the level of the top of that wall, thus giving it a character all its own. It is surrounded by the old village houses, including ***722** the former vicarage, the two remaining pubs, the shop, the village institute, and the 18th century building which was until recently the old grammar school. It was and is the centre of the community. Both villagers and grammar school boys played cricket there in the summer; archery contests were held there; a bonfire was built for Guy Fawkes Day; the fair and other events of Scorton feast were held there every August; and all the villagers could walk and play games upon it. It is just the sort of place that the Royal Commission had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann, in para 14 of his opinion.

130 But how much should our answers to the examination paper which we have been set by the parties be influenced by that image? That has emerged as an important issue between us. So too has the propriety of the examination paper itself.

131 I confess that it did not occur to me during the hearing (to which I came rather later than your lordships); but having now had the benefit of reading in draft the opinion of my noble and learned friend, Lord Scott of Foscote, I share his misgivings about the propriety of our being asked, still less of our answering, some of the questions on the examination paper. These are private law proceedings, not an application for judicial review in which a declaration is sought as to the legality of the actions of a public body. The declaratory jurisdiction has been expanded considerably in recent decades, as we from the Family Division are very well aware: see the judgment of Sir Thomas Bingham MR in *In re S (Hospital Patient: Court's Jurisdiction) [1996] Fam 1* . Nevertheless, it remains a discretionary jurisdiction to make "binding declarations of right". As Lord Diplock famously said in *Gouriet v Union of Post Office Workers [1978] AC 435* , 501:

> "But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the

parties represented in the litigation before it and not those of anyone else."

Since then, but not without some misgivings, the jurisdiction has been extended to enable the courts to declare whether or not a proposed course of action, such as the sterilisation of, or the withdrawal of artificial nutrition and hydration from, a person who lacks the capacity to decide it for himself will be lawful. In the leading case of *In re F (Mental Patient: Sterilisation) [1990] 2 AC 1* , 82, Lord Goff of Chieveley, after quoting from the speech of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438* , 448, said this:

> "indeed there is authority in the English cases that a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument... In the present case, however, none of these objections exists. Here the declaration sought does indeed raise a real question; it is far from being hypothetical or academic. The plaintiff has a proper interest in the outcome, so that it can properly be said that she is seeking relief... The matter has been fully argued in court... I wish to add that no question ***723** arises in the present case regarding future rights: the declaration asked relates to the plaintiff's position as matters stand at present."

132 These proceedings were launched by the registration authority because of a difference of opinion between the inspector they had appointed to conduct an inquiry into Miss Robinson's application to register the Trap Grounds as a town green and their own legal adviser. Could Miss Robinson be allowed to amend her application, either to claim that the land had become a town green on a different date from that first stated or to reduce the area of land to be registered? Even if she could not amend her application, could the registration authority nevertheless adopt a different date or register a different area?

133 On one view, the better course would have been for the registration authority to take a decision, following whichever advice seemed best to them. Whichever party was aggrieved, Miss Robinson or the Oxford City Council, would be left to apply for judicial review. Leave would have been required and the issues would have been confined to those raised by the authority's decision. But the authority clearly did have an immediate interest in knowing what their powers were. There was nothing hypothetical or academic about the issues. There were opposing parties who also took different views on these matters, so that they could be properly argued. This could therefore be seen as a proper case for seeking an advisory opinion from the court, tied specifically to the issues relating to the powers of the registration authority in the circumstances which had arisen.

134 But this does not apply to issues (i) and (ii). Both are entirely hypothetical. They are pure questions of law, not related to any existing set of facts. Issue (i) is asking the court "whether the relevant inhabitants have rights to indulge in lawful sports and pastimes on land which has become a [new] green". It is not even asking the more precise question: if the Trap Grounds are registered as a town green, will Miss Robinson and other local inhabitants be entitled to continue to walk their dogs and/or conduct other lawful sports and pastimes and/or clear some land so that they can play football and other games (which would, I imagine, horrify Miss Robinson more than the city council) without let or hindrance from the city council? Issue (ii) is asking whether land which has become a new green falls within the scope of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 . It is not even asking the more precise question: if the whole of the Trap Grounds (apart from the reed beds) are registered as a town green, will it be a criminal offence to construct an access route to the new school?

135 The county council as registration authority have no interest in the answers to those questions (although as education authority they would have an interest in a more precisely formulated version of the second). Miss Robinson and Oxford City Council do have an interest, in that their legal positions may in future be affected by the answers. The Government and the public at large have an interest, in the sense that they might have preferences, for any number of policy and other reasons, for the answers to be one way or another. But the court has a discretion whether or not to make a declaration. I question whether any of these are good enough reasons for a court to make general declarations as to the future legal ***724** position, in advance of any actual set of facts raising a precise question upon which the court may make a "binding declaration of right".

136 Unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum. They know that, while hard cases may indeed make bad law, the particular facts of the case before them do cast a particularly bright light upon the legal issues and may throw up important questions which no rehearsal of the legal arguments in the abstract can ever do. Why, after all, do the best legal examination papers require candidates to answer problems based upon a precise, though imaginary set of facts? Because that is the way in which our case law has developed over the centuries. It is only legislators who make legal rulings in general and without reference to a specific set of facts. Yet this is exactly what our legislators have so far declined to do on questions (i) and (ii). They have an immediate opportunity, in the Commons Bill currently before Parliament, to fill in those two important gaps. Both raise important policy issues of a kind which courts should not have to resolve by reference to legal rather than policy arguments. Above all, if we give an answer to these questions, it will be taken as binding-not only on the parties before us now but on all future parties before any future court, including a criminal court, because the way in which we state the law will be binding upon the judges who decide those cases.

137 My Lords, as an academic lawyer and examiner of students, I would see nothing wrong in essaying an answer to those questions, secure in the knowledge that if I turned out to have overlooked some important consideration which emerged in a later case, a court could and would ignore my views. As a judge, I see every objection to answering those questions. The fact that all parties and all courts have so far proceeded on the basis that we both can and should answer them does not to my mind outweigh the formidable objections to our doing so. Their efforts will be more than rewarded by our answers to the other questions on the examination paper. I would therefore set aside "rulings" (i) and (ii) made by the Court of Appeal in para 117 of the judgment of Carnwath LJ and declarations (i) and (ii) made by Lightman J and put nothing in their place.

138 The other declarations and "rulings" are different. For what it is worth, I would have agreed with Lightman J, supported by counsel for Miss Robinson and the Secretary of State for the Environment, Food and Rural Affairs, on the effect of events occurring after 31 July 1970 and before 31 January 2001. As I understand that your lordships take a different view, I shall state my reasons briefly.

139 After 31 July 1970, by virtue of section 1(2)(a) of the Commons Registration Act 1965 , "no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered". At that date, the definition of a "town or village green" in section 22(1) of the 1965 Act contained three categories: (a) land "which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality"; (b) land "on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes"; and (c) land "on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

140 Clearly, once the axe had fallen in 1970, there could be no more class b greens. By definition, such customary rights must have existed since ***725*** time whereof the memory of man knoweth not the contrary, and so the land must have been registrable then. Whether or not the Trap Grounds had previously been part of Port Meadow became totally irrelevant. But there could be new class a and c greens. Indeed, land which had previously been a class b green but had been left off the register might subsequently become a green once more by virtue of statute or, more probably, 20 years' continuing exercise of what had previously been the local inhabitants' customary rights (as has happened with the ancient town green in Richmond, North Yorkshire).Section 98 of the Countryside and Rights of Way Act 2000 altered the definition of a class c green in three ways: the use had to be by a "significant number" of local inhabitants; but they could be inhabitants of any locality "or a neighbourhood within a locality"; and, relevantly for present purposes, they had to "continue" to use the land in that way. That amendment came into force after the expiry of two months from Royal Assent on 30 November 2000, but there were no transitional provisions governing the earlier position.

141 Section 13 of the Commons Registration Act 1965 requires that Regulations are made to provide for the amendment of registers where "(b) any land *becomes* common land or a town or village green" (my emphasis). It could have said "where (b) any land becomes registrable as a village green" but it does not. Elsewhere in section 13 itself there is a reference to "matters capable of being registered under this Act". When different expressions are used in the same statute, let alone in the same section, it is usually assumed that they have different meanings. This is reinforced by section 1 , which first envisages in section 1(1) that land already " *is* common land or a town or village green" (my emphasis) and requires that it be registered, and then provides in section 1(2)(a) for the effect of failure to register any "land capable of being registered". Obviously, land could (before the axe fell) *be* a town or village green without being registered as such. I see no reason why land could not later

become a village green without being registered as such. Section 10 provides that the register is conclusive evidence of the matters registered. It does not say anything about matters which are not registered. Section 1(2)(a) does that. But section 1(2)(a) cannot apply to land which became a green after the axe fell: otherwise there could be no new greens at all. (Some might have considered this a good thing, because then the register would be conclusive for all land and all time, which land lawyers and conveyancers like; but we must beware of translating the principles of other registration schemes relating to land into this one.) Parliament quite clearly envisaged the creation of new greens, however tiresome they may have turned out to be. There is no other provision in the Act catering for the effect of non-registration.

142 If that is right, then land might become a new green at any time after the axe fell. Twenty years after the axe expired on 31 July 1990, so it is not surprising that 1 August 1990 was the date claimed in the application. Nothing in the 2000 Act provided that land which had already become a new green should cease to be such when the new definition came into force; nothing in the 2000 Act provided that land which had already become registrable as a new green should cease to be so registrable when the new definition came into force. Left to myself, therefore, I would have concluded that there is a short period of time, from 1990 to 2001, when land might ***726** become a new green and remain registrable as such even though the required use was not still continuing.

143 Be that as it may, I entirely agree, for the reasons given by my noble and learned friend, Lord Hoffmann, that the use need continue no longer than the date of the application for registration as a green. I would have liked to agree that it need continue no longer than when it is first put in issue, either by the landowner in some way challenging the inhabitants' right so to use the land, or by the inhabitants taking some steps to assert their right. But the Act is all about registration. Its main provisions deal with the requirement to register, the process of registration, the effect of registration, and in the case of old greens and commons, the effect of non-registration. In that context, it is difficult to read the words "and continuing" as continuing until some date entirely divorced from the registration process. This is reinforced by the express power (in section 22(1A)(b)) to make provision for land where the use has ceased some time previously. If, as I understand counsel's argument, the Secretary of State would prefer an earlier date than the date of application, he has only to provide accordingly.

144 I also entirely agree that the registration authority may allow amendments or deal with an application in accordance with the evidence before them, provided always that they have given every person who might wish to object (or who otherwise has a legitimate interest in the process) a fair opportunity to consider what is proposed and make representations about it.

145 The final issue was not on the examination paper at all, but it is relevant to the guidance requested on the actual facts of this case-in particular to whether scrubland, 75% of which is inaccessible to the local inhabitants who might wish to use it for lawful sports and pastimes, can possibly qualify as a town or village green. Indeed, it seems that it is that very inaccessibility, and the habitat it provides for wildlife, which makes Miss Robinson so anxious to preserve the Trap Grounds in their present state. Is there some essence of the very expression "town or village green" which would preclude or at least militate strongly against the registration of such land as a green? My Lords, we have not been asked this question and any view which we express upon it would, I believe, be obiter dictum. I myself have considerable sympathy for the views expressed by my noble and learned friend, Lord Scott of Foscote. The very powerful points made by my noble and learned friend, Lord Hoffmann, in para 39 of his opinion depend to a large extent on events since the 1965 Act was passed rather than on the meaning of the phrase at the time when it was enacted. I believe that it would be much better for us to leave this issue to be properly fought out on another day, whether in answer to whatever decision Oxfordshire County Council make in relation to the Trap Grounds or elsewhere.

146 There are major policy considerations underlying many of the issues raised by this and similar cases: between preserving local amenities of whatever kind for the benefit of the local people and permitting the appropriate development of land, in particular to meet the needs of local people for somewhere to live. Consideration needs to be given to how and in what circumstances land can cease to be a town or village green (as also envisaged in section 13 of the 1965 Act) as well as to how and in what circumstances it can become one. Parliament may not choose to deal with these on this occasion but sooner or later it may have to do so.

***727**

147 In the meantime, I would make no ruling or declaration on issues (i) and (ii), make the declaration

proposed by my noble and learned friend, Lord Hoffmann, on issue (iii), restore the declarations made by Lightman J on issues (iv) and (v), and agree with the rulings of the Court of Appeal on issues (vi), (vii) and (viii). I too would not answer questions (ix) and (x) even to the extent indicated by my noble and learned friend, Lord Hoffmann.

Order accordingly.

No order as to costs.

Representation

Solicitors: Public Law Solicitors, Birmingham ; Solicitor, Oxford City Council ; Winkworths Sherwood for Solicitor, Oxfordshire County Council ; Legal Services, Department of the Environment, Food and Rural Affairs .

C T B

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1. Commons Registration Act 1965, s. 13 : see post, para 22. S 22(1) : see post, para 20. S 22(1A) , as amended: see post, para 26.

Status: ⊠ Positive or Neutral Judicial Treatment

ICLR

*70 Regina (Lewis) v Redcar and Cleveland Borough Council (No 2)

Supreme Court

3 March 2010

[2010] UKSC 11

[2010] 2 A.C. 70

Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry , Lord Walker of Gestingthorpe , Lord Brown of Eaton-under Heywood , Lord Kerr of Tonaghmore JJSC

2010 Jan 18, 19, 20; March 3

Commons—Town or village green—Registration···Land used by local inhabitants for sport and recreation for more than 20 years—Conflicting uses of land by inhabitants and landowner—Whether inhabitants' user sufficient assertion of right so to use land···Whether claim to user "as of right" defeated by inhabitants deferring to landowner's use—Whether registration enlarging inhabitants' rights to detriment of landowner··· Commons Act 2006 (c 26), s 15

The claimant, a resident of an area where the local authority owned land, sought registration of part of that land as a town green within the meaning of section 15 of the Commons Act 2006[1] , on the ground that the inhabitants of the locality had indulged as of right in lawful sports and pastimes on the land for at least 20 years. Until 2002 the disputed land had formed part of a golf course which was regularly used by members of a private golf club. However, the local inhabitants had continued to use the land for informal recreation without interfering with or interrupting play by the golfers, and would wait until the play had passed or until they were waved across by golfers, so that there had generally been a cordial relationship between the golfers and the local inhabitants. The local authority appointed an inspector to hold a non-statutory public inquiry and provide a report and recommendation as to whether the application for registration should succeed. The inspector found that local inhabitants' use of the land was "not as of right" because, first, the fact that certain signs had been erected on the land had that effect, and, secondly, the local inhabitants had "overwhelmingly deferred" to the extensive use of the land by the golfers. He accordingly recommended that the land should not be registered as a town or village green, and the local authority accepted that recommendation. The claimant sought judicial review of the local authority's decision. The judge upheld the challenge to the first of the inspector's reasons but rejected the challenge to the second, and accordingly dismissed the claim for judicial review. The Court of Appeal dismissed the claimant's appeal on the ground that in order for user to be as of right, it had to be not merely nec vi, nec clam, nec precario, but had also such as to lead a reasonable landowner to conclude that a right to use the land was being asserted by the local inhabitants, and that the judge had been right to hold that the inspector's finding that the local inhabitants had "overwhelmingly deferred" to the golfers undermined the local inhabitants' assertion of a right, so that the claim for registration was not established.

On the claimant's appeal—

Held , allowing the appeal, that, although "sports and pastimes" in section 15 of the 2006 Act denoted a single composite class and land registered as a town or village green could be used generally for sports and pastimes, registration neither enlarged the inhabitants' rights nor diminished those of the landowner, who retained the right to use the land as he had done before, and in practice it was possible for the respective rights of the owner and of the local inhabitants to coexist with give and take on both sides; that, although the English theory of prescription was concerned with how matters would have appeared to the landowner, the tripartite test of nec vi, nec clam, ***71*** nec precario, was sufficient to establish whether local inhabitants' use of land for lawful sports and pastimes was "as of right" for the purposes of section 15 , and it was

unnecessary to superimpose a further test as to whether it would appear to a reasonable landowner that they were asserting a right so to use the land or deferring to his rights; that, if the user by the local inhabitants for at least 20 years were of such amount and in such manner as would reasonably be regarded as the assertion of a public right so that it was reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of registration, the landowner would be taken to have acquiesced in it unless he could show that one of the three vitiating circumstances applied; that, in any event, a reasonably alert landowner could not have failed to recognise in the present case that the user by the local inhabitants, who had regularly and in large numbers continued to cross the area covered by the golf course in order to pursue their lawful sports and pastimes, was the assertion of a right to use the land which would mature into an established right unless he took action to stop it, and he would not have concluded that they were not doing so merely because they showed civility or deference towards members of the golf club when play was in progress; that, therefore, the inspector's assessment constituted an error of law in that he had misdirected himself as to the significance of perfectly natural behaviour by the local inhabitants; and that, accordingly, the local authority was required to register the disputed land as a town green (post, paras 20, 36–38, 47–49, 67–78, 79, 85, 93, 95–97, 100–102, 105, 108, 109, 113–116).

Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229, HL(E) applied .

Fitch v Fitch (1797) 2 Esp 543 , *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335, HL(E)* , *R (Beresford) v Sunderland City Council [2004] 1 AC 889, HL(E)* and *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674, HL(E)* considered .

R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573 not followed .

Per Lord Hope of Craighead DPSC. In the proposed consultation as to whether changes are needed to the existing framework for the registration of new town and village greens, the opportunity should be taken by the Government to look at the consequences of registration as revealed by the developing case law as well as how the registration system itself is working (post, para 56).

Decision of the *Court of Appeal [2009] EWCA Civ 3* ; *[2009] 1 WLR 1461* ; *[2009] 4 All ER 1232* reversed .

The following cases are referred to in the judgments:

*72

Bridle v Ruby [1989] QB 169; [1988] 3 WLR 191; [1988] 3 All ER 64, CA

Bright v Walker (1834) 1 Cr M & R 211

Costagliola v English (1969) 210 EG 1425

Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SC 357; 1992 SLT 1035, Ct of Sess; 1993 SC (HL) 44, HL(Sc)

Dalton v Henry Angus & Co (1881) 6 App Cas 740, HL(E)

Fitch v Fitch (1797) 2 Esp 543

Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229, HL(E)

Henderson v Volk (1982) 35 OR (2d) 379

Hollins v Verney (1883) 11 QBD 715, DC; (1884) 13 QBD 304, CA

Humphreys v Rochdale Metropolitan Borough Council (unreported) 18 June 2004 , Judge Howarth

Mercer v Woodgate (1869) LR 5 QB 26

New Windsor Corpn v Mellor [1975] Ch 380; [1975] 3 WLR 25; [1975] 3 All ER 44, CA

Oxfordshire County Council v Oxford City Council [2004] EWHC 12 (Ch); [2004] Ch 253; [2004] 2 WLR 1291; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817, HL(E) ***72**

Pye (JA) (Oxford) Ltd v United Kingdom [2005] 3 EGLR 1

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)

R v Suffolk County Council, Ex p Steed (1995) 70 P & CR 487; (1996) 75 P & C R 102, CA

R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28; [2008] AC 221; [2007] 3 WLR 85; [2007] 4 All ER 273, HL(E)

R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin); [2004] 1 P & CR 573

Rhins District Committee of Wigtownshire County Council v Cuninghame 1917 2 SLT 169

Sturges v Bridgman (1879) 11 Ch D 852

White v Taylor (No 2) [1969] 1 Ch 160; [1968] 2 WLR 1402; [1968] 1 All ER 1015

The following additional cases were cited in argument:

Field Common Ltd v Elmbridge Borough Council [2005] EWHC 2933 (Ch)

Hall v Beckenham Corpn [1949] 1 KB 716; [1949] 1 All ER 423

Mann v Brodie (1885) 10 App Cas 378, HL(Sc)

Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA

Simpson v Attorney General [1904] AC 476, HL(E)

APPEAL from the Court of Appeal

By leave of the Supreme Court (Lord Hope of Craighead DPSC, Lord Kerr of Tonaghmore and Lord Clarke of Stone-cum-Ebony JJSC) granted on 7 December 2009, the claimant, Kevin Paul Lewis, appealed from a decision of the Court of Appeal (Laws, Rix and Dyson LJJ) on 15 January 2009, dismissing the claimant's appeal from a decision of Sullivan J [2008] EWHC 1813 (Admin); *[2008] NPC 97 who on 18 July 2008* had dismissed the claimant's claim for judicial review of a decision of the General Purposes and Village Greens Committee of the defendant local authority, Redcar and Cleveland Borough Council, on 19 October 2007 to reject an application to register part of the land known as Coatham Common as a town or village green under the Commons Act 2006 . Persimmon Homes (Teesside) Ltd appeared as an interested party in support of the local authority's case.

The facts are stated in the judgments.

Charles George QC, Jeremy Pike and *Cain Ormondroyd* (instructed by *Irwin Mitchell*) for the claimants.

The real issue is whether the use was "as of right". The Commons Act 2006 is solely concerned with rights where there is de facto public use of private land and the landowner does not take steps to stop it.

The tests under section 15 of the Act are whether there was 20 years' use of the land by a sufficient number of local inhabitants and whether that use fulfils the tripartite test of nec vi, nec clam, nec precario. Where there is recreational use which is nec vi and nec clam it will always be known to the owner who can bring it to an end or permit it or acquiesce. Where the use is precario the owner will know that it can never develop into a prescriptive right. The only exception to the tripartite test is where the users expressly say to the owner that they would never claim a prescriptive right. In that case there would be estoppel by representation.

***73**

As of right means as if of right and therefore any use which was by right can be disregarded. Where land has been extensively used by local inhabitants for lawful sports and pastimes for 20 years and the tripartite test is satisfied, it is not necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that the users were asserting a right to use the land for that purpose. It would be wrong to add a further test. The activities of the owner are not relevant unless they are activities which asserted the rights of the owner or excluded the inhabitants. The law presumes that a reasonable landowner with knowledge of what is taking place on his land will either resist it or license it.

If the local inhabitants have asserted the tripartite test the right is established. All that the court is concerned with is whether the land was used for the requisite purpose for 20 years. The key principle is that of acquiescence and the governing concept is that of reasonableness.

[Reference was made to Dalton v Henry Angus & Co (1881) 6 App Cas 740 ; Mann v Brodie (1885) 10 App Cas 378 ; *Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229* ; *Simpson v Attorney General [1904] AC 476* ; *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1993 SC (HL) 44* ; *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* ; *R (Beresford) v Sunderland City Council [2004] 1 AC 889* ; R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2008] AC 221 ; *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* ; *Mills v Silver [1991] Ch 271* ; Hollins v Verney (1884) 13 QBD 304 ; Sturges v Bridgman (1879) 11 Ch D 852 ; Field Common Ltd v Elmbridge Borough Council [2005] EWHC 2933 (Ch) and R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573 .]

The Court of Appeal erroneously added an additional factor to the conventional test of "as of right" and rejected the appeal in circumstances where the user had been nec vi nec clam nec precario.

The mere fact that the local inhabitants did not prevent the playing of golf by walking in front of the ball or seeking to prevent the playing of strokes by golfers did not preclude the use by local inhabitants from being as of right. The conduct of the local inhabitants was capable of being regarded as other than one of deference or submission to a greater right. They were merely exercising their right in a way that a reasonable person with a right would do, namely, in a manner which was consistent with the rights of the landowner. The inhabitants' behaviour which the inspector described as "deference" could equally consistently be described as a good neighbourly, courteous and safety conscious assertion of a right. The role of reasonableness and give and take between dominant and

servient tenants pervades the law of easements. The inspector's finding of deference could not properly be looked at in isolation and had to be looked at in the context of all the circumstances and the local inhabitants' relationship with the golf club. It was not conduct which demonstrated the lack of assertion of a right. The inspector approached the matter too narrowly.

George Laurence QC and *Rodney Stewart Smith* (instructed by *Head of Legal Services, Redcar and Cleveland Borough Council, Middlesborough*) for the local authority.

***74**

If a landowner acquiesces in an activity which is capable of being recognised as the assertion of a right and does not complain for a sufficiently long time he will lose his right to complain about the activity. There are many circumstances in which the landowner has nothing to fear from not complaining. The unifying element in all those circumstances is reasonableness. If it is not reasonable to expect the owner to resist what the users are doing, no harm can come to the owner by not complaining. [Reference was made to Sturges v Bridgman 11 Ch D 852 ; *Bridle v Ruby [1989] QB 169* ; Field Common Ltd v Elmbridge Borough Council [2005] EWHC 2933 ; Hollins v Verney 13 QBD 304 ; *White v Taylor (No 2) [1969] 1 Ch 160* and R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573 .]

In order to be "as of right" the user must be nec vi nec clam nec precario and in many situations user which meets those negative conditions will, without more, be "as of right". However those conditions, while always necessary, will not always be sufficient. It is also necessary to prove that there were circumstances which showed that the landowner acquiesced in the user as in an established right. In order to establish for the purposes of section 15(4) of the 2006 Act that use of the land for lawful sports and pastimes was as of right, it had also to be shown that it would have appeared to a reasonable landowner that the local inhabitants were asserting a right to use the land for the lawful sports and pastimes in which they were indulging.

It is a question of fact and degree whether the local inhabitants did sufficient to bring home to the reasonable landowner that they were asserting a right to use the land. In answering that question the extent to which the local inhabitants deferred to the right of the owner was a relevant factor. The greater the degree of deference, the less likely it would appear to a reasonable landowner that they were asserting any right to use the land.

Stewart Smith following.

Fundamental to the local authority's case is that the concept of give and take and reasonableness has no place in the law relating to the exercise of customary rights. [Reference was made to Mercer v Woodgate (1869) LR 5 QB 26 and *Fitch v Fitch (1797) 2 Esp 543* .]

The inspector found as a fact that the local inhabitants overwhelmingly deferred to the extensive use of the land as a golf course by the golf club. The inspector was entitled to find that in view of that deference by the inhabitants to the golfers it would not have appeared to the reasonable landowner that the inhabitants were asserting a right. The argument that the inspector misdirected himself cannot be sustained. This is a judicial review case and the Court of Appeal was entitled to find that the inspector's conclusion that there was deference was a conclusion to which he was entitled to come.

Ross Crail (instructed by *Ward Hadaway, Newcastle upon Tyne*) for the interested party.

For use to be "as of right" it is in law necessary, but not sufficient for it to be nec vi nec clam nec precario. Use cannot be "as of right" if the users have not conducted themselves in a way in which persons asserting a right would conduct themselves.

If for 20 years users have restricted their activities so as not to interfere with the landowner's own activities, and have given the appearance of not ***75** asserting a right, it would be a perverse outcome if by doing so they acquired a right which entitled them to interfere with the landowner's activities. The essence of prescription is that users acquire a right to act in a way in which they have been acting. By acting as if they had that right already, they acquire the right. That is because the landowner has acquiesced in their acting as if they already had the right. The principle of acquiescence which underlies any acquisition of rights by "as of right" user requires and entails a symmetry between the user acquiesced in and the right of user acquired. That is the theoretical basis on which the Court of Appeal's decision rests, and it is a sound one. Local inhabitants acquire

unrestricted rights of recreation over the whole of land registered as a town or village green. A landowner needs express statutory authority to use for some other purpose land which is subject to statutory recreational rights for the benefit of the public. [Reference was made to *Hall v Beckenham Corpn [1949] 1 KB 716* and *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* .]

If it is accepted that users have to give the outward appearance of asserting a right, then whether they do so or not is a matter for the fact-finding tribunal and it is not a matter of law. The inspector who heard and read all the evidence came to the conclusion that the users had not given the appearance of asserting a right. "Deference" means submission to or showing respect for. When the inspector used that word in his reports and opinions there is no reason to think that he was not using it in its proper sense, with those connotations, and simply meant to say that the local inhabitants physically kept out of the way of the golfers. The inspector's reasoning was as full as it needed to be and his conclusions were conclusions which on his findings of fact he was entitled to reach.

George QC in reply.

There is no injustice in applying section 15 of the 2006 Act. It is a recent provision and reflects Parliament's best efforts. If there is an injustice in applying section 15 it is for Parliament to correct. Village green rights are vested in the local inhabitants and easements are vested in the owner of a particular tenement or piece of land. Once a village green comes into being it has its own statutory code. The rights of the local inhabitants are not unqualified: see *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* , para 51. [Reference was made to *Bridle v Ruby [1989] QB 169* .]

The court took time for consideration.

3 March 2010. LORD WALKER OF GESTINGTHORPE JSC

The issue

1 Section 15 of the Commons Act 2006 , so far as relevant to this appeal, provides as follows:

> **"Registration of greens**
>
> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> "(2) This subsection applies where—(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, ***76*** have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the application."
>
> "(4) This subsection applies (subject to subsection (5)) where—(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; (b) they ceased to do so before the commencement of this section; and (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b)."
>
> "(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and (b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land 'as of right'."

The application relevant to this appeal was expressed to be made under section 15(4) . It was suggested in argument that (because of the "deeming" provision in subsection (7)) it was also, or alternatively, made under subsection (2) . In any case it was a valid application, and neither subsection (5) nor subsection (6) is in point.

The issue

2 The general issue for the court is whether a piece of open land next to the sea in Redcar ought to have been registered as a town green under section 15 . For at least 80 years before 2002 the land in question ("the disputed land") formed part of a golf course in regular use by members of the Cleveland Golf Club, whose trustees were tenants of the course. The inspector who held a public inquiry found as a fact that when local residents using the disputed land for recreation encountered members of the golf club playing golf, the former "deferred" to the latter. In these circumstances the legal issue for the court can be more particularly stated as whether the legal consequence of this deference was that the local residents were not indulging in recreation "as of right" within the meaning of the Commons Act 2006 .

3 During the last decade there have been three important decisions of the House of Lords dealing with different aspects of the law (as it stood before the Commons Act 2006) as to town and village greens: *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* (" Sunningwell "); *R (Beresford) v Sunderland City Council [2004] 1 AC 889* (" Beresford ") and *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* (" Oxfordshire"). In none of these appeals did the House of Lords have to decide the point now at issue, although both sides have placed reliance on some passages in their Lordships' opinions. The Commons Act 2006 (which is still not fully in force) makes important changes in the law, but does not directly affect the issue of deference.

'77

The facts

4 The appellant, Mr Kevin Lewis, is one of five local residents who made the application for registration of the disputed land under section 15 of the Commons Act 2006 . The first respondent, Redcar and Cleveland Borough Council, has a dual capacity, being both the registration authority and the freehold owner of the disputed land. The second respondent, Persimmon Homes (Teesside) Ltd is an interested party. It has since 2003 been the Borough Council's development partner in the Coatham Links coastal regeneration project. The project is for a mixed development for residential and leisure purposes on a site extending to 14 hectares. The disputed land forms an important, and possibly indispensable, part of the development site. The appeal is therefore of great importance to the parties, as well as raising a point of law of general public interest.

5 Redcar is on the south side of the Tees estuary. The disputed land is part of an area known as Coatham Common or Coatham Links (Coatham was originally a separate village but is now part of Redcar). On the south (landward) side of the disputed land there is a mainly residential area. To the east is the site of the former club house and a leisure centre (the club house site is not included in the disputed land but was included in the earlier application mentioned below). To the west is more open land still used as a golf course. To the north is the beach and the North Sea. The disputed land formerly included the tees, fairways and greens of the first and 18th holes, and a small practice area.

6 The inspector's report dated 14 March 2006 described the boundaries in more detail and contained, at paras 6 and 7, this further description of the disputed land (referred to as "the report land"):

> "The character of the report land is typical of coastal sand dunes, with irregular sand hills covered in rough grass. The dunes are noticeably higher on the northern side. There is a flatter area along the southern side, particularly west of the Church Street access. The former tees, greens and fairways of the golf course are no longer obvious. The report land is crossed by numerous informal paths of which the most well used run alongside and close to the southern and northern boundaries. A number of photographs show the general nature of the land. There are some fairly new signs erected by [the borough council] on the report land. The gist of the signs is that they give the public temporary permission to use the report land for recreation pending its redevelopment. I call these signs 'the permissive signs'."

The footpath near the southern boundary is a public footpath.

7 Mr Lewis and his fellow applicants applied for registration of the disputed land on 8 June 2007, soon after section 15 of the Commons Act 2006 had come into force on 5 April 2007. It was not the first application that had been made in respect of the disputed land. An earlier application had been made by another group of local residents on 1 March 2005. It was therefore considered under the earlier law, that is the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000 . This earlier application was the subject of a public inquiry held by Mr Vivian Chapman QC as an inspector appointed by the borough council as registration authority. The inquiry was held over several days in December 2005 and January 2006. Mr Chapman produced a lengthy report dated ***78** 14 March 2006 recommending that the application should be refused, and the borough council accepted his recommendation. An application for leave for judicial review of that decision was refused on the papers by Collins J on 22 August 2006 and was not renewed.

8 When the second application was made in 2007 it was rightly thought that it was unnecessary, and would be a waste of time and money, to hold a second public inquiry, since it would be directed to the same factual issues. Mr Chapman did however (in connection with the first application) make a second report dated 9 June 2006 addressing the decision of the House of Lords in Oxfordshire (he advised that it made no difference to his conclusions, and that in any case it was not open to the borough council to reopen its decision).

9 The relevant findings of fact are therefore in Mr Chapman's report dated 14 March 2006 on the first application. The crucial findings are in paras 171, 172, and 175. These paragraphs are set out in full in the judgment of Dyson LJ in the *Court of Appeal [2009] 1 WLR 1461* , but they are of such central importance that they need to be set out again. Para 171 dealt with use of the disputed land by golfers:

> "I find that, from as far back as living memory goes (at least as far back as the 1920s), the report land was continuously used as part of the Cleveland Golf Club links. The only exception is that the golfing was suspended during World War II. Golfing use ceased in 2002. I find that the club was a popular one and that the golf links were well used nearly every day of the year. In the years before 2002, the report land was used for the club house, the first and 18th holes and for a practice ground. There is some evidence that the precise configuration of the course changed somewhat over the years. The club house, tees, fairways, greens and practice ground did not, however, take up the whole of the report land and there were substantial areas of rough ground beside and between these features."

10 Para 172 dealt with use by non-golfers (that is, local residents):

> "I find that from as far back as living memory goes, the open parts of the report land have also been extensively used by non golfers for informal recreation such as dog walking and children's play. Some of the walking has been linear walking in transit. Thus the informal paths running east-west have been used by caravan residents to get access to the centre of Redcar with its shops and public houses. Also, there is evidence of people taking a short cut south-north from Church Street to the gap in the fence in Majuba Road. However I am satisfied that the open parts of the report land have been extensively used by non golfers for general recreational activities apart from linear walking. I prefer the evidence on this point of the applicants' witnesses and of Mr Fletcher to the evidence of the objector's other witnesses that such use was occasional and infrequent."

11 Paras 173 and 174 concluded that the local people who used the land for informal recreation came primarily from the Coatham area of Redcar. Then para 175 dealt with the relationship between the two types of use: ***79**

> "I find that the relationship between the golfers and the local recreational users was generally cordial. There was evidence of only a few disputes. Only Squadron Leader Kime seems to have caused problems by actively asserting a right to use the report land and the golf club appears to have tried to avoid any formal dispute with him. In my judgment, the reason why the golfers and the local people generally got on so well was because the local people (with the exception of Squadron Leader Kime) did not

> materially interfere with the use of the land for playing golf. Many of the applicants' witnesses emphasised that they would not walk on the playing areas when play was in progress. They would wait until the play had passed or until they were waved across by the golfers. Where local people did inadvertently impede play, a shout of 'fore' would be enough to warn them to clear the course. I find that recreational use of the report land by local people overwhelmingly deferred to golfing use."

12 Para 221 (in the part of the report applying the law to the facts as found) referred to the decisions of Sullivan J in R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573 (" Laing Homes ") and Judge Howarth in Humphreys v Rochdale Metropolitan Borough Council (unreported) 18 June 2004 :

> "Leaving aside the public footpath, I consider that the reasoning in Laing Homes Ltd and Humphreys squarely applies to the report land in the present case. Use of the report land as a golf course by the Cleveland Golf Club would have been in breach of Inclosure Act 1857 section 12 and Commons Act 1876 section 29 if the report land had been a town or village green. It was a use which conflicted with the use of the report land as a place for informal recreation by local people. It was not a use which was with a better view to the enjoyment of the report land as a town or village green. The overwhelming evidence was that informal recreational use of the report land deferred to its extensive use as a golf course by the Cleveland Golf Club. Accordingly, use of the report land by local people was not as of right until use as a golf course ceased in 2002."

Mr Chapman concluded, at para 223, that (apart from use of the public footpath) recreational user of the disputed land was not as of right before 2002 because it deferred to extensive use of the land by the golf club, and that user as of right was not continuing because of the permissive signs erected in 2003.

13 It is convenient, at this point, to dispose of the matter of the signs. They were contentious earlier but are no longer a live issue. There were two sets of signs: warning signs erected by the golf club in 1998 and the permissive signs erected by the borough council in 2003. The warning signs read "Cleveland Golf Club. Warning. It is dangerous to trespass on the golf course". The inspector found, at para 176:

> "Although these were vandalised several times after which the golf club gave up trying to maintain them, I am satisfied that they were in place long enough for regular users of the report land to know of them. Indeed it seems that they caused a stir locally because of the implication that local people using Coatham Common were trespassers."

***80** The inspector treated them as material to the outcome of both applications, but on judicial review of the second application Sullivan J [2008] EWHC 1813 (Admin) at [11]-[23] held that the wording was too ambiguous to alter the character of the residents' use of the land, and that conclusion has not been challenged by the respondents. The permissive signs erected in 2003 were fatal to the first application but not to the second application, because of the change in the law made by section 15 of the Commons Act 2006 .

The course of the second application

14 Mr Chapman advised the borough council in an opinion dated 12 June 2007 that the application made on 6 June 2007 was bound to fail on two of the same grounds on which the first application failed, that is the deference issue and the 1998 warning notices. He recommended that the application should be summarily dismissed, subject to any new points raised by the applicants. Various points were raised but in three further opinions dated 29 July, 13 October and 18 October 2007 Mr Chapman maintained his advice that the application should be rejected. On 19 October 2007 the borough council, by its General Purposes and Village Greens Committee, accepted Mr Chapman's advice and resolved to reject the application for registration.

15 On 18 July 2008 Sullivan J, at a "rolled up" hearing, granted the applicants permission to apply for

judicial review of the borough council's decision, but dismissed the substantive application. He did so on the ground that the local residents' deference to the golfers had prevented their user being "as of right" before 2002. He relied on para 82 of his own judgment in Laing Homes [2004] 1 P & CR 573 , and on para 57 of Lord Hoffmann's opinion in *Oxfordshire [2006] 2 AC 674* . He granted leave to appeal, commenting, at p 62, "deference is judge-made law, judge-made by me".

16 The *Court of Appeal (Laws, Rix and Dyson LJJ) [2009] 1 WLR 1461* unanimously dismissed the appeal in reserved judgments handed down on 15 January 2009. Dyson LJ gave the principal judgment, and Rix LJ added a concurring judgment. Both judgments put the decision squarely on the ground of deference excluding user as of right (although Dyson LJ denied that there was any "principle of deference"). The provisions of two Victorian statutes relating to greens (section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876 (39 & 40 Vict c 56)) which had formed part of the grounds of decision in Laing Homes, were not relied on in the Court of Appeal . In short, all the subsidiary issues have disappeared and this court is faced with the single issue of deference. It is not however a simple issue.

As of right

17 The concept of user "as of right" is found (either in precisely those words or in similar terms) in various statutory provisions dealing with the acquisition by prescription of public or private rights. Section 5 of the Prescription Act 1832 (2 & 3 Will 4, c 71) makes it sufficient to plead enjoyment "as of right" (while section 2 refers to a way "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years"). Section 31(1) of the Highways Act 1980 refers to use of a way ***81** being "actually enjoyed by the public as of right and without interruption for the full period of 20 years". Section 22(1A) of the Commons Registration Act 1965 , as inserted by section 98(3) of the Countryside and Rights of Way Act 2000 , refers simply to inhabitants indulging in lawful sports and pastimes "as of right" for at least 20 years.

18 Both *Sunningwell [2000] 1 AC 335* and *Beresford [2004] 1 AC 889* were concerned with the meaning of "as of right" in the Commons Registration Act 1965 . In Sunningwell Lord Hoffmann discussed the rather unprincipled development of the English law of prescription. He explained, at pp 350–351, that by the middle of the 19th century the emphasis shifted from fictions:

> "to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see Mills v Colchester Corpn (1867) LR 2 CP 476 , 486.) The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right-in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

Lord Hoffmann pointed out that for the creation of a highway, there was an additional requirement that an intention to dedicate it must be evinced or inferred (as to that aspect see R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2008] AC 221).

19 In *Sunningwell [2000] 1 AC 335* the villagers had used about ten acres of glebe land for dog-walking, children's games, and similar activities. This use seems to have coincided with the land being let for grazing by horses, but the report gives little detail about this. The inspector (as it happens, Mr Chapman) advised against acceptance of the registration because although the witnesses had said that they thought they had the right to use the glebe, they did not say that they thought the right was confined to villagers (as opposed to the general public). Lord Hoffmann held (and the rest of the Appellate Committee agreed) that this was an error. The decision of the Court of Appeal in R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102 was overruled . That was the context in which Lord Hoffmann stated in a passage, at pp 352–353, relied on by the respondents:

> "My Lords, I pause to observe that Lord Blackburn [in Mann v Brodie (1885) 10 App Cas 378 , 386, as to dedication of a highway] does not say that there must have been evidence that individual members of the public using the way believed there had been a

> dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been, as Parke B said in relation to private rights of way in Bright v Walker 1 Cr M & R 211 , 219, 'openly and in the manner that a person rightfully entitled would have used it'. The presumption arises, as Fry J said of prescription generally in Dalton v Angus & Co 6 App Cas 740 , 773, from acquiescence."

***82**

20 The proposition that "as of right" is sufficiently described by the tripartite test nec vi, nec clam, nec precario (not by force, nor stealth, nor the licence of the owner) is established by high authority. The decision of the *House of Lords in Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229* is one of the clearest: see Lord Davey, at p 238, and Lord Lindley, at p 239. Other citations are collected in *Gale on Easements* , 18th ed (2008), paras 4–80 and 4–81. The proposition was described as "clear law" by Lord Bingham of Cornhill in *Beresford [2004] 1 AC 889* , para 3. The opinion of Lord Rodger of Earlsferry, at para 55, is to the same effect. So is that of Lord Scott of Foscote, at para 34, though with a cautionary note as to the difference between the acquisition of public and private rights.

Laing Homes

21 The respondents' case is that although Sullivan J, in his judgment in Laing Homes [2004] 1 P & CR 573 , was indeed the first judge to speak in terms of "deference" shown by local residents, he was not striding into entirely unknown and uncharted territory. Earlier authorities (including those mentioned in the passage of Lord Hoffmann's opinion in *Sunningwell [2000] 1 AC 335* , 350–351 quoted in para 19 above) suggest that although the local residents' private beliefs as to their rights are irrelevant, the same is not true of their outward behaviour on the land in question, as it would appear to a reasonable owner of the land. It is relevant, on this argument, to look at what might today be called the residents' attitude or body language (this thought is elaborated in an imaginary example given by J G Riddall, "Miss Tomkins and the Law of Village Greens" [2009] Conveyancer and Property Lawyer 326). I propose to look next at Laing Homes [2004] 1 P & CR 573 itself, and then to consider how far the respondents can claim much more long-established roots for the doctrine of deference which Laing Homes articulates.

22 Laing Homes was concerned with three adjoining fields ("the application area"), extending in all to 38 acres, on the edge of Widmer End in Buckinghamshire. This land, together with three smaller fields not affected by the application for registration, had been acquired by Laing Homes, a house-builder, and held in its "land bank" since 1963. The land was subject to a grazing licence from 1973 to 1979, when the farmer stopped using it for grazing because of repeated troubles with trespassers. In the course of time footpaths were established round the three fields in the application area (cutting some corners) and these were officially recognised as public footpaths in June 2000. An application for registration of the application area was made in August 2000. The registration authority's decision to register the land as a village green was challenged by way of judicial review on various grounds (including human rights grounds on which Sullivan J did not find it necessary to rule).

23 In his judgment Sullivan J listed, in para 50, the four main grounds on which Laing Homes was attacking the inspector's report (and the registration based on it). The first ground was that there was insufficient evidence of the use of the whole of the application area for lawful sports and games over the 20-year period. The second was the inspector's conclusion that the use of the fields for an annual hay crop (from about 1980 until the early 1990s) was not incompatible with the establishment of village green rights. Sullivan J considered the second ground first. He discussed it at some ***83** length and differed from the inspector. He did so primarily on the view he took of the perception of a reasonable landowner, although he was also influenced by the point (no longer relied on) as to the Victorian statutes, at para 86:

> "Like the inspector, I have not found this an easy question. Section 12 [of the Inclosure Act 1857] acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of land for recreational purposes: see Sunningwell . If the statutory framework within which section 22(1) [of the Commons Registration Act 1965] was enacted had made provision for low-level agricultural activities to coexist with village green type uses, rather than effectively preventing them

> once such a use has become established, it would have been easier to adopt the inspector's approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with [the farmer's] taking of an annual hay crop for over half of the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist."

24 I have to say that I am rather puzzled by Sullivan J's summary of the evidence about hay-making, and the discussion of it (both by the inspector at paras 56 and 57, and by the judge himself at paras 59–63). There is a detailed description of the local residents keeping off the fields for a few days in spring when they were harrowed, rolled and fertilized, and again for a few days during hay-making. But there are only the most passing references by the judge (in paras 59 and 111) to the further need for people to keep off the fields for many weeks while the crop was growing, if it was to be worth the farmer's while to get it in. The length of this period would vary with the quality of the land and the seasonal weather, but would usually, I imagine, be of the order of three months. The evidence was that the farmer generally got well over 2,000 bales of hay from the application area. So it seems that the local residents must, in general, have respected the hay crop.

25 The puzzle is partly explained by Sullivan J's consideration of the first ground (evidence of use of the whole application area) which follows at paras 88–111. In para 111 the judge commented that there was an overlap between the two grounds, because the existence of public footpaths round the three fields (cutting some corners) provided an alternative explanation of the local residents' use of the fields. It seems likely that they used the perimeter paths and kept off the hay while it was growing, although their dogs may not have done, as the judge discussed at some length, at paras 103–110.

26 There are some dicta about Laing Homes in Lord Hoffmann's opinion in *Oxfordshire [2006] 2 AC 674* . Lord Rodger and I expressed general agreement with Lord Hoffmann, but did not comment on this point. Lord Hoffmann observed, at para 57:

> "No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so 'as of right'. But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as ***84*** having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not."

27 There was some discussion in the course of argument of what Lord Hoffmann meant by the first sentence of this passage. In the *Court of Appeal [2009] 1 WLR 1461* , para 45, Dyson LJ took it to mean inconsistency between competing uses manifested "where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees)". I am rather doubtful about that. I think it just as likely that Lord Hoffmann had in mind, not concurrent competing uses of a piece of land, but successive periods during which recreational users are first excluded and then tolerated as the owner decides. An example would be a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals were indoors for the worst of the winter.

28 Whether that is correct or not, I see great force in the second sentence of the passage quoted. Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. *Fitch v Fitch (1797) 2 Esp 543* is venerable authority for that. That is not to say that Laing Homes [2004] 1 P & CR 573 was wrongly decided, although I see it as finely-balanced. The residents of Widmer End had gone to battle on two fronts, with the village green inquiry in 2001 following a footpaths inquiry two or three years earlier, and some of the evidence about their intensive use of the footpaths seems to have weakened their case as to sufficient use of the rest of the application area.

The earlier authorities

29 I have already referred to Fitch v Fitch 2 Esp 543 , the case about cricket and hay-making at Steeple Bumpstead in Essex. The report is brief, but what Heath J is reported as having said, at pp 544–545, is a forthright declaration of the need for coexistence between concurrent rights:

> "The inhabitants have a right to take their amusement in a lawful way. It is supposed that because they have such a right, the plaintiff should not allow the grass to grow; there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers."

30 Against that Mr Laurence QC relied on the general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. That was in line with what Lord Hoffmann (in *Sunningwell [2000] 1 AC 335* , 350–351, quoted at para 18 above) called "the unifying element" in the tripartite test: why it would not have been reasonable to expect the owner to resist the exercise of the right.

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31 The first of the old authorities relied on by Mr Laurence was *Bright v Walker (1834) 1 Cr M & R 211* , 219, a case on a private right of way, in which Parke B spoke of use of a way "openly and in the manner that a person rightfully entitled would have used it". I read that reference to the manner of use as emphasising the importance of open use, rather than as prescribing an additional requirement. On its facts the case raised as much of an issue as to *vi* as to *clam* since gates had been erected and broken down during the relevant period. The point of law in the case turned on the peculiarity that the freehold owner of the servient tenement was a corporation sole.

32 The next case relied on (another case about a claim to a private way) was Hollins v Verney (1884) 13 QBD 304 (there is a fuller statement of the facts in the first instance report (1883) 11 QBD 715). Lindley LJ (giving the judgment of the Court of Appeal) observed 13 QBD 304 , 315:

> "No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute."

33 The second sentence of this passage begins with "Moreover", suggesting that Lindley LJ was adding to the requirement that the use should be continuous. But the passage as a whole seems to be emphasising that the use must be openly (or obviously) continuous (the latter word being used three more times in the passage). The emphasis on continuity is understandable since the weight of the evidence was that the way was not used between 1853 and 1866, or between 1868 and 1881. It was used exclusively, or almost exclusively, for carting timber and underwood which was cut on a 15-year rotational system. The use relied on was too sparse for any jury to find section 2 of the Prescription Act 1832 satisfied.

34 In *Bridle v Ruby [1989] QB 169* the plaintiff established a right of way by prescription despite his personal belief that he had such a right by grant. Ralph Gibson LJ said, at p 178:

> "The requirement that user be 'as of right' means that the owner of the land, over which the right is exercised, is given sufficient opportunity of knowing that the claimant by his conduct is asserting the right to do what he is doing without the owner's permission. If

> the owner is not going to submit to the claim, he has the opportunity to take advice and to decide whether to question the asserted right. The fact that the claimant mistakenly thinks that he derived the right, which he is openly asserting, *86 from a particular source, such as the conveyance to him of his property, does not by itself show that the nature of the user was materially different or would be seen by the owner of the land as other than user as of right."

That the claimant's private beliefs are generally irrelevant, in the prescription of either private or public rights, was finally confirmed by the *House of Lords in Sunningwell [2000] 1 AC 335* : see paras 18 and 19 above.

35 The last authority calling for mention on this point is *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035 (Court of Session); 1993 SC (HL) 44 (House of Lords*). In the Court of Session the Lord President (Lord Hope), after considering several authorities, observed, at p 1041:

> "The significance of these passages for present purposes is that, where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance."

Lord Hope's reference to the manner of use must, I think, be related to the unusual facts of the case (set out in detail at pp 1037–1038). The issue was whether there was a public right of way over an extensive walkway in a new town, designed to separate pedestrian from vehicular traffic. It gave access to the town centre where there were numerous shops (whose tenants no doubt had private rights of way for themselves and their customers). But the walk was also used for access to public places such as the railway station, the church, a health centre and a swimming pool. It was held that the use of the way "had the character of general public use of a town centre pedestrian thoroughfare", at p 1042. The House of Lords upheld this decision. It is worth noting that Lord Jauncey of Tullichettle stated, at p 47, "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor".

Deference or civility?

36 In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in *Sunningwell [2000] 1 AC 335* , to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector's word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the *87 owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998).

37 There is in my opinion a significant difference, on this point, between the acquisition of private and public rights. As between neighbours living in close proximity, what I have referred to as "body language" may be relevant. In a Canadian case of that sort, Henderson v Volk (1982) 35 OR (2d) 379, 384, Cory JA (delivering the judgment of the Court of Appeal of Ontario) observed:

> "It is different when a party seeks to establish a right-of-way for pedestrians over a sidewalk. In those circumstances the user sought to be established may not even be known to the owner of the servient tenement. In addition, the neighbourly acquiescence to its use during inclement weather or in times of emergency such as a last minute attempt to catch a bus, should not too readily be accepted as evidence of submission to

> the use. It is right and proper for the courts to proceed with caution before finding that title by prescription or by the doctrine of lost modern grant was established in a case such as this. It tends to subject a property owner to a burden without compensation. Its ready invocation may discourage acts of kindness and good neighbourliness; it may punish the kind and thoughtful and reward the aggressor."

38 That is, if I may say so, obviously good sense. But I do not think it has any application to a situation, such as the court now faces, in which open land owned by a local authority is regularly used, for various different forms of recreation, by a large number of local residents. The inspector's assessment did in my opinion amount to an error of law. He misdirected himself as to the significance of perfectly natural behaviour by the local residents.

Rights after registration

39 Mr Laurence made some forceful submissions as to what the position would have been on a double hypothesis: that the disputed land had been registered as a town green, and that it had continued to be let to the golf club after its registration. In those circumstances, he said, the fortunes of the golfers and the local residents would be dramatically reversed: instead of being all "give" by the residents it would be all "take", to the point at which the golf club would no longer be able to function at all. There was, he said, a massive mismatch between what the residents would have done in order to gain the rights, and what they would be in a position to do after the green had been registered. This lack of symmetry was a reason, he argued, for doubting the soundness of the reasoning on which the appellant's case rested.

40 These submissions raise two distinct questions. The first is a question of law about the effect of registration of a green. The second is a speculative question of predicting the behaviour of a group of people in an eventuality which cannot now arise.

41 I would spend little time on the second question. Like other members of the court, I am sceptical about the notion that the local residents' attitude towards the golfers, if the green were to be registered in circumstances where it was still being used by the golf club, would suddenly turn from friendly civility to vindictive triumphalism. Many of them must ***88*** have friends or neighbours who are members of the golf club; some are even members themselves. But I would accept that the question of law needs to be considered on the footing that it is at least possible that relations between the two groups might become rather more strained.

42 Here it is necessary to come back to *Oxfordshire [2006] 2 AC 674* . The proceedings in that case were not judicial review proceedings. They were initiated by the registration authority, by a claim form under CPR Pt 8 , for guidance on a pending application for registration (the first instance judgment is reported *[2004] Ch 253). In the House of Lords* both Lord Scott of Foscote and Baroness Hale of Richmond regarded some of the questions raised as unnecessary, academic and inappropriate: see Lord Scott, at paras 91–103, and Baroness Hale, at paras 131–137. The questions to which they most strongly objected were (i) whether, when a green was registered, the relevant inhabitants had legal rights to take recreation on it; and (ii) whether land registered as a green fell within the scope of what had been referred to as the Victorian statutes.

43 Lord Hoffmann, while recognising these concerns, thought that it would be appropriate to answer the questions, because Oxford City Council had a real interest in the question, at para 45:

> "But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so."

So Lord Hoffmann proceeded to answer them, and Lord Rodger and I expressed general agreement with his opinion.

44 Lord Hoffmann noted, at para 46, that registration is conclusive evidence of the matters registered, but "In the case of a town or village green, the registration states simply that the land is a green. No other information is prescribed". The position under the Commons Act 2006 will be similar once it has come fully into force. The only rights specifically registrable in respect of a town or village green will

be rights of common: see section 2(2) and section 3(4) . But section 3(5) enables regulations to be made requiring or permitting other information to be included in the register. Regulations have been made (The Commons Registration (England) Regulations 2008 (SI 2008/1961)) but they do not require or permit specific rights of recreation to be registered. The extensive management provisions in Part 2 of the Act apply to town or village greens only if they are subject to rights of common, and deal with the regulation of rights of common. This seems to be in line with what Lord Hoffmann said in *Oxfordshire [2006] 2 AC 674* , para 48, that although the Commons Registration Act 1965 was intended to be followed by further legislation in relation to the management of commons, it was by no means clear that Parliament contemplated further legislation as to rights over greens.

45 I must set out at some length what Lord Hoffmann said about rights after registration, at paras 49–51:

> "49. So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending commons commissioners round the country on a useless exercise. If the Act conferred no rights, **89* then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court. There would have been no point in the conclusive presumption in section 10. Another possibility is that registration conferred such rights as had been proved to support the registration but no more. So, for example, if land had been registered on the strength of a custom to have a bonfire on Guy Fawkes Day, registration would confer the right to have a bonfire but no other rights. But this too would make the registration virtually useless. Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.
>
> "50. In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell case [2000] 1 AC 335* , 357 a-c .
>
> "51. This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides."

Lord Hoffmann then, at paras 54–57, dealt with the Victorian statutes as I have already mentioned.

46 Lord Scott (thinking it right to express a limited view on this issue) disagreed, at para 105:

> "But I do not agree that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he has been able to use the land during that 20-year period. I do not accept that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field."

47 Having reconsidered the general agreement that I expressed in Oxfordshire , I find that I agree with almost all that Lord Hoffmann said in the paragraphs that I have quoted. He had already, in *Sunningwell [2000] 1 AC 335* , 357, explained that "sport or pastime" denotes a single composite class, and recognised that "dog walking and playing with children [are], in modern life, the kind of

informal recreation which may be the main function ***90*** of a village green". The only point on which I differ from Lord Hoffmann is the point which Lord Scott picked up in para 105: the notion that a custom to have an annual bonfire on Guy Fawkes Day could be a sufficient basis for registration of a green. Such a right might have been established as a stand-alone custom, but would to my mind be far too sporadic to amount to continuous use for lawful sports and pastimes (quite apart from the fact that most bonfires are now illegal on environmental grounds). Once that special case is eliminated, I see little danger, in normal circumstances, of registration of a green leading to a sudden diversification or intensification of use by local residents. The alleged asymmetry between use before and after registration will in most cases prove to be exaggerated. Golfers and local residents can coexist without much friction even when the latter have established legal rights.

Conclusion

48 Disparaging references are sometimes made to the "village green industry" and to applications for registration being used as a weapon of guerilla warfare against development of open land. The House of Lords has (both in Beresford [2004] 1 AC 889 and Oxfordshire [2006] 2 AC 674) expressed some doubt about the extension of town or village green protection to land very different (both in size and appearance) from a traditional village green. However, in the Commons Act 2006 Parliament has made it easier, rather than more difficult, to register a green. There is also the prospect (as Lord Hope of Craighead DPSC mentions in para 56 of his judgment) of further legislation, which might possibly make provision for the management of greens on lines comparable to those proposed for commons in Part 2 of the Commons Act 2006 . As it is, district councils have power under section 1 of the Commons Act 1899 to make by-laws for the preservation of order on commons, which are defined (in section 15) as including town and village greens. Even without such regulation, conflicts over competing uses (whether as between the owner and the local residents, or between different interest groups among the local residents) are capable of resolution by the "constant refrain in the law of easements that 'between neighbours there must be give as well as take'": *Gray & Gray, Elements of Land Law* , 5th ed (2009), para 5.2.72, citing Megarry J in Costagliola v English (1969) 210 EG 1425 , 1431.

49 For these reasons I would allow the appeal and order that the borough council should register the disputed land as a town green under section 1 of the Commons Act 2006 (if then in force in Redcar and Cleveland) or under the applicable transitional provisions.

LORD HOPE OF CRAIGHEAD DPSC

50 This appeal relates to an claim by Kevin Paul Lewis for judicial review of a decision of the General Purposes and Village Greens Committee of Redcar and Cleveland Borough Council on 19 October 2007 to reject an application to register part of the land in Redcar known as Coatham Common as a town or village green under the Commons Act 2006 . On 18 July 2008 Sullivan J [2008] EWHC 1813 (Admin) dismissed the application but granted permission to appeal. On 15 January 2009, the Court of Appeal (Laws, Rix and Dyson LJJ) [2009] 1 WLR 1461 dismissed the appeal. The claimant now appeals to this court. The interested party, ***91*** Persimmon Homes (Teesside) Ltd, seeks to develop the land for housing and leisure activities. It supports the case for the local authority, as it did in the courts below.

51 As Lord Walker of Gestingthorpe JSC has explained, the land is owned by the local authority. Until 2002 it was part of the land that formed the links of the Cleveland Golf Club. It comprised the first and eighteenth holes of the golf course and a practice ground. There were also substantial areas of rough ground beside and between these features. It was also used by the local inhabitants for informal recreation such as walking their dogs, children's games and picnics. They did not interfere with or interrupt play by the golfers. They would wait until the play had passed or until they were waved through by the golfers. The relationship between the golfers and the local inhabitants was cordial. The two activities appear to have coexisted quite happily during this period. The details are set out in the report by Mr Vivian Chapman QC ("the inspector"). He was appointed by the local authority to hold an inquiry following an application by Mr Lewis and a number of other local inhabitants to register an area of land which included the club house as a town or village green under the Commons Registration Act 1965 . He was asked to provide a further report following a second application to register the area with which this case is concerned which was made after the 2006 Act came into force. His comments in a series of further opinions on the relationship between the golfers and the local inhabitants confirmed his earlier conclusions that the local inhabitants deferred to the golfers, and that the deferral to golfing use precluded use of the land by the local inhabitants as of right for

recreational purposes. The relevant findings have been quoted in full by Lord Walker JSC: see paras 9–11 above.

52 On 18 January 2008 these judicial review proceedings were commenced. Sullivan J agreed with Mr Chapman's conclusion that the recreational use of the land was not "as of right" because it deferred to the use of the land by the golf club. Asking himself how the matter would have appeared to the golf club, he said that it would not be reasonable to expect the club to resist the recreational use of the land by local users if their use of the land did not in practice interfere with its use by the golf club: para 41. The *Court of Appeal [2009] 1 WLR 1461* agreed with that approach: Dyson LJ, para 54; Rix LJ, paras 64–65. Rix LJ said that, if it were otherwise, there would be no way of resolving questions that would subsequently arise, given that registration does not confer qualified or limited rights but the unqualified right to use the land generally for sports and pastimes. He envisaged questions as to whether, if a right of registration were to be assumed, the local inhabitants had a right of walking on the golf greens themselves during play or of playing golf as though they were members of the club itself.

The issues

53 As Lord Walker JSC has explained, the question is whether the land ought to have been registered. In an attempt to focus their arguments more precisely, the parties were agreed that it raised the following issues. (1) Where land has been extensively used for lawful sports and pastimes nec vi, nec clam, nec precario for 20 years by the local inhabitants, is it necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were ***92** asserting a right to use the land for the lawful sports and pastimes in which they were indulging? (2) If the answer to (1) is "yes", does the mere fact that local inhabitants did not prevent the playing of golf by walking in front of the ball (or seeking to prevent the playing of strokes by golfers) preclude the use from being "as of right" under section 15(4) ? (3) If the answer to (2) is "no", did the local authority (and the inspector) err in law in concluding that the inhabitants' use was not "as of right", given what the inspector described as "overwhelming evidence" that recreational use of the land by local people deferred to the golfing use?

54 This presentation was not, as it turned out, particularly helpful. As counsel recognised, issues (2) and (3) fall to be taken together, as they are both directed to the question of deference. And I agree with Lord Brown of Eaton-under-Heywood JSC that the critical question, which none of these issues addresses, is what are the respective rights of the local inhabitants and the owner of the land once it has been registered. It is a remarkable fact that the statute gives no guidance at all on this issue. In R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & C R 573 , paras 27–29, referring to what Carnwath J said in *R v Suffolk County Council, Ex p Steed (1995) 70 P & C R 487* , Sullivan J said that this was not the original intention. The 1965 Act was intended to be a two stage legislative process. As a first step the registers would establish the facts and provide a definitive record of what land was, and was not, common land or a town or village green. In the second stage Parliament would deal with the consequences of registration by defining what rights the public had over the land that had been registered.

55 In *New Windsor Comn v Mellor [1975] Ch 380* , 392, Lord Denning MR said that he hoped that the second stage legislation would not be long delayed. But here we are, 45 years after the passing of the 1965 Act. Parliament has still not said what these rights are. In *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* , para 48 Lord Hoffmann said that, while there were indications that further legislation about rights over common land was in prospect, it was by no means clear that Parliament contemplated further legislation about rights over village greens. It has been left to the courts to try to work this out for themselves. As Lord Hoffmann put in para 49, one has to look at the provisions about greens like those of any other legislation and assume that Parliament legislated for some practical purpose. I think that one must assume too that it was Parliament's intention that practical common sense would be the best guide to the way the public right was to be exercised once the land had entered the register.

56 In answer to a series of written questions by Lord Greaves, the Parliamentary Under-Secretary of State for the Department for the Environment, Food and Rural Affairs, Lord Davies of Oldham, said that the Government proposes to consult in the spring of 2010 as to whether changes are needed to the existing framework: Hansard (HL) written answers, 15 January 2010, cols *961–964* . This initiative appears to have been prompted by a research report which was received by DEFRA into the registration of new town and village greens, which has identified particular concerns as to its use in

relation to land which is subject to proposals for residential development. I hope that the opportunity will be taken to look at the consequences of registration as revealed by the developing case law as well as how the registration system itself is working.

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Previous authority

57 I agree with Lord Walker JSC that in none of the three decisions of the House of Lords to which he refers (see para 3, above) was it necessary for the House to address the question of deference which lies at the heart of this case. *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* was concerned with the registration of a glebe which was used predominantly by the villagers for informal recreation. The diocesan board had obtained planning permission to build two houses on part of the glebe, and it objected to registration. But the inspector found that it had been tolerant of harmless public use of the land for informal recreation. In *R (Beresford) v Sunderland City Council [2004] 1 AC 889* the land was an open, flat area of grass which was used by the local inhabitants for ball games and other lawful pastimes. The council cut the grass from time to time, but it did not use it in any other way that might have interfered with its use by the locals. In *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* , para 125 the land was described by Lord Walker of Gestingthorpe as an overgrown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in northwest Oxford-hardly the ideal site to focus close attention on the critical issue that is before us in this case.

58 The only passages in these three cases that might be taken as suggesting that the rights acquired by the local inhabitants would be enlarged over those of the owner once the land had been registered, as Rix LJ assumed would happen in this case, are to be found in Lord Hoffmann's speech in the Oxfordshire case. In para 51 he said of the effect of registration: "This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants." In para 59, where he distinguished the Oxfordshire case from the decision of the *European Court of Human Rights in JA Pye (Oxford) Ltd v United Kingdom [2005] 3 EGLR 1* , there is a subtle change of language. He said:

> "In the present case, first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration under the 1965 Act was introduced to preserve open spaces in the public interest."

I think that the first passage, in which Lord Hoffmann uses the words "interfere with", goes some way to supporting the idea that after registration the rights of the local inhabitants predominate. The second passage, on the other hand, does not. "Preventing" the use of the land for recreation would, of course, defeat the point of registration completely.

59 Lord Scott of Foscote was obviously very troubled in the Oxfordshire case by the idea that the public would acquire much broader, more intrusive rights over the land after registration and the management problems that this might give rise to: para 85. But his objections were, as I read them, based on an assumption as to the effect of the registration as a town or village green on places such as a dense wood in which people wandered to pick bluebells or look for mushrooms: para 76. His dissent casts some light on what he thought was at issue in that case. But I do not think that it can be used to elevate what Lord Hoffmann said in para 51 to a ruling on the point which, on the facts of that case, did not arise.

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60 The only case which directly addresses the question of deference is R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573 , in which Sullivan J quashed the resolution that the land should be registered. As Dyson LJ observed in the *Court of Appeal [2009] 1 WLR 1461* , para 30, the concept of deference as a bar to the creation of a new town or village green is Sullivan J's creation. The land in that case consisted of three adjacent fields which Laing Homes Ltd held as part of its land bank. It granted a grazing licence to a farmer, Mr Pennington, who for a few years at the start of the 20-year period kept cattle on the fields until he had to give this up because of problems with members of the public, whose use of the perimeters of the fields resulted in the paths that they had established there being registered as public footpaths. For over half of that period Mr

Pennington used the land for taking an annual crop of hay. The question was whether this use of the land, or the growing of any other crop, was inconsistent with the right to use the land for recreation that was contended for by the local inhabitants.

61 After referring to passages in Lord Hoffmann's speech in the *Sunningwell case [2000] 1 AC 335* about the extent of the user by the public that was needed to establish that the land was being used by them as of right, Sullivan J said [2004] 1 P & CR 573 , para 82:

> "If the starting point is, 'how would the matter have appeared to Laings?' it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's, use of them, for taking an annual hay crop."

In para 84 he said that, so long as the local inhabitants' recreational activities did not interfere with the way in which the owner had chosen to use his land, there would be no suggestion to him that they were exercising or asserting a public right to use it for lawful sports and pastimes. In para 85 he said:

> "I do not believe that Parliament could have intended that such a user for sports or pastimes would be 'as of right' for the purposes of section 22 [of the 1965 Act]. It would not be 'as of right', not because of interruption or discontinuity, which might be very slight in terms of numbers of days per year, but because the local inhabitants would have appeared to the landowner to be deferring to his right to use his land (even if he chose to do so for only a few days in the year) for his own purposes."

62 In para 86 he added these words:

> "Like the inspector, I have not found this an easy question. Section 12 acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of the land for recreational purposes: see Sunningwell . If the statutory framework within which section 22(1) was enacted had made provision for low-level activities to coexist with village green type uses, rather than effectively preventing them once such a use has become established, it would have been easier to adopt the inspector's approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with Mr Pennington's taking of an annual hay crop for over ***95*** half the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist."

63 This passage suggests that Sullivan J was approaching the case on the assumption that registration was inconsistent with the continued use of the land by Mr Pennington for taking the annual hay crop. In other words, registration would bring non-interference to an end. The public right to use the fields for recreational purposes would make it impossible for them to be used for growing hay. His approach has also been taken as indicating that in cases where the land has been used by a significant number of inhabitants for 20 years for recreational purposes nec vi, nec clam, nec precario, there is an additional question that must be addressed: would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging? I am not sure that Sullivan J was really saying that there was an additional question that had to be addressed. But if he was, I would respectfully disagree with him on both points.

The section 15 questions

64 The application in this case was made under section 15(4) of the 2006 Act, which provides that a person may apply for registration of land as a town or village green where "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years" if they ceased to do so before the commencement of that subsection, so long as the application is made within a period of five years beginning with the date of the cessation. The words that I have set out in quotation marks appear in each of subsections (2), (3) and (4) of section 15 . The definition of the phrase "town or village green"

in section 22(1) of the 1965 Act, as amended by section 98 of the Countryside and Rights of Way Act 2000 , has been repeated throughout this section, with the addition of the words "a significant number".

65 The theory on which these provisions are based is known to the common law as prescription: see Lord Hoffmann's explanation in the *Sunningwell case [2000] 1 AC 335* , 350–351, of the background to the definition of "town or village green" in section 22(1) of the 1965 Act. As the law developed in relation to private rights, the emphasis was on the quality of the user for the 20-year period which would justify recognition of a prescriptive right:

> "It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner ... The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right-in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in Dalton v Henry Angus & Co (1881) 6 App Cas 740, 773 Fry J (advising the House of Lords) was able to rationalise the law of prescription as follows: 'the whole law of prescription and the whole law which ***96** governs the presumption or inference of a grant or covenant rest upon acquiescence'."

Section 2 of the Prescription Act 1832 (2 & 3 Will 4, c 71) made it clear that what mattered was the quality of the user during the 20-year period. It had to be by a person "claiming right thereto". It must have been enjoyed openly and in the manner that a person rightfully entitled would have used it, and not by stealth or by licence: *Bright v Walker (1834) 1 Cr M & R 211* , 219 per Parke B. In *Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229* , 239 Lord Lindley said that the words "as of right" were intended to have the same meaning as the older expression nec vi, nec clam, nec precario.

66 Referring then to section 1(1) of the Rights of Way Act 1932 , Lord Hoffmann said in the *Sunningwell case [2000] 1 AC 335* , 353:

> "The words 'actually enjoyed by the public as of right and without interruption for a full period of 20 years' are clearly an echo of the words 'actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years' in section 2 of the 1832 Act. Introducing the Bill into the House of Lords (HL Debates), 7 June 1932, col 637, Lord Buckmaster said that the purpose was to assimilate the law of public rights of way to that of private rights of way. It therefore seems safe to assume that 'as of right' in the 1932 Act was intended to have the same meaning as those words in section 5 of the 1832 Act and the words 'claiming right thereto' in section 2 of that Act."

He concluded, at p 354, that there was no reason to believe that "as of right" in section 22(1) of the 1965 Act was intended to mean anything different from what those words meant in the 1832 and 1932 Acts. The same can be said of the meaning of those words in section 15 of the 2006 Act.

67 In the light of that description it is, I think, possible to analyse the structure of section 15(4) in this way. The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word "lawful" indicates that they must not be such as will be likely to cause injury or damage to the owner's property: see *Fitch v Fitch (1797) 2 Esp 543* . And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , paras 6, 77), the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter. There is no third question. The answer to the first issue (see para 4, above) is: No.

68 Mr Charles George QC for the claimant said that there was only one simple test: was the use caught by any of the three vitiating circumstances? Mr George Laurence QC confirmed that it was common ground that the use of the land for recreation in this case was nec vi, nec clam, nec precario,

but he said that this did not exhaust the issue. The unifying principle was one of *97 reasonableness. He said that, if it was not reasonable to expect the owner to resist what the users were doing, no harm could come to the owner from his omission to resist or complain. In this case, as the Inspector held, the local inhabitants overwhelmingly deferred to the golfers. As Dyson LJ said in the Court of Appeal [2009] 1 WLR 1461 , paras 48–49, the user of the local inhabitants was extensive and frequent, but so too was the use by the golfers: the greater the degree of deference, the less likely it was that it would appear to the reasonable owner that the locals were asserting any right to use the land.

69 I agree with Mr George that all the authorities show that there are only three vitiating circumstances: Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229 , 238, per Lord Davey, p 239, per Lord Lindley; the Sunningwell case [2000] 1 AC 335 , p 350, per Lord Hoffmann; the Beresford case [2004] 1 AC 889 , para 3, per Lord Bingham of Cornhill, para 16, per Lord Scott of Foscote, para 55, per Lord Rodger of Earlsferry; *Riddall & Trevelyan, Rights of Way* , 4th ed (2007), pp 41, 47. There is no support there for the proposition that there is an additional requirement. But that does not answer Mr Laurence's point, which was really and quite properly directed to the first question as to the quality of the user that is relied on. That, as has been said, is the critical question in this case.

Deference

70 In para 175 of his report the inspector said that he found that the relationship between the golfers and the local recreational users was generally cordial. This was because local people (with the exception of Squadron Leader Kime) did not materially interfere with the use of the land for playing golf. They would wait until the play had passed or until they had been waved on by the golfers. When local people did inadvertently impede play, the golfers' shout of "fore" was enough to warn them to clear the course. The Inspector asked himself whether this indicated deference to the golfers. Following what Sullivan J said in the Laing case [2004] 1 P & CR 573 , para 85, he understood that the use would not be "as of right" if the local inhabitants would have appeared to the owner to be deferring to his right to use his land for his own purposes. That approach is based on the judge's assumption, which the Court of Appeal endorsed, that the effect of registration would be to enlarge the right of the local inhabitants in a way that would effectively prevent the golfers from using the land for their own purposes.

71 I do not find anything in the words used in section 15(4) of the 2006 Act that supports that approach. On the contrary, the theme that runs right through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other. In Dalton v Henry Angus & Co (1881) 6 App Cas 740 , 774 Fry J, having stated at p 773 that the whole law of prescription rests upon acquiescence, said that it involved among other things the abstinence by the owner from any interference with the act relied on "for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop *the act* being done" (my emphasis). In other words, one looks to the acts that have been acquiesced in. It is those acts, and not their enlargement in a way that makes them more *98 intrusive and objectionable, that he afterwards cannot interfere to stop. This is the basis for the familiar rule that a person who has established by prescriptive use a right to use a way as a footpath cannot, without more, use it as a bridleway or for the passage of vehicles.

72 In White v Taylor (No 2) [1969] 1 Ch 160 , 192 Buckley LJ said that the user must be shown to have been "of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, *and of a right of the measure of the right claimed* " (again, my emphasis). That was a case in which it was claimed, among other things, that sheep rights had been established by prescription at common law. But I think that this observation is consistent with the approach that is taken to prescriptive rights generally. It has to be recognised, of course, that once the right to use the land for lawful sports and pastimes is established and the land has been registered its use by the local inhabitants for those purposes is not restricted to the sports or pastimes that were indulged in during the 20-year period. Lord Hoffmann said in the Oxfordshire case [2006] 2 AC 674 , para 50, that the rational construction of section 10 of the 1965 Act, which did not require the rights of recreation as such to be registered, was that land registered as a town or village green can be used generally for sports and pastimes:

> "It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell case [2000] 1 AC 335* , 357 a-c ."

As he put in the passage referred to in the *Sunningwell case [2000] 1 AC 335* , as long as the activity can properly be called a sport or pastime, it falls within the composite class. This approach indicates that, while the principle of equivalence tells one in general terms what the land may be used for, there may be some asymmetry as to the manner of its use for that purpose before and after it has been registered. But it does not follow that, where the use for recreation has coexisted with the owner's use of the land during the 20-year period, the relationship of coexistence is ended when registration takes place.

73 In Fitch v Fitch 2 Esp 543 , where the inhabitants had the right to play lawful games and pastimes on the plaintiff's close which he used for growing grass for hay, the jury were told that the rights of both parties were distinct and might coexist together. But the inhabitants could not use the close in the exercise of their right in a way that was not fair or was improper. Referring to that case in the *Oxfordshire case [2006] 2 AC 674* , para 51, Lord Hoffmann said that there had to be give and take on both sides. Mr Stewart Smith, following Mr Laurence, did not agree. He said that it was fundamental to his argument that the concept of give and take had no place in rights of the kind that were established by registration under the 2006 Act. He submitted that these rights were unqualified and unlimited. He said that Fitch v Fitch did not support the idea of give and take, and he sought to contrast rights of the kind that follow registration with those of the kind discussed in Mercer v Woodgate (1869) LR 5 QB 26 , where there was dedication of the right of way to the public subject to the owner's right to *99 plough the soil in the due course of husbandry. Cockburn CJ said, at p 30, that there would be great injustice and hardship to hold that there had been an absolute dedication where the owner had clearly only intended a limited dedication. Blackburn J said, at p 31, that he could see no objection in law to such a partial dedication.

74 I agree that care needs to be taken in drawing conclusions from cases about the creation of a right of way by dedication. But the concepts of partial dedication and the coexistence of rights on both sides appear to me to be capable of being applied generally. Lord Hoffmann would not have mentioned give and take in the *Oxfordshire case [2006] 2 AC 674* if he had thought that it had no application to town and village greens. If it were otherwise it would in practice be very difficult, if not impossible, to obtain registration in cases where the owner is putting his land to some use other than, perhaps, growing and cutting grass for hay or silage. There being no indication in the statute to the contrary, I would apply these concepts to the rights created by registration as a town or village green too.

75 Where then does this leave deference? Its origin lies in the idea that, once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: the Laing case [2004] 1 P & CR 573 , para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20-year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can coexist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice coexist.

76 Of course, the position may be that the two uses cannot sensibly coexist at all. But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights coexist over the same land there may be occasions when they cannot practically be enjoyed simultaneously: Rowena Meager, "Deference & user as of right: an unholy alliance", Rights of Way Law Review, October 2009, section 15.3, pp 147, 152. If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the

landowner they could, no doubt, be restrained by an injunction: Philip Petchey, " R (Lewis) v Redcar and Cleveland Borough Council ", Rights of Way Law Review, March 2009, section 15.3, pp 139, 143. In my opinion the inspector misdirected himself on this point. The question then is whether the council's decision which was based on his recommendation can be allowed to stand if the facts are approached in the right way.

100

77 The facts of this case, as described by the inspector, show that the local inhabitants (except for Squadron Leader Kime) were behaving when they were using the land for sports and pastimes in the way people normally behave when they are exercising public rights over land that is also used as a golf course. They recognise that golfers have as much right to use the land for playing golf as they do for their sports and pastimes. Courtesy and common sense dictates that they interfere with the golfer's progress over the course as little as possible. There will be periods of the day, such as early in the morning or late in the evening, when the golfers are not yet out or have all gone home. During such periods the locals can go where they like without causing inconvenience to golfers. When golf is being played gaps between one group of players and another provide ample opportunities for crossing the fairway while jogging or dog-walking. Periods of waiting for the opportunity are usually short and rarely inconvenience the casual walker, rambler or bird-watcher. I cannot find anything in the inspector's description of what happened in this case that was out of the ordinary. Nor do I find anything that was inconsistent with the use of the land as of right for lawful sports and pastimes.

Conclusion

78 For these reasons, and those given by everyone else with which I agree, I would allow the appeal and make the order that has been proposed by Lord Walker JSC.

LORD RODGER OF EARLSFERRY JSC

79 I agree with the judgment of Lord Walker of Gestingthorpe JSC. In view of the importance of the issue, I add some observations of my own.

80 As Lord Walker JSC has explained, until 2002 an area of land ("the disputed land") in the Coatham district of Redcar formed part of a golf course on which members of the Cleveland Golf Club played. The club were tenants of the council, which owned the land. Then, in 2002, the course was reconfigured and the club gave up its tenancy of the disputed land. The following year, the council entered into an agreement with Persimmon Homes (Teesside) Ltd for a mixed residential and leisure development on an area of land of which the disputed land formed an important part.

81 In March 2005 a group of residents applied to have the disputed land registered as a village green. In March 2006 the inspector recommended against registration. In June 2007 Mr Lewis and his fellow applicants put in a fresh application under section 15 of the Commons Act 2006 . Again the inspector recommended against registration and the matter has now led to the present appeal.

82 This sequence—a proposal to develop an area of open land, followed by an application to register the land as a village green in order to stop the development-is very familiar. The House of Lords dealt with three such cases in the space of a few years and newspaper articles refer to many other examples. But the fact that the disputed land was used by the golf club during the period of 20 years which the applicants rely on to justify its registration as a village green has prompted much heart-searching as to what the position would have been if the land had been registered as a village green while the club was still in occupation and its members were still wanting to play on the land. Would registration have enabled the dog ***101*** walkers of Redcar to take over and, in effect, extinguish the rights of the golfers to play on that part of their course?

83 However interesting the point of law may be, in a case like this the issue is more than just a little unreal. The fact of the matter is that, if the golf club had remained as tenants after 2002, the golfers would have continued to hack their way over the disputed area and the dog walkers would have continued to make their way across the course. It is a fair bet that in that happy state of affairs no one would have dreamed of applying to have the land registered as a village green. It was only the prospect of the development on this open space, when the golf club was no longer using it, which prompted the application for registration with a view to stopping the development in its tracks. So, in the real world, the dog walkers and golfers will never actually have to coexist on the disputed land if it is registered as a village green.

84 If, however, in some imaginary parallel universe, the two groups had been required to coexist after registration, then, like Lord Walker JSC, I find it hard to imagine that there would, in practice, have been many problems. The pre-existing situation suited the local inhabitants well enough: doubtless, some of them were themselves members of the club and played on the land; in any event, the golf club must have kept the grass cut and the area looking presentable. If the inhabitants had previously shown no inclination to break out the croquet hoops, or to set up butts or cricket stumps or to dance around a maypole on the disputed land, it seems unlikely that registration would have suddenly brought on the urge. Indeed, too many developments of these kinds would probably have upset the dog walkers almost as much as the golfers. In all likelihood, therefore, things would have gone on much as before, with a bit of give and take on both sides. I would therefore particularly associate myself with what Lord Walker JSC says in para 47 of his judgment.

85 Under section 15 of the Commons Act 2006 registration of land as a village green requires that a significant number of the inhabitants of any locality, or of any neighbourhood in a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. Since *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* it has been settled law that dog walking and playing with children count as lawful sports and pastimes. Since both activities can and do take place on almost any and every open space near centres of population, the scope for applying to register land as a village green is correspondingly wide. Owners of land are taken to be aware of this chapter of the law and of the need to take appropriate preventive steps if they see a risk of circumstances arising in which an application could be made and their land become registered as a village green. If they fail to do so, they are treated as having acquiesced in the inhabitants indulging in sports and pastimes on their land "as of right".

86 Here the evidence shows that, as far back as living memory goes, many local inhabitants used the disputed land for informal recreation such as dog walking and children's play. But the courts below have held that they were not doing so "as of right".

87 The basic meaning of that phrase is not in doubt. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* Lord Hoffmann showed that the expression "as of right" in the ***102** Commons Registration Act 1965 was to be construed as meaning nec vi, nec clam, nec precario. The parties agree that the position must be the same under the Commons Act 2006 . The Latin words need to be interpreted, however. Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.

88 The opposite of "peaceable" user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is "vi" only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi. See, for instance, D.43.24.1.5–9, Ulpian 70 ad edictum, commenting on the word as used in the interdict quod vi aut clam.

89 English law has interpreted the expression in much the same way. For instance, in Sturges v Bridgman (1879) 11 Ch D 852 , 863, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:

> "Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, *or which he contests and endeavours to interrupt* , or which he temporarily licenses." (Emphasis added.)

If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi and so does not give rise to any right against him. Similarly, in Dalton v Henry Angus & Co (1881) 6 App Cas 740 , 786, Bowen J equated user nec vi with peaceable user and commented that a neighbour,

> "without actual interruption of the user, ought perhaps, on principle, to be enabled by

> continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton v Swansea Waterworks Co (1851) 17 QB 267* ."

The contrary view, that the only manner in which enjoyment of window lights could be defeated before the Prescription Act was by physical obstruction of the light, "was not the doctrine of the civil law, nor the interpretation which it placed upon the term 'non vi' ..."

90 In short, as *Gale on Easements* , 18th ed (2008), para 4–84, suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.

91 In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 350–351, Lord Hoffmann found that the unifying element in the three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right. In the case of nec vi he said this was "because rights ***103** should not be acquired by the use of force". If, by "force", Lord Hoffmann meant only physical force, then I would respectfully disagree. Moreover, some resistance by the owner is an aspect of many cases where use is vi. Assuming, therefore, that there can be vis where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

92 If, then, the inhabitants' use of land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious. This is at least part of the reason why, as Lord Jauncey of Tullichettle observed, in the context of a claim to a public right of way, in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1993 SC (HL) 44* , 47, "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor".

93 In this case the local inhabitants' use of the disputed land for recreation was peaceable, open and not based on any licence from the council or the golf club. So, prima facie, the inhabitants did everything that was necessary to bring home to the council, if they were reasonably alert, that the inhabitants were using the land for recreation "as of right".

94 But the council argue that, since there were competing interests, the inhabitants' use of the land was peaceable only because they "overwhelmingly" deferred to the golfers' simultaneous use of the same land. Had they not done so, it would have become contentious. But, because they routinely deferred to the golfers, the inhabitants did not do "sufficient to bring home to the reasonable owner of the application site that they were asserting a right to use it": Dyson LJ *[2009] 1 WLR 1461* , para 49. In other words, the reasonable owner of the disputed land would have inferred from the behaviour of the inhabitants that they were not asserting a right over the land-and so would have seen no need to take any steps to prevent such a right accruing.

95 On closer examination, the starting point for this argument must be that the owner of the land is entitled to infer from the inhabitants' behaviour in deferring to the golfers that they are aware of the legal position. But that starting point is inherently implausible. To adapt what Lord Sands said in connexion with a public right of way in *Rhins District Committee of Wigtownshire County Council v Cuninghame 1917 2 SLT 169* , 172, people walk their dogs or play with their children on the disputed land because they have been accustomed to see others doing so without objection. The great majority know nothing about the legal character of their right to do so and never address their minds to the matter. Moreover, to draw an inference based on the premise that the inhabitants are aware of the legal position is hard to reconcile with the decision in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 355–356, that the subjective views of the inhabitants as to their right to indulge in sports and pastimes on the land are irrelevant. It would therefore have been far from reasonable for the council to infer that the inhabitants' behaviour towards the golfers was based on some understanding of the legal position. It would have been equally unreasonable for the council to go further and conclude that the inhabitants were deferring to the golfers because of a conscious ***104** decision on their part to respect what they perceived to be the superior rights of the owners of the land.

96 Such a conclusion might, just conceivably, have been plausible and legitimate if there had been no other explanation for the inhabitants' behaviour. But that is far from so. The local inhabitants may well have deferred to the golfers because they enjoyed watching the occasional skilful shot or were amused by the more frequent duff shots, or simply because they were polite and did not wish to

disturb the golfers who---experience shows---almost invariably take their game very seriously indeed. A reasonable landowner would realise that any of these motives was a more plausible explanation for the inhabitants' deference to the golfers than some supposed unwillingness to go against a legal right which they acknowledged to be superior. In my view the inspector misdirected himself on this aspect of the case.

97 I would accordingly allow the appeal and make the order proposed by Lord Walker JSC. I confess that I view the outcome with little enthusiasm. The idea that this land should be classified and registered as a village green, when it was really just an open space that formed part of a golf course, is unattractive, to say the least. It is hard to imagine that those who devised the registration system ever contemplated that it would produce such a result. But, given the established case law and given also that Parliament has not amended the law despite the known problems, the result is unavoidable.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

98 I would formulate the critical question for the court's determination on this appeal very differently from any of those identified in the statement of facts and issues. The critical question to my mind is what are the respective rights of the landowner ("the owner") and the local inhabitants ("the locals") over land once it is registered as a town or village green?

99 Take the facts of this case, as already sufficiently recounted by other members of the court, but assume that the land here in question, instead of becoming vacant in 2002 and subject now to development proposals, remained in use by the owner (as for convenience I shall call the Cleveland Golf Club, the actual owner's licensee) as the first and eighteenth holes (and practice green) of their golf course. Suppose then that the local inhabitants, having themselves made such use of the land as the inspector records, "deferring" to the golfers in the way he describes, successfully applied for its registration as a town green, what then would be the consequences with regard to the owner's own continuing rights? Would the owner remain entitled to use the land for golf with the locals continuing to "defer" to the golfers? Or would the balance shift entirely, the locals' rights being substantially enlarged by registration, the owner's effectively extinguished?

100 So far from this question begging that as to the right to registration (the ultimate question at issue here), it seems to me one which necessarily should be resolved before it can sensibly be decided what must be established in order to have the land registered. Indeed, I may as well say at once that, were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold ***105** that more is required to be established by the locals merely than use of the land for the stipulated period nec vi nec clam nec precario. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case.

101 This is not merely because in my opinion no other approach would meet the merits of the case. Also it is because, to my mind, on the proper construction of section 15 of the Commons Act 2006 , the only consequence of registration of land as a green is that the locals gain the legal right to continue to "indulge" in lawful sports and pastimes upon it (which previously they have done merely as *if* of right)—no more and no less. To the extent that the owner's own previous use of the land prevented their indulgence in such activities in the past, they remain restricted in their future use of the land. The owner's previous use ex-hypothesi would not have been such as to have prevented the locals from satisfying the requirements for registration of the land as a green. No more should the continuance of the owner's use be regarded as incompatible with the land's future use as a green. Of course, in so far as future use by the locals would *not* be incompatible with the owner continuing in his previous use of the land, the locals can change, or indeed increase, their use of the land; they are not confined to the same "lawful sports and pastimes", the same recreational use as they had previously enjoyed. But they cannot disturb the owner so long as he wishes only to continue in his own use of the land.

102 Is there, then, anything in the case law which precludes our deciding, as I have already indicated I would prefer to decide, that registration does not carry with it a right in future to use the land inconsistently with such use as the owner himself has been making and wishes to continue making of

it? The respondents here urge that the decision of the House of Lords in Oxfordshire County Council v Oxford City Council [2006] 2 AC 674 is just such a case. They so submit notwithstanding that the land there was disused scrubland of which the owner made no use whatever so that no question arose there as to possibly conflicting uses or the respective rights of owners and locals following registration. For my part I simply cannot regard the Oxfordshire case as having decided the particular question I am addressing here. The respondents rely on passages in Lord Hoffmann's speech such as that, following registration, "[the owner] still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants" (para 51) and "the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation": para 59. To my mind, however, these are not inconsistent with the position which I have suggested arises on registration and, indeed, (also at para 51) Lord Hoffmann states: "There has to be give and take on both sides."

103 True it is that, in a partially dissenting opinion, Lord Scott of Foscote, at para 105, himself appears to have understood the other members of the committee to have decided that registration of land as a green *106

> "bring[s] about a diminution of the landowner's property rights, not simply by establishing the local inhabitants' right to go on doing what they had been doing for the last 20 years but by depriving the landowner of the right to go on doing what he has been doing for the last 20 years."

Lord Scott did

> "not agree [inferentially, with the majority view] that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he had been able to use the land during that 20-year period ... [or] that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field."

That, however, was in the context of Lord Scott's view, at para 106, that registration of the land there in question would (or at least should) entitle the locals only to

> "recreative rights of user ... commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes [for instance, clay pigeon shooting or archery contests]"

It is important to note, moreover, that all of this was concerned with the first of the ten issues before the House as to which it was held (per the headnote) that:

> "registration gave rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes, such rights extending (Lord Scott of Foscote dissenting) to sports and pastimes generally and not merely that use which had been the basis for registration, the landowner retaining the right to use the land in any way which did not interfere with those rights."

104 I repeat, the position arising on registration at a time when both the owner and the locals are using land in theoretically conflicting ways but in fact harmoniously simply did not arise in the Oxfordshire case and I for my part would decline to treat that case as if it has decided how such an issue should be resolved.

105 I would, therefore, hold that in this different situation the owner remains entitled to continue his use of the land as before. If, of course, as in the Oxfordshire case itself, he has done nothing with his land, he cannot complain that upon registration the locals gain full and unqualified recreational rights over it. But that is not the position I am considering here.

106 In short, on the facts of this case, had the use of the land as part of a golf course continued, the locals would in my opinion have had to continue "deferring" to the golfers. By this I understand the inspector to have meant no more than that the locals (with the single exception of Squadron Leader Kime) recognised the golfers' rights to play (in this sense only the locals "overwhelmingly deferred to golfing use"), both locals and golfers sensibly ***107*** respecting the use being made of the land by the other, neither being seriously inconvenienced by the other, sometimes the locals waiting for the golfers to play before themselves crossing, sometimes the golfers waiting for the walkers to cross before playing. It is not unique for golf courses to embrace at least some common land and there are innumerable courses crossed by public footpaths. Both walkers and golfers are generally sensible and civilised people and common courtesy dictates how to behave. Harmonious coexistence is in practice easily achievable. For my part, and in the light of my own experience both as a golfer and a walker for over six decades, I do not read the inspector's findings as indicating (to quote Sullivan J) [2008] EWHC 1813 at [40] "that there was overwhelmingly 'give' on the part of the local users and 'take' on the part of the golfers".

107 This being so I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker of Gestingthorpe JSC has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather, as Lord Hope of Craighead DPSC, Lord Walker and Lord Kerr of Tonaghmore JJSC make plain, the focus must always be on the way the land has been used by the locals and, above all, the quality of that user.

108 I too, therefore, would allow this appeal.

LORD KERR OF TONAGHMORE JSC

109 For the reasons given by Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood JJSC with all of which I agree, I too consider that this appeal should be allowed. I venture to offer a few words of my own because my conclusion that the appeal should be allowed represents a change from the view that I initially held and because I can well understand why the Court of Appeal and Sullivan J dismissed the claim for judicial review.

110 The critical question in this case centres on the meaning to be given to the words "as of right" in section 15 of the Commons Act 2006 . It is not possible to give a literal interpretation to the words since, clearly, the right cannot vest in the local inhabitants until the period of 20 years has elapsed. They cannot be considered to have indulged in sports and pastimes by dint of a right until the right has come to fruition: see Lord Bingham of Cornhill in *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , para 3. It is also clear that they do not need to believe that they have a right: see below. As Lord Walker of Gestingthorpe said in the Beresford case, at para 72, it has sometimes been suggested that the meaning of the statutory formula is closer to "as if of right": see, for instance, Lord Cowie in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035* , 1043.

111 Using this formulation, the question is what does "as if of right" mean. Does it simply mean openly indulging in the pastimes etc without force or under licence or does it connote something more? Clearly, it cannot be construed to mean "as if they believed they had the right". The *House of Lords so held in R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* . ***108*** Does it mean that they *acted* as if they had the right? If so, how is that to be judged? Does it mean that they gave every indication that they had the right to indulge in the pastimes and sports? According to Mr George QC, the only exception to the tripartite test arises where the users expressly represent that they are not asserting any right at all. In those circumstances, according to him, they are either benefitting from the implied permission of the owner or they are covertly allowing the necessary period to elapse in which case they fall foul of the requirement that the use of the lands should not be secret.

112 The question that has troubled me is, "What if the inhabitants' engagement in the pastimes and sports is not on foot of an express representation that they are not asserting a right but on the basis of an unspoken understanding by all concerned that they are not doing so?" Is there a reason why, as a matter of principle, there should be any different legal outcome? It appears to me that there is none. If the owner of the lands and those who recreate on them share the appreciation that no right is being

asserted, then no right is acquired. Therefore, as Lord Hope DPSC has said (in para 69 of his judgment), one must focus on the manner in which the local inhabitants have used the land or, as he has put it, "the quality of the user that is relied on".

113 The use of the word "deferring" in the context of the inhabitants' use of lands is potentially misleading. In common parlance "deferring to an owner's use of his lands" can easily be understood to mean no more than the ordinary courteous and civilised acknowledgement of the entitlement of the owner to make use of the lands. Such civility does not necessarily import an acceptance of any lack of entitlement on the part of the users to continue to indulge their recreations with a view to the acquisition of a right under section 15 . But if deference takes the form of acceptance that the users are not embarked on a process of accumulating the necessary number of years of use of the lands or if it evinces an intention not to embark on such a process, this must surely have significance in relation to the question whether the inhabitants have indulged in the activities "as of right".

114 It is for this reason in particular that I am in emphatic agreement with Lord Hope DPSC in his view that one must focus on the way in which the lands have been used by the inhabitants. Have they used them as if they had the right to use them? This question does not require any examination of whether they believed that they had the right. That is irrelevant. The question is whether they acted in a way that was comparable to the exercise of an existing right? Posed in that way, one can understand why the Court of Appeal considered that the examination of the relevant question partook of an inquiry as to the outward appearance created by the use of the lands by the inhabitants. On that basis also one can recognise the force of Mr Laurence QC's argument that it was necessary to show not only that the lands had been used nec vi, nec clam, nec precario but also that it was reasonable to expect the landowner to resist the use of the land by the local inhabitants. The essential underpinning of both these assertions, however, was the view that the registration of the lands as a village or town green had the inexorable effect of enlargement of the inhabitants' rights and the commensurate diminution of the right of the owner to maintain his pre-registration level of use, if that interfered with the inhabitants' extended use of the lands.

109

115 For the reasons that Lord Hope DPSC and Lord Walker JSC have given, the view that this was the effect of the relevant authorities in this area may now be discounted. For my part, I find it unsurprising that this view formerly held sway. Mr Laurence (without direct demur from Mr George) informed us that it was the universal opinion of all who practised in this field that the inevitable consequence of the decision in *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* was that local inhabitants acquired unrestricted rights of recreation after registration. Passages from the speech of Lord Hoffmann in that case—particularly at para 51—appeared to lend support for the notion that general, unrestricted rights of recreation over the entire extent of the lands followed upon registration. And the speech of Lord Scott of Foscote certainly seemed to imply that he apprehended that this was the outcome of the decision by the majority. Whatever may have been the position previously, however, it is now clear that, where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration.

116 On that basis, I am content to accept and agree with the judgments of Lord Hope DPSC, Lord Walker and Lord Brown JJSC that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test. The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands. Put simply, if confronted by such use over a period of 20 years, it is ipso facto reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration.

Appeal allowed .

Local authority to register disputed land as town green .

Parties to make written submissions on costs .

S H

1. Companies Act 2006 s 15 : see post, para 1.

Status: ▒ Positive or Neutral Judicial Treatment

*32 Taylor v Betterment Properties (Weymouth) Ltd

Court of Appeal

7 March 2012

[2012] EWCA Civ 250

[2012] 2 P. & C.R. 3

Carnwath , Sullivan and Patten L.JJ.

March 7, 2012

Land registration; Rectification; Trespass; User; Village greens;

H1 *Real property—commons—town or village green—registration of land as green—application for rectification of register by removal of land—whether land should have been registered as green—whether user by public "as of right" for twenty years—whether user was forcible—whether erection of signs by landowner objecting to pubic use sufficient to make user forcible—relevance of fact signs were repeatedly removed by some members of public—relevance of applicant purchasing land after registration as green—relevance of delay in applying for rectification.*

H2 In 2001, Dorset County Council registered 46 acres of former grazing land (crossed by two public footpaths) as a town or village green, under the Commons Registration Act 1965 ("the Land"). The Land had been owned for many decades by the Curtis family. In 2004 they sold the Land to B, and in 2005 B applied to remove the Land from the register, by way of rectification under s. 14 of the 1965 Act. B contended that the Land should never have been registered as a green, since the necessary pre-conditions for registration had not been satisfied.

H3 The registration of the land as a green in 2001 had followed an application by a member of the public under s.13 of the 1965 Act. That application had contended that the Land had become a green because inhabitants of the locality had indulged in lawful sports and pastimes on the Land, in particular dog walking and playing with children, "as of right for not less than twenty years". The Curtis family had objected to the application. They contended: (i) that the users had not been from a sufficiently defined locality; and (ii) that their user had not in any event been "as of right". In that regard the Curtis family relied on the fact that they had, until about 1984, repeatedly erected and re-erected clearly visible signs—stating that the Land was "private" or that the public were to "keep out" or that their presence would be a "trespass"—which had made it plain that the public were not entitled to go onto the Land other than by using the footpaths. Those signs had been repeatedly vandalised and removed by some members of the public, with the result that they had not been seen by some other members of the public. The Curtis family and their employees had also challenged or warned off members of the public from time to time. The Council heard evidence at a public enquiry, following which it decided that the Land had become a green, and registered it as such. ***33**

H4 B's application for rectification contended that the Council's decision had been wrong because: (i) there was no evidence that the users of the Land came from a locality sufficient to satisfy the definition in s.22(1) of the 1965 Act; and (ii) there had not been at least twenty years' user "as of right" because: (a) the use of the whole Land by members of the public had been contested by the landowners for part of the contended 20 year period; and (iii) in relation to part of the Land known as the Works Site, that had been completely fenced off for a period of about four months, during which time it could not be accessed at all by members of the public. By way of preliminary issue, it was held that it was for the judge hearing the application for rectification to decide on what procedure was most appropriate for that application, and that the application was to be governed by the definition of a green which applied at the time the original application for registration had been made, and not the amended definition which had subsequently been introduced by s.98 of the Countryside and Rights of Way Act 2000 ([2008] EWCA Civ 22). The application for rectification was then heard by Morgan J., who reviewed the evidence which had been heard at the public enquiry, and also heard some additional evidence. Morgan J. granted B's application for rectification, and held that the Land should be removed from the register, on

the basis of issue (ii): there had not been user "as of right" for at least twenty years prior to the s.13 application, since the user had remained contentious until 1984 even if it was acquiesced in thereafter. He also held that, in relation to issue (iii), the fact that the Works Site had been fenced off and not available for public use for a period of at least four months was an additional reason why that part of the Land should not have been registered as a green. In the circumstances it was unnecessary for him to decide issue (i). Morgan J. also rejected the inhabitants' contention that the application should in any event be dismissed, as a matter of discretion, because B had purchased the Land after it had been registered as a green, or because B had delayed making and pursuing the application for rectification.

H5 **Held,** dismissing the inhabitants' appeal, the judge had been right to hold, on issue (ii), that the user of the Land had not been 'as of right' for at least part of the relevant period. In order for relevant user to have been contentious or forcible, the landowner must have taken reasonable steps to bring his opposition to such user to the actual notice of those who were regularly using the land in question. If the steps taken to manifest that opposition are sufficient to bring it to the attention of any reasonable and regular user of the land, then it is irrelevant that particular users may not have been aware of it. The steps to be taken do not have to be fail-safe; they must be reasonable and proportionate to the user which the landowner wishes to prevent. In this case, the signs erected by the Curtis family were clear in their terms, and their number and position had been sufficient to make it clear to any reasonable and regular user of the Land that members of the public should keep to the footpaths, that the Land was private, and that any use of it by them would be a trespass. Although some users of the Land had not seen the signs, that was because the signs had been repeatedly vandalised and stolen by other local inhabitants; and the unlawful actions of the latter had to be taken into account when considering whether the use by local inhabitants as a whole had been forcible or contentious.

H6 As to issue (iii), the judge had been right to hold that the complete exclusion of the public from the Works Site for a period of four months was incompatible with that land remaining a green during that time. ***34**

H7 Neither the fact that B had purchased the Land after it had been registered as a green, nor B's delay in making and pursuing the application for rectification, were sufficient reasons for dismissing the application in this case. The change in ownership following registration was a relevant factor, but in this case not a significant one. A delay in applying for rectification is a relevant factor, but is unlikely to be a barrier to rectification unless either it has resulted in some significant prejudice to local inhabitants or other relevant interests, or it brings into account more general considerations of good administration. *Per* Sullivan and Carnwath L.JJ.: there is a strong public interest in upholding the register in the absence of a prompt challenge to its contents, and there will be exceptional cases where the delay is so long that prejudice to good administration can properly be inferred, even without evidence of actual prejudice; a delay of a decade would be capable of being such a delay.

Cases referred to in the judgment:

Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 A.C. 738; [1990] 2 All E.R. 434

Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1993 S.C. (H.L.) 44

Dalton v Henry Angus & Co (1881) 6 App. Cas. 740

Eaton v Swansea Waterworks Co (1851) 17 Q.B. 267

Fairey v Southampton County Council [1956] 2 Q.B. 439

Goodey v Everett (1860) Unreported

Newnham v Willison [1987] 56 P. & C.R. 8

Paddico (267) Ltd v Kirklees Metropolitan Council [2011] EWHC 1606 (Ch)

Piper Land Development (Solihull) Ltd v The Rhondda Cynon Taf County Borough Council [2011] EWHC 3591 (Ch)

R. v Exeter City Council Ex p. J L Thomas & Co Ltd [1991] 1 Q.B. 471; [1990] 1 All E.R. 413

R. v Newbury District Council Ex p. Chieveley Parish Council (1998) P.L.R.C. 51

R. v Oxfordshire CC Ex p. Sunningwell PC [2000] 1 A.C. 335

Regina (Beresford) v Sunderland City Council [2004] 1 A.C. 889

Regina (Lewis) v Redcar and Cleveland Borough Council (No.2) [2010] 2 A.C. 70

R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council [2010] L.G.R. 631

Smith v Brudenell-Bruce [2002] 2 P. & C.R. 51

Sturges v Bridgman (1879) 11 Ch. D. 852

Taylor v Betterment [2007] EWHC 365 (Ch); [2008] EWCA Civ 22

Legislation referred to:

Commons Registration Act 1965 ss.1, 2, 13, 14 & 22

Countryside and Rights of Way Act 2000 s.98

Commons Registration (New Land) Regulations 1969 (SI 1969/1843)

H10 **Appeal** by Mrs Gill Taylor, on behalf of the Society for the Protection of Markham and Little Francis, from the order of Morgan J. made on November 23, 2010 ([2010] EWHC 3045 (Ch)), by which he allowed the applicants application ***35*** for the alteration of the register of commons. The facts are set out in the judgment of Patten L.J.

H11 **Representation**

Charles George QC , Philip Petchey and Ned Westaway for the appellant.

George Laurence QC and William Webster for the respondents.

JUDGMENT

Patten L.J.:

Introduction

1 Betterment Properties (Weymouth) Ltd ("Betterment") is the owner of some 46 acres of land near Weymouth in Dorset which was registered by Dorset County Council ("the Council") in June 2001 as a town or village green. At the time of the registration the land (which I shall call "the registered land") was in the ownership of members of the Curtis family as part of a larger parcel of open grazing land comprising some 94 acres. The registered land forms the eastern portion of the total holding and is bordered on that side by a built-up area consisting of housing and a school. It is also bisected by two public footpaths; one of which (FP79) runs diagonally across the land from the end of a street of houses on the northern boundary of the registered land (Markham Avenue) to its south-western corner; the other of which (FP92) runs in from the western boundary of the land (Cockles Lane) until it joins FP79 roughly speaking in the middle of the registered land. Cockles Lane is also a public footpath (FP130) which forms the north western boundary of the registered land up to the point where it reaches a public highway.

2 The western boundary of the registered land is open land and by using FP79 one can walk across the registered land from the north and then on to reach Wyke Road further to the south. The other geographical feature which needs to be mentioned by way of introduction is a relatively small area of land in the south west corner of the registered land which is shown cross-hatched on the plan of the area. It is common ground that this should not have been included as part of the registration and it will therefore be removed from the register regardless of the outcome of the appeal.

3 The location of the registered land and the existence of public rights of way both over and adjacent to it are important features relevant to its registration. Although the eastern and northern boundaries with the areas of developed housing were largely fenced, members of the public remained entitled to cross the registered land via the public footpaths. But they had no legal entitlement before 2001 to walk or exercise their dogs on the remainder of the land or to seek to enter the land at any points other than the footpath entrances. But in December 1994 a Mrs Horne applied to the Dorset County Council ("the Council") (which is the registration authority under s.2 of the Commons Registration Act 1965) ("the 1965 Act") to register the land (including the cross-hatched land) as a new town or village green. This was defined in s.22(1) of the 1965 Act as it then stood as:

> "Land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of ***36*** any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years."

4 The statutory definition is not broken down into sections (a), (b) and (c) as above but, like the judge, I have added these letters simply to differentiate between the three bases upon which a valid registration can be made.

5 Section 1(2) of the 1965 Act empowered the minister by order to designate the end of a period after which no land capable of being registered as a town or village green shall be deemed to be a town or village green unless it is so registered. As a result of orders made under s.1(2) , the relevant period ended on July 31, 1970. The effect of this was to bring into effect a system of compulsory registration of common land and town or village greens under which applications for registration could be made by any person or by the registration authority resulting in provisional registration: see s.4 . The registration authority had then to give notice of that registration to the public (including the landowner) and any objections to registration (unless withdrawn) were referred for determination by a Commons Commissioner: see s.6 .

6 Once confirmed, the registration of land as a town or village green became conclusive

evidence of the matters registered but s.13 of the 1965 Act made provision for regulations to be made whereby the registers might be amended where "any land becomes common land or a town or village green". This power was exercised in the form of the Commons Registration (New Land) Regulations 1969 (SI 1969 No. 1843) under which any person may apply for the registration of a town or village green. On receipt of the application, the registration authority is required to notify the landowner and any other interested parties and to consider any objections which it receives. It is then for the registration authority itself to decide whether to accept the application and to make the necessary amendment to the register.

7 No procedure is laid down by the 1969 regulations as to how that decision should be reached but s.14 of the 1965 Act enables the High Court to further amend the register if:

> "(b) [T]he register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;
>
> and, in either case, the court deems it just to rectify the register."

8 Mrs Horne's application was made under s.13 on the basis that the registered land had become a town or village green on August 1, 1990. She therefore relied on twenty years' user after July 31, 1970. The Council notified the Curtis family of the application and an objection to registration was lodged on their behalf on October 19, 1995. This consisted of a 12-page report supported by 15 witness statements including statements from Mr Barry Curtis and Mr Maurice Curtis. The objection was based on two main grounds: it was said that the use of the registered land by members of the public that was relied on was not use by the inhabitants of a locality within the meaning of s.22(1) because the individuals in question were residents of too wide an area; and it was contended that their use was not user as of right. ***37**

9 This second ground of objection was that user had to be *nec vi, nec clam, nec precario* for the entire twenty years and that throughout this period the public had either used force in order to gain access to the land or had done so with stealth or with permission. On the first of these issues the evidence from the Curtis family was that they had at all times strenuously resisted any acts of trespass on their land by maintaining fences to the boundaries with local housing and by erecting notices on the registered land warning people not to trespass and to keep off the land on either side of the footpaths.

10 These objections were forwarded by the Council to Mrs Horne who then submitted a lengthy response. The members of the public whose use of the land was relied on in the s.13 application had in most (if not all) cases filled in questionnaires in which they were asked (*inter alia*) to say where they lived; what use they had made of the land; what use they had seen others making of the land; whether people from outside their locality used the land; whether they had ever met the owner of the land; whether they had used the land with the owner's permission; and whether anyone (by a notice or other means) had tried to prevent them from using the land. Mrs Horne, in her response, relied on the fact that none of these users recalled seeing any signs warning them off the land.

11 The county solicitor recommended that the s.13 application for registration be refused on the ground that the evidence pointed to user of the registered land being by the public at large rather than by the inhabitants of a defined locality. He also said that there was no evidence of any lawful sports or pastimes. Most of the use was simply recreational such as walking (with or without a dog). On November 21, 1996 the Council proceeded to refuse the application. Undeterred by this, Mrs Horne continued to correspond with the Council and in February 1997 asked for her application to be re-considered. On March 17, 1997 she formally submitted a second s.13 application explaining that she was now relying on new evidence about the relevant locality. After further correspondence Mrs Horne was invited to re-submit her application with all the evidence she wished to rely upon. This she did on September 30, 1997.

12 On April 29, 1998 the Council amended the register with a provisional registration of the registered land (including the cross-hatched land) as a new town or village green. This was an error because there is nothing equivalent to provisional registration under s.4 of the 1965 Act when the application is made under s.13 . The application was then considered by the Council's countryside and conservation sub-committee on November 24, 1999 when it recorded that Mrs

Horne had agreed to the deletion of the cross-hatched land from the registration. In relation to the remaining land, the sub-committee resolved to hold a non-statutory public inquiry into the application which would take the form of a hearing before three councillors. This took place between December 7 and 11, 2000. There was oral evidence from a large number of witnesses followed by submissions from Mrs Horne (who acted in person) and from Mr Webster who was instructed on behalf of the Curtis family. Both sides then put in written submissions.

13 One issue raised in these closing submissions was the amendment made to the definition of a town or village green in s.22(1) of the 1965 Act by s.98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act"). In its amended form s.22(1) now provides that:

> "In this Act, unless the context otherwise requires ... ***38**
>
> 'town or village green' means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years or which falls within subsection (1A) of this section.
>
> (1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either—
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

14 Mr Webster submitted to the inquiry that the amended definition did little more than to set out the existing law on the meaning of "inhabitants of any locality". Mrs Horne contended that as her s.13 application had not been determined by January 30, 2001 when the amendment came into force, the new definition should be applied.

15 On June 5, 2001 the Council notified the parties that it had decided to register the land as a new town or village green. In its decision letter it stated that it had applied the amended definition under s.98 of the 2000 Act. After summarising the evidence and the submissions the Council set out its conclusions. In summary, these were:

> (i) that there had been 20 years' use of the registered land by residents of the borough of Weymouth and Portland which was a distinct and identifiable locality for this purpose. So also was Wyke Regis;
>
> (ii) that the user was for lawful sports and pastimes which could include dog walking and playing with children: see *R. v Oxfordshire CC Ex p. Sunningwell Parish Council [2000] 1 A.C. 335* (" *Sunningwell* ");
>
> (iii) that this period of user had not been obstructed or prevented by work carried out to part of the registered land between 1979 and 1982 by the Weymouth Drainage Scheme: (this is a separate and distinct objection to the registration of part of the land which I will come to later in this judgment); and
>
> (iv) that the user had been as of right. The letter stated that:
>
> "The Panel also considered whether the evidence showed that the owner had taken sufficient steps either to prevent use by the people living in the neighbourhood or to make it clear to them that their use was not as of right. The Panel noted that the applicant's witnesses who were presented to the inquiry did not mention seeing any signs on the

Application Site or surrounding area.

The Panel also noted that the Objector had taken no steps either to secure the site or make it clear that use was not as of right since the previous application in 1995, when the Objector had notice of the rights being claimed over the application Site. Panel Members were satisfied that the evidence showed that a significant number of the ***39*** inhabitants of the neighbourhood had as of right continued to use the Application Site for lawful sports and pastimes from 1995 until the Panel determined the application."

16 In August 2001 Mr Barry Curtis, on behalf of the landowners, began proceedings in the Administrative Court for judicial review of the Council's decision to register. Part of the Council's response to the application was that it was inappropriate for the Curtis family to seek judicial review when Parliament had provided a statutory right to seek rectification of the register under s.14 of the 1965 Act. Permission was refused on the papers by Stanley Burnton J, but before the application came to be renewed at an oral hearing Mr Curtis agreed (on advice from Mr Laurence QC) to discontinue the application for judicial review and to make instead a s.14 application for the removal of the amendment to the register. The Council agreed that it would not seek to argue that Mr Curtis was issue estopped in this regard.

17 The Administrative Court proceedings were discontinued in November 2001. There is then a gap in time until January 2004 when Betterment acquired the freehold of the registered land. In December 2005 the company commenced an application under Pt 8 for s.14 relief. On July 18, 2006 Master Teverson directed the trial of two preliminary issues as to (1) whether a hearing under s.14(b) was by way of re-hearing, review or on some other basis; and (2) whether the s.13 application to amend the register had been governed by the amended or unamended definition of a town or village green.

18 The hearing of the preliminary issues took place before Lightman J. in March 2007: see [2007] EWHC 365 (Ch). He held that the jurisdiction exercised by the court on a s.14(b) application was not merely appellate or supervisory:

"15. In my judgment on the face of the statute the court is free to adopt the procedure best calculated to enable a just and fully informed decision to be reached whether 'no amendment or a different amendment ought to have been made', whether it is just to rectify the register, what should stand as evidence and what evidence should be admitted. The court in exercise of its case management powers will have regard to the process adopted by the registration authority or any panel when the amendment of the register under section 13 of the 1965 Act was made and the evidence adduced before it. It will no doubt have in mind that with the passage of time recollections will have dimmed and potential witnesses may have died or ceased to be available. It may (for example) direct that evidence (in particular if unchallenged) adduced before the registration authority or any panel shall stand as evidence and any finding by it shall stand: (a) as a finding of fact at the hearing before the court; (b) as evidence; or (c) as a finding of fact in the absence of evidence to the contrary; and in deciding on the admissibility of evidence the court will no doubt bear in mind that no amendment shall be rectified unless it is just to do so and that it may be unjust to order rectification on the basis of new evidence e.g. which cannot now be challenged but could have been when registration took place.

...

20. I accordingly hold in answer to the first question that Section 14 imposes no fetter on the evidence or arguments which may be relied on to establish that no amendment or a different amendment should have been made, even as it imposes no fetter on the evidence or argument which may be relied on ***40*** to establish that it is or is not just to rectify the register; and that it is a matter for the judge hearing the application under Section 14 in the exercise of his case management powers to decide the procedure to be adopted and what should stand as evidence and what should be admitted as evidence at the trial."

19 On the second issue he held that the applicable definition of "town or village green" was the one in force when the s.13 application was made. It was therefore s.22(1) in its unamended form. On appeal his judgment was upheld on both grounds for the reasons which he gave: see [2008] EWCA Civ 22.

20 The s.14 application therefore proceeded to a hearing on this basis. Mrs Horne was no longer able to represent the interests of the local inhabitants and in August 2008 Mrs Taylor was joined by consent as the second defendant. In a letter dated May 15, 2008 Betterment's solicitors accepted that the evidence which had been given at the 2000 inquiry did establish that "most of the land" had been used for lawful sports and pastimes for over twenty years prior to 1997. In its Re-amended claim form (dated October 27, 2009) the amendment of the register in 2001 was challenged on three grounds:

> (i) that there was no evidence that the users of the registered land came from a locality sufficient to satisfy the definition in s.22(1) ;
>
> (ii) that there had not been at least twenty years' user as of right because:
>
> (a) before 1980 and after 1994 in relation to the registered land as a whole; and
>
> (b) between 1979 and 1982 in relation to what was described as the Works Site;
>
> ... that use was contested by the landowners; and
>
> (iii) in relation to the Works Site there was uncontested evidence that the site had been fenced and not used for lawful sports and pastimes during the period of the works.

21 The Works Site refers to the part of the registered land that was excavated between 1979 and 1982 as part of a major drainage scheme. This involved the construction of a tunnel across the land. In addition a large surrounding area was used for a car park and associated construction works. Betterment's case (which the judge accepted) is that for several months at the very least the entire site was fenced off thereby making any use of the land by the local inhabitants impossible. Its secondary case therefore is that this land should be excluded from the registration even if it is otherwise upheld.

22 The hearing of the s.14 application took place before Morgan J. over nine days in June 2010. The judge sat in Weymouth to hear the oral evidence and was able during that time to visit the site himself. He was provided with copies of the witness statements produced at the 2000 inquiry and with a transcript of that hearing. Some of Betterment's witnesses produced new witness statements for use in the s.14 proceedings and one (Mr Barry Curtis) gave oral evidence and was cross-examined. But, for the most part, the judge was confined to the witness statements and cross-examination at the earlier inquiry and was asked to re-consider and review that evidence having regard to the points of objection raised in the s.14 proceedings. ***41***

23 He held ([2010] EWHC 3045 (Ch)) that there had not been user as of right for at least twenty years prior to the s.13 application. The user remained contentious (i.e. *vi*) until 1984 even if it was acquiesced in thereafter.

24 In these circumstances he made no findings about locality and expressed no view as to what was required to satisfy the s.22(1) definition of a town or village green in its unamended form. But he did also accept that at least from December 1979 to April 1980 a substantial part of the works site was fenced off and was not available for public use and that this area ought not to have been included in the s.13 registration.

25 The judge went on to hold that it was just to rectify the register:

> "188. Mr Petchey submitted that the court should be more reluctant to rectify the register when the register entry has remained in existence for a period of some 9½ years, from around June 2001 to the present time. However, during those 9½ years, residents in the local area have had the benefit of the registration which, on my findings, they should not have had. I do not see why the fact that the local residents have in the past, by reason of the registration, enjoyed rights which they should not have had, produces the result that they should now be able to enjoy such rights in perpetuity.
>
> 189. Betterment has referred to all the events which occurred in the intervening 9½ years and has submitted that time has not been wasted in getting the case to the point it has now reached. It is no doubt the case that the matter could have been progressed more quickly at certain stages. I get the sense that Betterment has not treated this litigation as one which required an urgent resolution. After all, Betterment still does not have any planning permission for development for any of its land. However, any disadvantage suffered by reason of delay since 2001 appears to me to have been felt by Betterment (with reference to any responsibilities they may have had to members of the public being on their land) rather than by the residents of the local area, who have been able to enjoy the land without interference from the landowner. In the end, I do not see that the mere passage of time is material, one way or the other, to the issue of the justice of rectifying the register."

26 Mrs Taylor now appeals against the judge's decision that the user of the registered land until 1984 was not as of right and that it was just to order rectification. Permission to appeal on the first issue was granted by Lloyd L.J. but he refused permission to appeal on the issue of justice. Mrs Taylor has renewed her application for permission on that ground and we have heard argument on both points. The issue of locality does not arise for consideration on this appeal but it is a major issue in the appeal in Paddico (267) Ltd v Kirklees Metropolitan Council & Ors (" Paddico ") which has been heard by the same constitution and which raises similar issues as to whether it is just to order rectification of a register on a s.14 application brought many years later by a purchaser of the registered land with a view to securing its development. At first instance Vos J. ([2011] EWHC 1606 (Ch)) expressed the view that delay in challenging the registration was a factor which weighed against rectification but was not likely to be conclusive. ***42**

User as of right

27 The landowners' case at the inquiry was that fences had been maintained on the boundaries with housing and that signs had been erected so as to make it clear to the public that they should not trespass on to the registered land from the footpaths. The evidence from local inhabitants (as summarised in the Council's decision letter of June 5, 2001) was that they had regularly used the land for games and recreation and did not confine themselves to the footpaths. In doing so they had (they said) never been challenged nor did they recall seeing any signs saying that the fields were private property which they should not enter.

28 By contrast, the landowners' witnesses gave evidence that signs were put up at strategic points on the perimeter of the land and at the edge of the footpaths. It is worth noting at this point that the evidence about the fencing of some of the boundaries relates to the period when the registered land continued to be grazed under a series of grazing agreements with local farmers. These continued from 1963 to 1979 although the evidence was that the land was grazed until 1980 or later by a Mr Crees.

29 It is not really in dispute that these farmers faced serious (and increasing) difficulties in their use of the land due to the activities of local residents who cut wire fences marking the boundary between the registered land and their houses in order to access the registered land without having to walk to the nearest footpath entrance. These acts of vandalism and trespass (exacerbated by dogs being allowed to worry cattle) eventually made it impossible for the land to be used for grazing and after 1980 attempts to maintain the fences intact largely ceased. But the unlawful activities of these residents are not relied upon for the purposes of this appeal nor were they relied upon as part of Mrs Horne's evidence of user at the inquiry. The residents who provided evidence to support the s.13 application were all local inhabitants who gained access to the registered land via one or other of the footpaths.

30 The issue for the inquiry and for Morgan J. was whether the Curtis family had taken sufficient steps so as to effectively indicate that any use by local inhabitants of the registered land beyond the footpaths was not acquiesced in. At the inquiry this turned on the presence or visibility of the signs. The panel appear to have accepted (in the passage from the decision letter quoted above) the evidence of local residents that they did not see any signs. But Morgan J., having reviewed this and the evidence of the landowners' witnesses, made the following findings of fact:

> "92. During the period up to and including 1980 when the land was grazed by the farmers, I find that there were many occasions on which members of the public broke down fences or created gaps in hedges in order to gain access to the fields. I also find that there were many occasions when an attempt was made, whether by members of the Curtis family or their employees or by the farmers, to make good those gaps. Repairs of the gaps in turn only led to further gaps being created or re-created by members of the public. I also find that it is more likely than not that fencing and hedges were broken down or penetrated after 1980. It seems likely that the number of gaps which would have existed in the period up to 1980 when there was stock on the land was significantly increased after the farmer left at the end of 1980. I am not able to find that very much, if anything, happened by way of repair of those gaps after 1980. In the period after 1980, there does not appear to have been stock ***43*** on the land which would have required the gaps to be repaired. Further, in and after 1980, the aspirations of the Curtis family appeared to be to obtain planning permission for development of some part of the land and it became less important to repair the gaps.
>
> 93. I accept the farmers' evidence as to interference by members of the public, particularly by young people, with the stock on the land. I also accept the farmers' evidence that dogs worried the stock to a significant extent over the years. Of course, those matters ceased when the stock were removed at the end of 1980. I also accept the farmers' evidence and indeed the evidence of other witnesses, as to the degree of vandalism which occurred in relation to the water trough and some basic farm building and interference with hay bales on the land. Again, that interference would have ceased when the last farmer left at the end of 1980.
>
> 94. I now turn to the question of whether signs were erected and, if so, where they were erected, what they said and for what period of time they remained erected. I find without any hesitation that the Curtis family did erect and re-erect signs with reference to the total area of land which they owned. I find that this process of erecting and re-erecting signs continued for a period of years and was not a short lived affair. As to the location of the signs, there is sufficient evidence that there were clearly visible signs, and not just one or two of them, which would have brought home to a person using the registered land that the registered land was governed by such a sign. I also find that all signs which are relevant in this way would have made it clear that members of the public were being told they were not entitled to leave the footpaths. That was because the land apart from the footpaths was 'private' or that the public were to 'keep out' of that land or that their presence on the land would be 'trespass'. It is, I regret, not possible to be precise as to the period of time during which the Curtis family erected and re-erected signs. I find that signs were erected during the period that the land was grazed by the farmers. I also find on the balance of probabilities that the erection and re-erection of signs continued after the end of 1980. Maurice Curtis placed the purchase and erection of Mr Sackley's signs in the period 1985 to 1990. Mr Sackley placed the time when he constructed the signs as 1991 to 1992. I think it is more likely than not that both Maurice Curtis and Mr Sackley are wrong about these dates and that the time when Mr Sackley constructed the signs and when Barry Curtis erected those signs and when Maurice Curtis saw that they had been knocked down is earlier than they believe. However, I find that those signs were constructed and erected after 1980. I think it is more probable than not that the Curtis family's wish to have signs on the land became a more pressing wish after the land ceased to be used for grazing. After 1980, the land was virtually unused and the Curtis family could see that the public were eager to walk over the land. That seems to me to be a very good reason why the Curtis family would have wanted to erect signs to make it clear to the public that such user was not permitted. The signs must have been erected so as to prevent, or at least limit, the opportunity for members of the public to acquire rights over the land given that the Curtis family hoped that they would get planning permission for development of that

land.

95. I also find that members of the Curtis family and employees did warn off members of the public who had left the footpath. Again, it is difficult to make ***44*** precise findings as to the period of time during which such warning off occurred and the extent of the warning off. It is clear on the evidence that the warning off was largely ineffectual although it is possible that an individual who was caught on the land, away from the footpaths, by a forceful member of the Curtis family, might have turned tail and left the land on that occasion. However, individual warnings off of that kind do not seem to have done much to stem the flow of the public onto the land at other times. Further, even when some individuals were warned off, they did not heed the warning but abused the person giving the warning. I think it is more probable than not that there were warnings off after the end of 1980 as well as before. When grazing ceased at the end of 1980, if anyone was to warn off members of the public it could only have been members of the Curtis family and their employees. I find that for a period of time such warnings off did take place.

96. I find that there came a point when the Curtis family effectively gave up trying to keep the public off the land. The Curtis family gave up repairing the fences and the hedges. They gave up re-erecting the signs. They probably to all intents and purposes gave up warning off people from the land. I do not think that the Curtis family had given up by the end of 1980. I think they gave up later. If it is necessary to identify a time by which they had stopped taking action in relation to fences, signs and warnings off, I would, on the balance of probabilities, place that time as being shortly before the middle of the 1980's. For the sake of the later discussion, it does not matter if that state of affairs came about in 1983 or in 1984 or in 1985 and I will therefore describe my finding on this point as being that the state of affairs I have described came about in, say, 1984."

31 The landowners' evidence about the signs was given by a number of witnesses. For reasons which will become apparent later in this judgment, it is not necessary for me to do more than to summarise what they said. Mr Weeden (who gave evidence and was cross-examined at the inquiry) said that signs were put up each side of footpath 92 leading to (but not on) the registered land stating that the land was private. A Mr Westmacott (who made a witness statement but died before the inquiry) referred to signs telling the public to keep off the land being erected "at various places around the perimeter of Mr Curtis' land". The signs were regularly pulled down and removed. Similar evidence was given by Mr Barry Curtis. He said that the signs were regularly vandalised soon after being put up but were then replaced. The signs were erected around the entirety of the land. Sometimes people walking on the land off the footpaths were also challenged.

32 Mr Maurice Curtis also provided evidence that signs saying "private" and "keep out" were erected around different parts of the land where the public were gaining access to the field. He also spoke of them being taken down. His evidence was not specific as to the precise location of the notices but a Mr Quartermaine (who made a statement but did not give oral evidence to the inquiry) said that a notice was erected near to the footpath close to Markham Avenue advising the public not to trespass on the land either side of the footpath. A Mr Pashen also prepared a witness statement in October 1995 saying that signs were erected a couple of times a year at strategic points on the extremity of Mr Curtis' land adjacent to the rights of way. He attended the inquiry but was not cross-examined. ***45***

33 The judge's reconciliation of the conflicts between this evidence and that of Mrs Horne's witnesses who had no recollection of seeing the signs turned in part on his discounting the accuracy of some of that evidence:

"90. As regards the evidence of people from the local area who appeared at the public inquiry, I do not get any sense that they were setting out to mislead the inquiry. I think that they were attempting to describe matters as they genuinely saw them. However, in some respects, I must be cautious about some of the things which they said. For example, if a witness said at the inquiry in 2000 that he or she had never seen a sign near to the registered land, it is entirely possible that such a witness may have forgotten that he or she had seen a sign say some 15 or 16 years earlier in around, say, 1984 or 1985. Fifteen or sixteen years of total absence of signs and absence of warning off by the landowners

> and absence of any difficulty of any kind might well persuade a witness that there had never been any signs or any warning off or matters of that kind. Memory in these respects can be very fallible. Although I do not suggest that the people from the local area who gave evidence at the inquiry attempted to mislead the inquiry, it is right to record that many of them were passionate in their belief that a great wrong would be done if the land was not registered as a town or village green because, they believed, a failure of the application to register the land would result in undesirable development of the land. That degree of commitment to a cause can unconsciously distort recollection. "

34 The quality of this evidence is important when one comes to consider the issue of user as of right. This is because the appellant's case does not rely on the activities of residents who cut fences or pulled signs down but on those who gained access to the registered land by the footpaths and say that they have used the entirety of that land for lawful pastimes unaware of any objection by the landowners to such use. Mr George QC submits that the effect of the notices has to be considered in relation to these users. Not in relation to those who removed any signs that were there and must therefore have seen them.

35 But the visibility or not of the signs in relation to what I shall refer to as lawful user also raises a more fundamental question of law as to whether and to what extent signs stating the landowner's opposition to the use of his land must ultimately come to the knowledge and attention of all users if the landowner has in fact taken all reasonable steps to achieve this. The point is encapsulated in para.31 of Betterment's Re-amended Claim Form which states that:

> "...the defendant apparently took the view that the landowners could not render user non-peaceable otherwise than by erecting signs which those who gave evidence of use admitted seeing. The claimant contests this and says (i) that the landowners did erect and re-erect signs; (ii) that that was enough to render subsequent user non-peaceable even though many users would not have seen the signs (because they were promptly torn down); and in any event (iii) that a landowner need not as a matter of law erect or re-erect signs in order to render user non-peaceable..."

36 It is common ground on this appeal that, following the decision of the House of Lords in *Sunningwell* , registration of a town or village green on the basis of twenty or more years' user as of right depends upon showing that such user was *nec vi, *46 nec clam, nec precario* . This test is traceable back to the common law and to the Prescription Act 1832 . It has subsequently been applied in *R. (on the application of Beresford) v Sunderland City Council [2004] 1 A.C. 889* and, most recently, by the Supreme Court in *R. (on the application of Lewis) v Redcar and Cleveland BC [2010] 2 A.C. 70* .

37 Perhaps the most informative explanation of the content of this principle is that contained in the judgment of Lord Rodger of Earlsferry in *Redcar (No.2)* :

> "87. The basic meaning of that phrase is not in doubt. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* Lord Hoffmann showed that the expression 'as of right' in the Commons Registration Act 1965 was to be construed as meaning nec vi, nec clam, nec precario. The parties agree that the position must be the same under the Commons Act 2006 . The Latin words need to be interpreted, however. Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.
>
> 88. The opposite of 'peaceable' user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is 'vi' only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi. See, for instance, D.43.24.1.5–9, Ulpian 70 ad edictum, commenting on the word as used in the interdict quod vi aut clam.
>
> 89. English law has interpreted the expression in much the same way. For instance, in

Sturges v Bridgman (1879) 11 Ch D 852 , 863, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:

'Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, *or which he contests and endeavours to interrupt* , or which he temporarily licenses. (Emphasis added.)'

If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi and so does not give rise to any right against him. Similarly, in Dalton v Henry Angus & Co (1881) 6 App Cas 740 , 786, Bowen J. equated user nec vi with peaceable user and commented that a neighbour:

'without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton v Swansea Waterworks Co (1851) 17 QB 267* .' ***47**

The contrary view, that the only manner in which enjoyment of window lights could be defeated before the Prescription Act was by physical obstruction of the light, 'was not the doctrine of the civil law, nor the interpretation which it placed upon the term 'non vi" ...'

90. In short, as *Gale on Easements* , 18th ed (2008), para 4-84, suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.

91. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 350–351, Lord Hoffmann found that the unifying element in the three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right. In the case of nec vi he said this was 'because rights should not be acquired by the use of force'. If, by 'force', Lord Hoffmann meant only physical force, then I would respectfully disagree. Moreover, some resistance by the owner is an aspect of many cases where use is vi. Assuming, therefore, that there can be vis where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

92. If, then, the inhabitants' use of land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious. This is at least part of the reason why, as Lord Jauncey of Tullichettle observed, in the context of a claim to a public right of way, in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1993 SC (HL) 44* , 47, "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor."

38 If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in. But in some cases (and this is one of them) the landowner's attempts to assert his opposition to the unauthorised use of his land may face the practical difficulty that a minority of users will not only defy his assertion of ownership but will also take active steps to remove or vandalise the signs which are put up. In these circumstances the failure of lawful users to see the signs may be attributable to their unlawful removal. But the appellant contends that in the absence of the signs, the use of the registered land by the majority of lawful users was peaceable.

39 In *Redcar (No.2)* this issue did not arise but Lord Rodger expressed the principles involved in terms of there being actual knowledge of the landowner's objections to the use of his land.

Similar statements can be found in *Newnham v Willison (1988) 56 P. & C.R. 8* (a claim to a right of way under the Prescription Act 1832) and *Fairey v Southampton County Council [1956] 2 Q.B. 439* where the issue was whether a path had been dedicated as a public highway under the Rights of Way Act 1932 . In the latter case, Denning L.J. (at p.457) said that:

> "If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to 'the public' that they had no right to use it. He ought at least to make it clear to the villagers of ***48** Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it."

40 The question of how far the landowner must go was considered by Pumfrey J. in *Smith v Brudenell-Bruce [2002] 2 P. & C.R. 4* (a case about the acquisition of a private right of way by prescriptive user). He said that:

> "It seems to me a user ceases to be user 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when a servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."

41 This requires to be unpacked a little. Assuming that the notice is in terms sufficiently clear to convey to the average reader that any use of the relevant land by members of the public will be treated as a trespass then it will be irrelevant that individual users either misunderstood the notice or did not bother to read it. The inhabitants who encounter the sign have to be treated as reasonable people for these purposes to whom an objective standard of conduct and comprehension is applied. But the last sentence of this dictum suggests a wider test under which the owner who does everything reasonable to contest the user will thereby have made such user contentious regardless of the extent to which his opposition in fact comes to the notice of those who subsequently seek to establish the prescriptive right.

42 In the case of a private right of way, the situation is much less likely to arise because any sign erected along the route of a potential right of way will almost certainly come to the attention of the dominant owner and the judgments in the right of way cases have to be read in this context. But in the case of a town or village green where the area of land will often be much larger, the problems of visibility may be more common.

43 In *R. (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire CC [2010] B.L.G.R. 631* , H.H. Judge Waksman QC (sitting as a Judge of the High Court) considered Pumfrey J.'s dictum in *Smith v Brudenell-Bruce* in the context of an application to register a meadow adjoining the Warneford Hospital in Oxford as a town or village green. The land in question was crossed by a public footpath alongside which was a notice stating: "No public right of way". This was said to have prevented any public use of the meadow itself from being as of right.

44 The judge held that the notice had not rendered such use contentious because, reasonably read, it had to be taken to refer to the user of the footpath rather than the meadow land generally. He was not therefore concerned with a case where the notice had been placed in an inaccessible position or where (as in the present case) the notices had been removed. But in his judgment he set out some general principles. Having referred to *Smith v Brudenell-Bruce* and to *Redcar (No.2)* he said this: ***49**

> "22. From those cases I derive the following principles:
>
> (1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land,

the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;

(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;

(3) The nature and content of the notice, and its effect, must be examined in context;

(4) The notice should be read in a common sense and not legalistic way;

(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user.

Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in Brudenell-Bruce 's case to 'consistent with his means'. That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. As it happens, in this case, no point on means was taken by the authority in any event so it does not arise on the facts here."

45 Morgan J. applied those authorities to the facts found by him as follows:

"121. The parties did not dispute that the test identified by Pumfrey J in Smith v Brudenell-Bruce [2002] 2 P&CR 51 was a useful general test to be applied for this purpose. I will adapt that test for a case of a town or village green rather than a private easement. For the time being, I will leave in the reference to 'means', notwithstanding the comment of Judge Waksman QC in R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust & Anr) v Oxfordshire County Council [2010] LGR 631 . So adapted, the test can be stated thus:

'Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.'

122. In my judgment, until (at least) say 1984, a reasonable person using the land and knowing the facts which I have found to have existed would ***50*** appreciate that the landowner objected and continued to object to that use of the land and that the landowner would back the objection by physical obstruction to the extent possible. For the avoidance of doubt, I ought to say something more specific as to what a reasonable user of the land for sports or pastimes would have known about the breaking down or cutting of fences and hedges and about the notices erected by the landowners. I find that a reasonable user of the land would have known that the fences and hedges had been broken down or cut. Many users of the land came on to the land by means of gaps in the fences and hedges. It would have been clear enough to such a reasonable user of the land that one of the purposes of the fences and the hedges being there was to prevent the public accessing the land at those points. It would have been clear enough to a reasonable user of the land that the gaps had been created (against the wishes of the landowners) by persons wanting to gain access at such point. I also find that a reasonable user of the land in the period up to, say 1984, would have known that the landowners had erected signs which

had been torn down and re-erected. As the various statements of the legal principle make clear, it is not necessary for the landowners to show that every single user of the land knew what a reasonable user would have known. I find that the landowner was doing everything, proportionately to the user, to contest the user and to endeavour to interrupt it. In answering the question in this way, nothing turns in this case on the means of the landowners and I need not consider in any more detail the point made by Judge Waksman QC."

46 Mr George QC criticises this analysis on a number of grounds. He submits that for the landowner to make the use of his land contentious it is necessary for him to bring it home to at least the majority of users that he objects to their use of his land. His first point (as already indicated) is that the focus is wrong. Morgan J. made no findings of fact that any of the witnesses called by Mrs Horne had broken down fences (as opposed to having seen gaps in the fencing) nor did he make findings about their actual knowledge. The fact that some residents had cut or broken down fences or had entered the registered land through gaps cut in the fences is also irrelevant he says to whether a town or village green has been established by peaceable user. Mrs Taylor does not rely upon user of that kind which she accepts, I think, is not peaceable user of the registered land. What she relies on is access via the footpaths by residents who said that they saw no signs. The issue is whether in relation to these users (who Mr Laurence is prepared to accept may have been in the majority) one is entitled to treat the landowner as objecting to their wider use of his land notwithstanding that they did not actually see the signs erected to that effect.

47 The evidence of such users that they did not see any signs of the kind described by the landowners' witnesses is, Mr George submits, entirely consistent with the notices not surviving for very long and with any replacements faring no better. Morgan J. failed to take this into account in considering, as he put it, the picture in the round. Nor did he properly apply the principle that the landowner must do everything proportionately to the user, to contest it. Mr George's submission was that, faced with the vandalism of the signs, the Curtis family could and should have circulated their objections to the use of the registered land either by placing a notice ***51*** to that effect in a local newspaper or by distributing leaflets with a similar message to the residents of the neighbourhood.

48 The test formulated by Morgan J. in [121] of his judgment specifies two alternative approaches to the question of notice. If the landowner erects suitably worded signs and they are seen by would-be peaceable users of the land then it follows that their user will be contentious and not as of right. That is the easy case. The alternative is an objective test based on knowledge being attributed to a reasonable user of the land from what the landowner did in order to make his opposition known. If the steps taken to manifest that opposition are sufficient to bring it to the attention of any reasonable user of the land then it is irrelevant that particular users may not have been aware of it. The steps to be taken do not have to be fail safe in that regard. But they must be proportionate to the user which the landowner wishes to prevent.

49 All the relevant authorities in this area proceed on the assumption that the landowner must take reasonable steps to bring his opposition to the actual notice of those using his land. Disputes about whether the wording of the notices was sufficient to make it clear that any use of the land was not consented to and would be regarded as a trespass would be irrelevant if the landowner did not have to make his position known. They assume that some process of communication is necessary. If the landowner keeps his opposition to himself and makes no outward attempt to prevent the unauthorised use of his land he may be taken to have acquiesced.

50 It is therefore important to read the tests set out by Pumfrey J. and Judge Waksman as directed to what the landowner in any given case will be required to do in order to manifest his objections to the use of his land. What Judge Waksman refers to as the putative knowledge of the reasonable user means (as he explains) what the reasonable man standing in the position of the actual user should have realised. It does not attribute knowledge to the reasonable user which the actual user walking over the land at the relevant time would not have had. Users of the land are therefore treated as more perceptive than they might actually have been but they are not deemed to have seen things which were not there.

51 The essential criticism of the judge's analysis at [122] is that it treats the reasonable user of

the land as being in possession of knowledge which the actual users who gave evidence in support of the s.13 application said they did not have. As mentioned earlier, the judge has not rejected that evidence or made any finding that they did see or were aware of the warning signs. He says in [122] that it is not necessary for the landowners to show that every single user of the land knew what the reasonable user would have known. And he seems to have relied on this so as to make it unnecessary to decide whether the signs on the fences were in fact seen by what I have called the lawful users of the land.

52 I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly ***52*** positioned to give reasonable notice of the landowner's objection to the continued use of his land.

53 It is not a ground of appeal that the judge's findings of primary fact were not open to him. Mr George submits that although a re-hearing rather than a review, Morgan J. should nonetheless have given due weight to the findings made by the 2000 inquiry. I do not accept that submission. The judge was entitled to approach the matter *de novo* in the manner indicated by Lightman J. in his judgment on the preliminary issues. This is not a case where there was substantial new evidence and it was never the residents' case even at the inquiry hearing that the landowners' evidence about the signs should be rejected. The Council's decision letter goes no further than to accept that the applicant's witnesses did not recall seeing any of the signs when they used the land.

54 But Morgan J.'s treatment of the landowners' evidence is not inconsistent with this and is simply an objective summary of the evidence that was produced at the inquiry. On the basis of this material it was open to him to make the findings set out in [92]–[96] of his judgment even though a number of the witnesses gave no precise evidence about the location of the signs and only one or two referred to the signs being placed adjacent to the footpaths.

55 Similarly there can be no issue about the wording of the signs. They were clearly sufficient to indicate to the reasonable observer that the landowner wished people to keep to the footpaths and not to trespass on the registered land.

56 In these circumstances the position in relation to the maintenance of the fences is, I think, secondary and not essential to the outcome of the appeal. The fencing was obviously important while the land continued to be used for grazing but, as Mr George points out, it did not really affect local inhabitants who obtained access to the registered land via the footpaths. I also accept his submissions that the occasions on which a member of the Curtis family or one of their employees actually challenged someone using the land were too infrequent to be treated as sufficient in themselves to make the local inhabitants' user of the land contentious.

57 The judge made no findings about actual knowledge on the part of local residents. To do so would have required him to disbelieve the evidence given by Mrs Horne's witnesses which the Council appears to have accepted. The highest that he put it was to express caution about their evidence in the passage quoted above from [90] of his judgment.

58 The s.14 application therefore turned on the second part of the judge's test: i.e. whether a reasonable person knowing the relevant circumstances would conclude that the landowner was objecting to the use of his land. Consistently with my view of the authorities, knowledge of the relevant circumstances should be confined to what was visible to any reasonable person using the land **on a regular basis** at the relevant time. This involves a consideration of whether the findings made by the judge in [94] of his judgment are sufficient to establish that the Curtis family did enough to make their opposition known to the world at large including, in particular, lawful users of the land. The judge has found that the signs were clearly visible and sufficient in number to have made it clear to users of the registered land that they should keep to the footpaths; that the land was private and that their use of it would be a trespass. These signs, if seen, would obviously have made the use of the registered land contentious. The judge was, I think, right to reject the submission made to him that the landowners should have taken legal proceedings in

order to have made their position known. But that still leaves the evidence of the Mrs ***53** Horne's witnesses that they did not see the signs which Mr George relies on as rebutting the judge's finding that the steps taken by the Curtis family to make their position known were reasonable.

59 It seems to me that the only possible reconciliation between the judge's findings of primary fact and the recollections of Mrs Horne's witnesses is that the signs were vandalised and removed on a regular basis shortly after they were erected. The issue between the parties is therefore a relatively narrow one which is whether the Curtis family had, in the circumstances, done enough by putting up and from time to time replacing the signs or whether they should have taken other steps such as the notices in the local papers or the leaflets suggested by Mr George.

60 It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?

61 One of Betterment's pleaded defences which was relied on by Mr Laurence as part of his submissions on this point is that to satisfy the statutory definition of a town or village green in s.22(1) of the 1965 Act it is necessary to show that all of the inhabitants of the relevant locality have used the land for lawful sports or pastimes. Unlawful use by some (by, for example, cutting down fences to gain entry or by removing signs) therefore disqualifies the otherwise lawful use by other inhabitants from forming the basis of an application for registration.

62 I would approach this question in a different way. What I think s.22(1) does do is to require the registration authority (and, on a s.14 application, the Court) to look at the evidence of use by the inhabitants of the locality as a whole. Mr George seeks to distance his clients from the unlawful activities of the minority by saying that evidence of their user of the land was not relied on as the basis of the s.13 registration. But the inquiry panel was not entitled in my view to shut its eyes to what some residents had done to the fences and to the signs in considering whether the landowner was to be taken to have acquiesced in the user. The evidence before them and before Morgan J. was that inhabitants of the locality who were seeking to obtain registration of the land as a town or village green had seen the signs; had understood what their meaning and purpose was; and, for that reason, had removed them. The landowners had therefore made their opposition known to the local inhabitants even though, by the actions of some members of that class, the signs may have disappeared within a few days of being erected and may not therefore have been seen by many users of the land.

63 It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger on *Redcar (No.2)*) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If ***54** the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious.

64 It follows from this that the Curtis family were not required to take other steps such as advertising their opposition in order to rebut any presumption of acquiescence. In my view, the judge was correct to hold that there was not user as of right for the requisite twenty years.

The works site

65 It is not strictly necessary to decide this point but I can set out quite shortly why I consider that the judge was entitled to find that public user of the works site had been disputed so as to stop time running under s.22(1) .

66 As the judge found, the works were carried out between December 1979 and April 1982. They necessitated the excavation of a wide channel for the new drains and the associated works and car park took up much of the works site. Although these works in themselves made movement across a large part of the site impossible, Mr Laurence relies in particular on the fact that the whole site was fenced off for several months at least during the construction period. There was conflicting evidence about this at the inquiry. A Mr Garman said that the site had been fenced off. A Mr Males produced a witness statement saying that there had not been fencing around the whole site.

67 Both Mr Garman and Mr Males gave evidence and were cross-examined before Morgan J. The judge also had evidence of a footpath diversion order being made in respect of footpath 79 and (perhaps most crucially) of a drawing of the site prepared by the consulting engineers dated April 1980 which indicates a continuous line of fencing along the boundary of the works site. The judge analysed this evidence as follows:

> "147. Along the northern end of the site starting at Markham Avenue in the east and continuing for some 110 metres there was a concrete post and close boarded fence. There was considerable controversy as to the presence of a fence on the western boundary of the works site. I find that, in December 1979, there was erected a fence comprising wooden posts and strained wire. The northern end of this fence was at the western end of the concrete post and close boarded fence. The southern end of this fence was the field boundary. When the engineers drew their plan in April 1980, this western fence was described as an 'existing fence'. Indeed, one of the purposes of the plan was to show that that existing fence was to be removed, not for the entirety of its length but a section of it would be removed towards the southern end of the works site. The April 1980 plan also showed an intention to erect a new fence from the southern end of the remaining posts and strained wire fence. The new fence would run in an easterly direction and then turn generally northwards until it reached the northern boundary of the field. This new fence was to be constructed of concrete posts and strained barbed wire. I am not able to make a finding as to whether the new fence was ever constructed, in or after April 1980. However, I do find that for a period of time the western fence ran from the northern point where it joined concrete post and close boarded fence to a southern point at the field boundary. I find that that western fence remained in position for several months after December 1979. The plan ***55*** would suggest that it remained until, at least, April 1980. I accept the evidence given on behalf of Betterment that this western fence was cut or interfered with from time to time and was repaired. I also find that the presence of this western fence for that period prevented use of, certainly non-contentious use of, that part of the registered land which lay to the east of the western fence.
>
> 148. In case it matters, I can also say that I accept the evidence of the witnesses on behalf of Betterment that this western fence remained in position from its original northern point to where it joined the original footpath for virtually all of the time that the works site was in use. I also find that throughout the period from December 1979 to the Spring of 1982, a substantial part of the works site was not available for use for sports and pastime because a part was used for the residents car park (not a use for sports and pastimes), as the site of active construction works, for use as a spoil heap and for use for storing or parking plant and vehicles.
>
> 149. It follows from the above findings that for a period from December 1979 until at least April 1980, the entirety of the application site which was to the east of what I have described as the western fence of the works site was cut off and not available for use for sports and pastimes, alternatively not available for non-contentious use for sports and pastimes."

68 As originally formulated, there was no challenge in the notice of appeal to these findings of fact. But Mr George has now produced an amendment to the notice to the effect that the judge was wrong to find that the western fence remained in position subject to repair from December 1979 until April 1980. This finding is said to have been against the weight of the evidence and involved rejecting the evidence of Mr Males which the inquiry panel had relied on for their own finding that there had been no significant disruption of user caused by the drainage scheme.

69 Mr Laurence makes the point that Mr Males' evidence to the inquiry was given without the benefit of the plan but the short answer to this ground of appeal is that the question of whether the works site was completely fenced off between 1979 and 1980 was a straightforward question of fact for the judge on which he heard all the relevant evidence and reached a conclusion. It cannot be said that his decision on this point was based on no evidence or was perverse and, in my view, there is no basis for this Court to interfere with the finding which he made.

70 The only real issue about the works site is whether the physical disruption to public use caused by the fencing off of the site for about four months was sufficient to interrupt user of that land for the purposes of s.22 . We were referred by Mr George to a transcript of the decision of the Court of Appeal in Goodey v Everett (1880) which was an appeal from an order of Fry J. declaring that land in the village of Chappel was a village green. At some point part of the land was occupied by a railway company for a period of four years but thereafter use of the land as a village green resumed. The report contains no indication of how long the recreational use of the land continued either before or after such disruption or of what effect the use by the railway had upon it. The report does not therefore assist on the issue which the judge had to decide.

71 It seems to me that for the actions of a third party to be taken into account there must be a physical ouster of local inhabitants from the land and the disruption must be inconsistent with the continued use of the land as a village green. If the two competing uses can accommodate each other (as they did in *Redcar (No.2)*) then ***56** time does not cease to run. But here the exclusion was complete and the use of the land for the drainage scheme was not compatible with it remaining in use as a village green. The judge was therefore correct in my view to hold that there had not been twenty years' user of the works site.

Justice

72 In some ways this has become the most significant aspect of the two appeals which we have heard because it raises some fundamental questions as to what competing factors may be sufficient to prevent the rectification of the register under s.14 when the court has found that the s.13 registration should never have been made.

73 It is clear from s.14 that an error in the original registration is not enough in itself to justify the rectification of the register. The court must also reach a positive conclusion that it would be just to do so. Mr George submitted that this put the burden of proof on the s.14 applicant to justify rectification but I am not convinced that this is likely to be of much assistance to a judge when deciding whether to make the order. The reality is that he has to balance the landowner's claim to free his land from rights over it which should never have been granted against any countervailing considerations of prejudice which the local inhabitants are entitled to rely upon to justify the maintenance of the register in its existing form.

74 Both in this case and in Paddico the court recognised the strength of the applicant's case that rights over land which had not been established and which should not have been registered ought in principle to be removed. This is an inevitable starting point in these cases. The position is perhaps particularly stark in the present case where the original landowners took all necessary and reasonable steps to make their opposition known and the user relied on by the s.13 applicants was not user as of right. But even in Paddico where the judge held that the application should have failed on grounds of locality there was still no lawful basis for the registration that was made.

75 It goes almost without saying that for someone to be deprived of the unrestricted use of his property by a process which has no lawful basis requires a considerable justification if it can be justified at all and, in this regard, I have in mind Mr Laurence's submissions (which I accept) that the landowner's rights under art.1 of the First Protocol to the Human Rights Convention are engaged by the degree of control which registration imposes upon his land.

76 Had the challenge proceeded by way of judicial review, overriding considerations of justice based on the removal of unlawfully registered rights are unlikely to have prevailed. We therefore have to ask whether Parliament can have intended by the closing provisions of s.14 to have brought into account interests which in another context would have been deemed to be irrelevant.

77 The considerations which Mr George relies on as going to justice can be grouped broadly into two categories. The first are specific to the status of the s.14 applicant and the way in which the s.14 application has been conducted. They include the fact that Betterment is a subsequent purchaser and the delay in bringing the application. The second group relates to the position of the local inhabitants themselves. There is also an issue (raised by Carnwath L.J. during the course of the hearing) about good administration which really straddles both categories. ***57**

78 Mr George began by submitting that the court should have taken into account matters such as the reasons why the judge considered that the s.13 registration should not have been made and the manner in which the case was run below. I think that both of these points are irrelevant to the question of justice. The rider to s.14 is directed in my view to the effect which rectification will have on relevant interests. Not to the reasons why the court's jurisdiction has become exercisable.

79 Reliance is also placed on the fact that Betterment is a subsequent purchaser of the registered land and bought with knowledge of its status as a town or village green. The evidence before the judge was that it paid a price which reflected the hope value of future development but was obviously much less than its value would have been had no s.13 registration been made. Unlike the Curtis family, it has therefore suffered no financial loss as a result of the registration and only stands to gain financially if the register is rectified and planning permission for development is obtained.

80 The judge declined to separate the interests of Betterment in this regard from those of the original owners. Betterment should, he held, be treated as having stepped into the shoes of the Curtis family and their position equated for the purpose of considering the justice of the case. I think that the change in ownership is a relevant factor but is not likely to be a significant one. Although the primary loss caused by the invalid registration was to the Curtis family, it would, I think, be wrong to ignore or lessen the importance to be attached to Betterment's right to exercise full legal ownership of its land merely because it was able to acquire it at a price which reflected its registered status. The maintenance of the register will still amount to an unjustified interference with its legal rights.

81 The next issue is delay. In this case the judicial review proceedings were commenced soon after Dorset County Council notified the Curtis family of its decision to register. But there was a period of four years between the discontinuance of those proceedings and the issue by Betterment of the s.14 application in December 2005. Mr Laurence told us that much of this time was taken up assembling the necessary papers, many of which had to be obtained from the County Council. This was complicated and took a long time. Judging by the way in which most of these cases seem to be conducted I can readily appreciate that but I think that Morgan J. was fully entitled to conclude (as he did in [189] of his judgment) that Betterment had not treated the litigation as a matter of urgency not least because it had still to obtain planning permission for any development of the land.

82 The judge's view, however, was that none of this mattered. He said in terms that the mere passage of time was immaterial, one way or the other, to the justice of rectifying the register. Mr George submits that this cannot be right and he referred us to the later decision of Morgan J. in Piper Land Development (Solihull) Ltd v The Rhondda Cynon Taf County Borough Council [2011] EWHC 3591 (Ch) where he seems to accept that delay between the date of registration and the issue of the s.14 application would be material to the court's consideration of the justice of ordering rectification. In Paddico , Vos J. took the same view.

83 It seems to me that delay is a relevant factor but is unlikely to be determinative of the outcome unless either it has resulted in some form of relevant prejudice or it brings into account the more general consideration of good administration which I referred to earlier. As Mr Laurence pointed out, there is no time limit for applications under s.14 and the courts should, I think, refrain from seeking to impose what would be an arbitrary time limit absent any discernable impact on the ***58** respondents or any other interested parties. There might, I suppose, be cases where the delay was so long (perhaps decades) that some prejudice could be inferred. But this is not that kind of case and even in such a case it would still be necessary in my opinion to identify what the interests prejudiced actually were.

84 One possible argument is that the interests of good administration are served by maintaining the register in place in the absence of a prompt challenge to its contents. The fact that the

register is a public document which is likely to form the basis of other decisions about planning, development and the purchase of land dictates that it should be able to be relied upon for what it states. Considerations of this kind are referred to in the judgment of the Court of Appeal in *R. v Newbury District Council Ex p. Chieveley Parish Council (1999) P.L.C.R. 51* where the court declined to quash a grant of planning permission because of the applicant's undue delay in seeking judicial review. Pill L.J. (at p.66c) said that:

> "The lapse of time between the grant of outline permission and the application for judicial review approached three years. Notwithstanding the points made on behalf of the Parish Council, including the fact that the permission was outline only and would not be implemented without approval of reserved matters, that lapse of time did in my judgment constitute 'undue delay' within the meaning of that term in s.31(6) of the 1981 Act. I agree with the approach of Simon Brown J in *R v Exeter City Council, ex parte J L Thomas & Co Ltd [1991] 1 QB 471, [1990] 1 All ER 413*, page 484 of the former report:
>
> 'I cannot sufficiently stress the crucial need in cases of this kind of the significance to proceed with the greatest possible urgency, giving moreover to those affected the earliest warning of an intention to proceed. In this connection it should be remembered that there is conspicuously absent from the legislation any right to appeal in fact or law from a planning authority's grant of planning permission. And even when a right of challenge is given — the right of statutory application under section 245 [of the Town and Country Planning Act 1971] to challenge a ministerial decision — it must be exercised within six weeks. Only rarely is it appropriate to seek judicial review of a section 29 permission (section 70 of the 1990 Act); rarer still will be the occasions when the court grants relief unless the applicant has proceeded with the greatest possible celerity.'
>
> A reason for that approach is that a planning permission is contained in a public document which potentially confers benefit on the land to which it relates. Important decisions may be taken by public bodies and private bodies and individuals upon the strength of it, both in relation to the land itself and in the neighbourhood. A chain of events may be set in motion. It is important to good administration that, once granted, a permission should not readily be invalidated. As confirmed in the House of Lords, s.31(6) recognises that there is an interest in good administration independent of hardship, or prejudice to the rights of third parties. The court is entitled to look at the interest in good administration independently of those other matters. It is important that citizens know where they stand and how they can order their affairs in the light of the relevant decision (*Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 A.C. 738; [1990] 2 All E.R. 434*). In my judgment, weight ***59** should be given to this aspect of the case notwithstanding the absence of convincing evidence that the applicants for planning permission have been prejudiced by the delay."

85 But this judgment has to be read against the background of s.31(6) of what is now the Senior Courts Act 1981 which expressly empowers the court to refuse relief by way of judicial review if there is undue delay in the making of the application which is likely to cause substantial hardship or prejudice to the rights of any person or would be detrimental to good administration.

86 It seems to me that while delay is a relevant factor, the broader test of justice under s.14 means that the consequences of rectification still have to be balanced against the obvious interests of the landowner in obtaining the vindication of his own legal rights. Unlike the planning cases a s.14 application is not simply a legal challenge to an administrative decision. Its purpose is to enable the landowner to re-establish his property rights free from the adverse registration which affects them. It is therefore not surprising that Parliament has imposed no limit on the court's powers by reference to undue delay and has merely required it to consider whether it would be just to make the order.

87 For this reason, delay will not, in my view, be a barrier to rectification unless there is material before the court to show that other public and private decisions are likely to have been taken on the basis of the existing register which have operated to the significant prejudice of the respondents or other relevant interests. One might well have a case in which other land has been developed or major land transactions carried through on the strength of the register. But in this

case none of those issues arises except for the position of Mr and Mrs Thomson who purchased Markham House in Wyke Road on December 20, 2001.

88 Their evidence to the judge was that they had bought the house because it overlooked the registered land which they found very attractive. They were told by the vendor that it was a registered village green and that the land could never be built on. Mrs Thompson said she was also re-assured by the designation of the land as open space in the local plan. However, the judge took the view that the position as regards planning was not as reassuring as she thought it was. This included her failure to appreciate that the land to the west of the registered land was not the subject of registration as a town or village green and therefore remained subject to possible changes in planning policy. The judge went on:

> "182. If as a result of this hearing the registration of the land as a village green is cancelled, it does not by any means follow that the land will be developed. The planning prospects for the land that was once registered as a green as well as the land to the west will be the subject of the planning policies of the local authority and any challenge by the landowner to those policies. Certainly, the removal of the registration is the removal of one further barrier to development. I can well understand that Mr and Mrs Thompson will now be concerned that the prospect of development will be bought nearer if the registration as a green is cancelled. Their thinking will no doubt be influenced by all that they have learned in the period since 2001 and by the persistence shown by Betterment in seeking this rectification, as well as the fact of rectification itself.
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> 183. Plainly, Mr and Mrs Thompson would greatly prefer that rectification was not ordered. Indeed, many people living in the vicinity of the registered ***60*** green would prefer the registration to remain, both as a curb on development and as conferring on certain local residents rights to use the green. However, I doubt if the circumstances in which Mr and Mrs Thompson bought Markham house at the end of 2001 places them in a situation that is much different from all the other residents who want to see the registration maintained. Mrs Thompson also attached importance to the ability to walk to Markham House from the centre of Weymouth across the registered land. As footpaths cross the registered land, that ability will not be taken away if the registration of the land is cancelled.
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> 184. It is also right, when considering the justice of the case, as between the landowners and Mr and Mrs Thompson, to record that the landowners were not in anyway responsible for Mr and Mrs Thompson's state of mind, whatever it was, when they acquired Markham House. The landowners did not make any representation or promise as to the future use of the land and, indeed, nobody asked the landowners for any information on that score."

89 In my view the judge was right to regard the position of Mr and Mrs Thompson as little different from any other local residents who have bought houses in the area in the late decade or so. What they will lose by the rectification of the register is not the open space comprised in the registered land but their right to unrestricted use of it for recreational purposes. Since they were never entitled to those rights no injustice can follow from their removal. If what the local inhabitants value is (like Mr and Mrs Thompson) an open outlook from their windows then that can be safeguarded by the planning policies of the local authority. The purpose of s.13 is not to provide some additional form of planning control.

90 The judge was therefore entitled in my view to conclude that it would be just to order rectification in this case. I would therefore grant permission to Mrs Taylor to appeal on the issue of justice but would dismiss this appeal.

Sullivan L.J.:

91 I am in complete agreement with Patten L.J. on the "User as of Right" and "The works site" issues. I also agree with his conclusion on the "Justice" issue: that the judge was entitled to conclude that it would be just to order rectification in this case.

92 I do not share Patten L.J.'s view as to the likely significance of two of the competing factors—change of ownership and delay—in his analysis of the "Justice" issue. I endorse his view that both factors are relevant, and differ only as to their potential significance. This difference of emphasis does not affect the outcome of this appeal.

93 Patten L.J. considers that the change in ownership, while relevant, is not likely to be a significant factor (at [80]). It seems to me that in any consideration of the justice of rectification, the fact that an applicant for rectification, knowing the status of the land and the uncertainty of litigation, has deliberately chosen to take a commercial risk in purchasing the land, is capable of being a significant factor in the balancing exercise. A party who deliberately takes a chance and "buys litigation" cannot realistically complain of injustice if his speculation is unsuccessful.

94 So far as delay is concerned, I agree with Patten L.J. that in most cases it is unlikely to be determinative of the outcome unless either it has resulted in some form of relevant prejudice or it brings into account the more general considerations ***61*** of good administration to which Patten L.J. has referred (at [83]). Patten L.J. acknowledges that there might be cases "where the delay was so long (perhaps decades) that some prejudice could be inferred", but considers that even in such cases it would be necessary to identify what the interests actually prejudiced were (ibid).

95 For the reasons set out in [84] of Patten L.J.'s judgment, there is, in my view, a strong public interest in upholding the register in the absence of a prompt challenge to its contents. Against this background, there will be exceptional cases where the delay is so long that prejudice to good administration can properly be inferred. Evidence of actual prejudice of the kind referred to in [87] of Patten L.J.'s judgment will reinforce the case against rectification, but if there has been very lengthy delay prejudice can properly be inferred even in the absence of any such evidence. A delay of decades would certainly be a sufficiently lengthy delay for this purpose, but I would go further and say that a delay of a decade—well beyond any normal limitation period—would be capable of being a delay that was so long that prejudice could be inferred.

96 My view as to the potential significance of these two factors does not affect the outcome of this case. While I take the view that Betterment would not suffer any significant injustice if rectification was refused, the judicial review proceedings were commenced promptly by the landowners and were discontinued upon the basis that a s.14 application would be made instead (at [16]). After discontinuance there was a delay of just over four years before Betterment made the s.14 application in December 2005, but this is not one of those exceptional cases where the delay was so long that prejudice to any interest, including good administration, can properly be inferred in the absence of any evidence of actual prejudice.

97 For these reasons, I too would dismiss this appeal.

Carnwath L.J.:

User as of right

98 I also agree with Patten L.J. on this issue, and would accordingly uphold the judge's conclusion.

99 I was initially troubled by the apparent conflict between his findings and those reached by the Council after the earlier inquiry, taking account also of Mr Laurence's concession that the majority of user was "peaceable". It is one thing to say with the judge (at [123]) that not "every single user" needs to have known of the owners' objection, but the concession arguably went further than that.

100 It is clear from the transcript and the carefully reasoned decision-letter that the informal inquiry conducted by the Council at that time was unusually thorough. Mr George fairly makes the point that the owner's case was primarily directed to establishing whether the user was confined to members of the local area, and less to seeking in cross-examination to undermine the evidence of those many users who claimed to have seen no signs. That raises the question how far it was open to the judge, in the rectification hearing, not having heard the witnesses, to reinterpret their evidence.

101 The answer in my view lies in the different characters of the two sets of proceedings. The former, however conscientiously conducted, remained administrative in nature. The latter was the first independent, article 6-compliant, ***62*** investigation. The relationship between the two was explained by Lightman J. in the preliminary proceedings in this case (quoted by Patten L.J. at [18]). The procedure, including the use to be made of the earlier evidence, was a matter for the judge. In this case it was agreed that there should be no limitations on the availability of the earlier evidence. But the judge was not bound by the form in which it had been presented or

cross-examined, nor by the authority's conclusions on it. It was open to the parties at the hearing before him to seek to supplement the evidence if they thought necessary. Subject to that it was his task to draw such inferences from the totality of the evidence as he thought appropriate.

102 On that basis, in my view, his conclusions show no error of law or approach. The claimants had to establish peaceable user for the whole of the period 1977 to 1997. There was no real issue about the last thirteen years, that is from about 1984. It was only in the first few years that there was a direct conflict. The judge was entitled to accept as convincing the evidence (both current and from the earlier inquiry) that in the earlier period the owners had erected signs sufficient to inform regular users of their objections (at [94]-[96]). That was supported by independent witnesses, and documentary records of the making of signs. Equally, he was entitled to give weight to the fact that the contrary evidence was given after 15 or 16 years of unhindered use, and to attribute the difference to the dimming of memories, or even "unconscious distortion" (at [90]). Nor was that conclusion inconsistent with acceptance that, taking the relevant 20-year period as a whole, the majority of the use, in terms of both numbers and years, was peaceable. Those were conclusions reasonably open to him on the evidence, and show no error of approach such as to justify intervention by this court.

Justice

103 On this issue I agree that the judge was entitled to conclude that it would be just to order rectification under s.14 . For reasons which I expand on in the Paddico case, I take a similar view of the relevant factors to that of Sullivan L.J. I would therefore respectfully adopt his reasoning, in preference to that of Patten L.J., but with the same result. ***63**

Status: Positive or Neutral Judicial Treatment

*646 Winterburn and another v Bennett and another

Court of Appeal

25 May 2016

[2016] EWCA Civ 482

[2017] 1 W.L.R. 646

Sharp , David Richards LJJ , Moylan J

2016 March 3; May 25

Easement—Right to park—Grant—Customers and suppliers of claimants' fish and chip shop parking in neighbouring landowners' car park for continuous period of 20 years—Signs displayed by landowners prohibiting parking by non-users of landowners' premises—Whether signs inconsistent with claimants' claim to user as of right—Whether precluding acquisition of right to park in car park under doctrine of lost modern grant—Whether landowners required to take further action when unlawful user persisted in

For over 20 years the claimants operated a fish and chip shop that was adjacent to a car park owned by the defendants' predecessors in title, whose club premises were behind the car park. Throughout that time the claimants' suppliers would park their vehicles in the car park up to nine times a day while making their deliveries and the claimants' customers would park there while buying their fish and chips. This was despite the fact that, for most of that period, two signs erected by the defendants' predecessors, one attached to a wall at the entrance of the car park, the other in the window of the club premises, stated that the car park was private and for the use of club patrons only. After the defendants had acquired the club premises and car park they let them to a tenant who obstructed all vehicular access to the car park from the road. The claimants applied for registration of a right of easement for themselves and their customers to park in a particular part of the car park, on the grounds that they had acquired such right by prescription by lost modern grant as a result of 20 years' continuous user "as of right". The First-tier Tribunal granted the claim, finding that, although the two signs were clearly visible, they were insufficient to prevent the user from being "as of right". The Upper Tribunal allowed the defendants' appeal, reversing that finding.

On the claimants' appeal—

Held , dismissing the appeal, that the continuous presence of clearly visible signs could, without more, constitute sufficient steps on the part of a landowner to effectively indicate that it did not acquiesce in unlawful user, thus preventing such user from being "as of right" for the purposes of the doctrine of lost modern grant; that it was not necessary for the landowner to back his objection to unlawful user by physical obstruction or by legal action, nor was he required to do everything, proportionate to the user, to contest the user; that if, once the landowner had made his objection clear, the unlawful user was persisted in, it would not be necessary for the landowner to take the further step of confronting the wrongdoers, either overtly or in writing, still less to go to the trouble and expense of bringing legal proceedings; that, in the circumstances, the signs erected by the defendants' predecessors had been sufficient to prevent the user relied on by the claimants from being "as of right"; and that, accordingly, the claimants had not acquired the right which they claimed (post, paras 23, 31, 36–37, 40–42, 43, 44).

Taylor v Betterment Properties (Weymouth) Ltd [2012] 2 P & CR 3 , CA applied.

Decision of the Upper Tribunal (Tax and Chancery Chamber) [2015] UKUT 59 (TCC) affirmed.

The following cases are referred to in the judgment of David Richards LJ:

***647**

Dalton v Henry Angus & Co (1881) 6 App Cas 740 , HL(E)

Eaton v Swansea Waterworks Co (1851) 17 QB 267 ***647**

Newnham v Willison (1987) 56 P & CR 8 , CA

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385; [1999] LGR 651 , HL(E)

R (Barkas) v North Yorkshire County Council [2014] UKSC 31; [2015] AC 195; [2014] 2 WLR 1360; [2014] 3 All ER 178; [2014] LGR 459 , SC(E)

R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] UKSC 11; [2010] 2 AC 70; [2010] 2 WLR 653; [2010] 2 All ER 613; [2010] LGR 295 , SC(E)

Smith v Brudenell-Bruce [2002] 2 P & CR 4

Taylor v Betterment Properties (Weymouth) Ltd [2012] EWCA Civ 250; [2012] 2 P & CR 3 , CA

No additional cases were cited in argument or referred to in the skeleton arguments.

APPEAL from the Upper Tribunal

The claimants, Trevor Winterburn and Elizabeth Winterburn, applied for registration of a right of easement acquired by prescription by lost modern grant by themselves and others using their premises since 1987, to park on neighbouring land belonging to the defendants, Garry Bennett and Lynne Bennett. The defendants opposed the application. By a decision dated 21 October 2013, on a reference from HM Land Registry, the First-tier Tribunal (Property Chamber) (Neil Cadwallader) [2014] UKFTT 989 (PC) granted the claim. By a decision promulgated on 6 February 2015, the Upper Tribunal (Tax and Chancery Chamber) (Judge Purle QC) [2015] UKUT 59 (TCC) allowed the defendants' appeal against that decision and granted the claimants permission to appeal.

By a notice of appeal filed on 27 February 2015, the claimants appealed on the grounds that (1) the claimants' right to park on the land had been acquired by prescription by lost modern grant, in that they had shown 20 years' uninterrupted user as of right, namely without force, without secrecy and without permission; (2) that the landowners had acquiesced in the claimant's user; (3) that to counter acquiescence in the unlawful user, the defendants had to resist or suitably protest against it in a proportionate manner, the circumstances had to indicate that the defendants objected and continued to object to the unlawful user, and if reliance were placed on protests, they had to be continuous and repeated; and (4) that the tribunal judge had failed to correctly apply the relevant legal tests applying to the question of whether the defendants had acquiesced.

The facts are stated in the judgment of David Richards LJ.

Jonathan Gaunt QC and *Caroline Shea QC* (instructed by *DAC Beachcroft LLP, Bristol*) for the claimants.

Guy Fetherstonhaugh QC and *Bruce Walker* (instructed by *Butcher & Barlow Solicitors, Bury*) for the defendants.

The court took time for consideration.

25 May 2016. The following judgments were handed down.

DAVID RICHARDS LJ

1 This appeal raises an issue as to the steps which an owner of land must take to prevent others using the land without permission from acquiring rights over the land. The claimants claim, as a result of use over a number of years, to have acquired by prescription the right for themselves and others

*648 using their premises to park on land belonging to the defendants. The First-tier Tribunal ("FTT") (Property Chamber) (Mr Neil Cadwallader) held that the claimants had established their claim to parking rights, but the Upper Tribunal (Tax and Chancery Chamber) (Judge Purle QC) allowed an appeal against that decision. Judge Purle gave permission to appeal to this court.

2 The land in question is in Keighley, West Yorkshire. It comprises part of a car park which until 2010 was owned by the Conservative Club Association. On the far side of the car park from the road, the club had premises which housed a bar and other social facilities for members of the club. The car park was used as a car park for the club. The claimants own and operate a fish and chip shop which is close to the road and adjacent to the entrance to the car park. There is a relatively narrow entranceway to the car park from the road with the wall of a building on one side, until its demolition in 2007, and the claimants' premises on the other side.

3 The club owned and used the club house and car park for many years until 2010 when they were purchased by the defendants. In May 2012 the defendants let the club building and car park to a tenant who obstructed access to the car park from the road, preventing all access by cars and other vehicles but not pedestrian access. Later in 2012, the tenant obstructed pedestrian access also. This appeal is not concerned with pedestrian access but only with the parking of cars and other vehicles on the disputed land.

4 The claimants went into occupation of the fish and chip shop in 1987 or 1988 as tenants or licencees and have operated it as such since then. They took a 20-year lease of the property in 1992. They purchased the freehold reversion in 2007 and were registered as its freehold proprietors. The FTT found, and there was little if any dispute about this, that throughout the time that the claimants operated the fish and chip shop until 2012, suppliers had up to nine times a week pulled off the road into the disputed part of the car park and parked there for long enough to make their deliveries. Also, throughout that period, customers had during opening hours pulled off the road to park on the disputed land while they bought their fish and chips. On the whole this use of part of the car park did not interfere with the club's operations but over a seven-year period there were 12 to 15 occasions on which the club steward asserted ownership of the disputed land, and, expressly or impliedly, asserted that the claimants and their suppliers and customers had no right to park on it, and also complained that their customers should not park in such a way as to cause an obstruction to the club's patrons.

5 At all times until 2007 there was a sign attached to the wall of the building on one side of the entranceway to the car park. It had been erected on behalf of the club and read: "Private car park. For the use of club patrons only. By order of the committee". It was attached at right angles to the wall and the FTT found that it was "clearly visible to anyone entering the disputed land, whether on foot or by vehicle. It must have been seen by many of the people so entering the disputed land to go to the shop". During the same period there was a similar sign in the window of the club premises which, as the FTT found, was "also clearly visible, although no doubt less so from the access land because further away".

6 These signs did not deter the claimants' suppliers and customers from parking on the disputed land. As the FTT found, at para 31:

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> "Neither the [claimants] nor any of those utilising the access land for purposes connected with the shop took the slightest notice of those signs. Save as described below, no-one made any attempt to restrict use of the car park to club patrons only, or to exclude the [claimants] or their visitors."

7 The FTT goes on to summarise the evidence of the club steward to which I have earlier referred.

8 The issue on this appeal is whether the signs were sufficient to prevent the claimants acquiring a right to use the disputed land as a car park for themselves and their suppliers and customers or whether the owners of the car park had acquiesced in such use so as to entitle the claimants to such a right, notwithstanding the presence of the signs.

9 The claimants based their claim to a right to park cars and other vehicles belonging to themselves, their suppliers and customers on acquisition by prescription by "lost modern grant". This requires the claimants to show 20 years' uninterrupted user "as of right", that is to say without force, without secrecy and without permission (nec vi, nec clam, nec precario).

10 The purpose of the law whereby a person may acquire rights by prescription is that the legal position should reflect and recognise the fact of long use: see *Easements, Covenants and Profits à Prendre* (2008) (Law Commission Consultation Paper No 186), para 4.178. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* (" Sunningwell ") Lord Hoffmann said, at p 349: "Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment."

11 By way of explanation of the need for the long user to be without force, secrecy or permission and therefore "as of right", Lord Hoffmann said in the same case, at pp 350–351:

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

12 In the present case, it is the element "without force" that is in issue. There is no doubt that the parking on the disputed land was open and known to the club and, later, the defendants and that no permission for parking had been given.

13 The phrase "without force" carries rather more than its literal meaning. It is not enough for the person asserting the right to show that he has not used violence. He must show that his user was not contentious or allowed only under protest. This appeal is concerned with what constitutes protest on the part of the owner of the land for these purposes.

14 Mr Gaunt QC for the claimants rightly emphasised that the basis of the law of prescription is acquiescence on the part of the owner of the land. In *Dalton v Henry Angus & Co (1881) 6 App Cas 740* , in which the doctrine of lost modern grant was authoritatively established, Fry J, one of the judges ***650*** asked to give his opinion to the House of Lords said at p 773, in a passage cited with approval by Lord Hoffmann in Sunningwell :

> "But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."

15 Mr Gaunt submitted that, to counter acquiescence in the unlawful use of land, it must be resisted or suitably protested against in a proportionate manner. The circumstances must indicate that the owner objects and continues to object to the unlawful use. If reliance is placed on protests, they must be continuous and repeated.

16 In a commendably economic manner, Mr Gaunt cited from a number of the leading authorities, beginning with Dalton v Henry Angus & Co 6 App Cas 740 . In that case, the House of Lords was concerned to establish whether the owner of a building enjoyed a right of support from neighbouring land and, if so, how this right arose in the absence of contract or ancient user. For these purposes, the House of Lords sought the opinions of seven common law and equity judges who were present when the case was argued and whose opinions are reproduced in full at pp 742–789 of the report. It is important to note that exactly what can or cannot constitute "without force" was not the issue in the case but the requirement for user "as of right" was in point because all the judges, and the members of the House of Lords, considered that the right of support either was an easement that could be acquired by prescription or arose in a manner analogous to the acquisition of an easement by prescription.

17 Some passages from the opinions of the judges on this issue have subsequently been cited, with approval.

18 Fry J said, at p 774:

> "It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or ***651** covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases.
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> "As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer."

19 Part of this passage was cited with approval by Lord Neuberger of Abbotsbury PSC in *R (Barkas) v North Yorkshire County Council [2015] AC 195* , para 18. This passage and other passages in some of the older authorities suggest that the owner of the land must take steps by physical means or through legal proceedings to prevent the wrongful user. However, the passage cited from the opinion of Fry J ends with a reference to a right being "acquired and enjoyed by the tacit consent of the sufferer" and in a passage of the opinion of Bowen J, also cited in later cases, he said 6 App Cas 740, 786:

> "The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions on which the presumption of right is raised: Eaton v Swansea Waterworks Co ."

20 Although this was said by Bowen J in the context of rights of support where active steps to interrupt the user would normally be wholly disproportionate, it has been cited in more recent cases as demonstrating a much broader proposition. See *R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70* , paras 88–91, per Lord Rodger of Earlsferry and *Newnham v Willison (1987) 56 P & CR 8* , 18, per Kerr LJ. In the latter case, Kerr LJ continued, at p 19:

> "In my view, what these authorities show is that there may be 'vi' —a forceful exercise of the user—in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious."

21 In the light of the development of the authorities, it cannot now be said, even if it ever could, that to avoid acquiescence, the owner of the relevant property must take steps through physical means or legal proceedings actually to prevent the wrongful user.

22 The issue in the present case is whether the continuous presence of legible signs stating that the car park was private property and for use by the club's patrons only was sufficient to render the use of the car park by the claimants and their suppliers and customers contentious.

23 The decision of this court in *Taylor v Betterment Properties (Weymouth) Ltd [2012] 2 P & CR 3* (" Betterment ") establishes that the continuous presence of legible signs may be sufficient to render user contentious.

24 Betterment was a commons registration case in which the owner of 46 acres of former grazing land, crossed by two public footpaths, which had been registered as a town or village green, applied to rectify the register by removal of the land from the register. The land had been registered as a ***652*** green following an application by a member of the public on the basis that inhabitants of the area had used the land for activities such as playing games, dog walking and playing with children as of right for not less than 20 years. Registration was opposed by the owner on the grounds that such user had not been "as of right". The evidence established that until about 1984 the owner had repeatedly erected and re-erected clearly visible signs, stating that the land was private or that the public were to keep out or that their presence would be a trespass, making it plain that the public were not entitled to go on to the land other than by using the footpaths. The signs had been repeatedly vandalised and removed by some members of the public, with the result that they had not been seen by other members of the public. From time to time members of the family that owned the land and their employees had also challenged or warned off members of the public from the land. Morgan J acceded to the application for rectification, holding that the user had remained contentious until at least 1984, and his decision was unanimously upheld by the Court of Appeal. Patten LJ gave the leading judgment, and Carnwath and Sullivan LJJ agreed with his judgment as regards the question of user as of right.

25 Patten LJ said, at para 30:

> "The issue for the inquiry and for Morgan J was whether the Curtis family had taken sufficient steps so as to effectively indicate that any use by local inhabitants of the registered land beyond the footpaths was not acquiesced in. At the inquiry this turned on the presence or visibility of the signs."

26 Morgan J found as a fact that signs were erected and re-erected with reference to the total area of land that the Curtis family owned over a period of years. The signs were clearly visible and would have brought home to a person using the registered land that it was governed by the signs. The signs would have made it clear that members of the public were not entitled to leave the footpaths.

27 Patten LJ said, at para 38:

> "If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in."

28 Patten LJ said, at para 48:

> "If the landowner erects suitably worded signs and they are seen by would-be peaceable users of the land then it follows that their user will be contentious and not as of right. That is the easy case."

However, the signs had frequently been vandalised or removed and there were members of the public who used the land without knowledge of the signs. That was the more difficult case to which a significant part of the judgment of Patten LJ is addressed. As to that, Patten LJ said, at para 52:

> "I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the ***653*** problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowners's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land."

29 As to challenges by members of the Curtis family or their employees, Patten LJ said, at para 56:

> "the occasions on which a member of the Curtis family or one of their employees actually challenged someone using the land were too infrequent to be treated as sufficient in themselves to make the local inhabitants' user of the land contentious."

30 Patten LJ set out his conclusions on the issue which arose on the facts of that case at paras 60–64. I should set out some of those paragraphs:

> "60. It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?"
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> "63. It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger in Redcar (No 2)) that rights of property cannot be acquired by force or by unlawful means for the court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious.
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> "64. It follows from this that the Curtis family were not required to take other steps such as advertising their opposition in order to rebut any presumption of acquiescence. In my view, the judge was correct to hold that there was not user as of right for the requisite 20 years."

31 Although *Betterment [2012] 2 P & CR 3* was a commons registration case, it is common ground that the same principles apply to the law of prescription. The present case does not feature the factual difficulties involved in Betterment that a significant number of members of the public ***654** using the land probably did not see the signs which were erected and re-erected by the owners. In the present case, there were two signs clearly visible to all users of the car park and clearly informing all users that it was a private car park for the use of club patrons only. The signs were never vandalised or, until 2007, removed and no occasion arose for their replacement. In those circumstances, applying the judgment of Patten LJ, the answer would appear to be clear that the signs were by themselves sufficient to make contentious the parking of cars and other vehicles by the claimants, their suppliers and customers.

32 Mr Gaunt relied on the decision at first instance of Pumfrey J in *Smith v Brudenell-Bruce [2002] 2 P & CR 4* . The claimant had purchased a cottage on an estate belonging to the defendants. The conveyance granted an express right of way over a track connecting the cottage to the public highway. The track continued from the cottage across the defendants' land to a forest. The claimant used the track to gain access both on foot and in vehicles to the forest and his use was tolerated by the defendants, without giving consent, from 1975 to 1998. By reason of a letter sent by the defendants to the claimant in October 1998, the use of the track to the forests ceased to be as of right. On these facts, the judge held that the claimant had used the track as of right for the period from 1975 to 1998 and that his user could not be explained by reference to some general tolerance of pedestrian use of the track by members of the public. The claimant had openly used the track to the knowledge of the defendants for a period of over 20 years without any form of protest. On its facts, the decision was plainly correct and, it may be thought, straightforward.

33 In a section of his judgment headed "The law" at paras 9–12 Pumfrey J cited from the opinion of Fry J in Dalton v Henry Angus & Co 6 App Cas 740 and from *Eaton v Swansea Waterworks Co (1851) 17 QB 267* and Newnham v Willison 56 P & CR 8 . In conclusion, the judge said at para 12:

> "It seems to me a user ceases to be user 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with a dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when the servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interpret the user."

34 As will be apparent, this statement was not necessary for the decision in the case but Mr Gaunt submits that, while it overstates the position in two respects, it is otherwise a correct statement of the law. Mr Gaunt says that the test is overstated in that, first, it is not necessary for the servient owner to say that he will erect a physical obstruction or commence legal proceedings and, secondly, the reference to "consistent with his means" is misplaced.

35 In *Betterment [2012] 2 P & CR 3* at first instance, Morgan J restated this passage from the judgment of Pumfrey J in terms applicable to a town or village green, which the parties in that case had accepted as a useful general test. Having so stated it, Morgan J held that the erection and re-erection of signs along the footpath was a sufficient protest by the landowner to make the user of the land by members of the public contentious. In the Court of ***655** Appeal, Patten LJ quoted the passage from the judgment of Pumfrey J. followed by the observation that "this requires to be unpacked a little". He then addressed its application and relevance in a case where a significant number of users of the property had not or may well not have seen the signs. As earlier mentioned, the Court of Appeal agreed with the conclusion of Morgan J, and Patten LJ was of the view that, in a case such as the present, where all users of the land saw and were aware of the signs, it was easy to conclude that the user by them was contentious.

36 For my part, I do not think that the obiter statement of Pumfrey J provides much assistance. While relying on it in general terms, Mr Gaunt felt constrained to submit that it was overstated in the two ways indicated above. In my judgment, the authorities do not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user. As it seems to me, the decision of this court in *Betterment [2012] 2 P & CR 3* is inconsistent with these propositions. The court there accepted that the erection and re-erection of signs was all that the owner needed to do to bring to the attention of those using the land that they were not entitled to do so.

37 Mr Gaunt put his case in a number of ways. First he said that there must, quoting Bowen J, be "continuous and unmistakeable protest" by the servient owner. The circumstances must indicate that the owner objects and continues to object to the parking. I agree that the circumstances must indicate to persons using the land that the owner objects and continues to object to the parking. As Patten LJ put in *Betterment [2012] 2 P & CR 3* , para 30 the issue is whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in. On the facts of the present case, the presence of the signs in my judgment clearly indicated the owner's continuing objection to unauthorised parking. Mr Gaunt submitted that the protest needs to be proportionate to the user. Again I would accept that but in my view the continuous presence of the signs asserting that it was private property for use by the club's patrons only was a proportionate protest. Mr Gaunt submitted that, in the face of parking by those not entitled to do so, there should have been additional signs ordering such parking to cease. I can see no reason why such further signs should be required. Any reasonable person, whether in the position of the owner of the land or those unlawfully parking on it, would understand the meaning and effect of the signs to be that persons other than the club's patrons were not allowed to park on the car park and should not do so. Nor, in my judgment, does it matter that the signs were in place before the claimants went into occupation of the fish and chip shop. It surely cannot make a difference that the signs were erected a week before they went into occupation or a week after they went into occupation, or that the claimants would be in a weaker legal position if the signs had been erected only after they or their suppliers and customers started to park unlawfully in the car park.

38 Mr Gaunt submitted that where, as was obvious in the present case, the signs were being ignored, it was incumbent on the owner of the land to take such further steps as were practicable. He accepted that if a sign was all that could practically be done, then a sign would be sufficient. But where, as here, the owner knew that the claimants (and their suppliers and customers) ***656** were unlawfully using the land, the owner must communicate directly with the claimants. He submitted that a stiff letter from the secretary of the club or its solicitors every year would have been sufficient.

39 In his skeleton argument, Mr Gaunt submitted that there was a power in the owner of the car park to stop the user "by the simple expedient of erecting a chain across the entrance to the car park, or objecting orally, or writing letters of objection, or threatening or commencing legal proceedings, but the owner conspicuously abstained from doing any of these". In the course of his oral submissions, Mr Gaunt suggested that, if one level of protest was insufficient to stop the unlawful parking, a more potent step should be taken, leading ultimately to the commencement and the prosecution of legal proceedings.

40 In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.

41 The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land.

42 For the reasons given in this judgment, I would dismiss the appeal.

MOYLAN J

43 I agree.

SHARP LJ

44 I also agree.

Appeal dismissed.

Sharene P Dewan-Leeson, Barrister

***657**