**IN THE MATTER OF:**

**AN APPLICATION TO REGISTER LAND KNOWN AS WESTBROOK WOODLAND, BATH (THE "SITE"), AS A NEW TOWN OR VILLAGE GREEN PURSUANT TO SECTION 15 OF THE COMMONS ACT 2006 (THE "APPLICATION")**

**FRIENDS OF THE ORCHARD**

**The Applicant**

**AND**

**MR. PAUL EALEY**

**The Objector**

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# OBJECTION STATEMENT

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## 1. INTRODUCTION

1.1 I refer to the Application.

1.2 I am the Objector and I make this objection statement (the **"Objection Statement"**) in response to the application issued by the Applicant on 4 March 2019 with application number TVG 19/1 (the **"Application"**).

1.3 I refer to various documents in this Objection Statement. These documents are exhibited in the bundle of documents which follow this Objection Statement (the "**Objector's Bundle**"). The references in square brackets to:

1.3.1 "Witness Statement [*Name*] / [*Page Reference*]"; or

1.3.2 "Additional Evidence Document [*No.*] / [*Page Reference*]",

indicate the location of each document within the Objector's Bundle, with:

(a) "[*Name*]" or "Document [*No.*]" indicating the relevant witness statement or additional evidence document contained in the Objector's Bundle; and

(b) "[*Page Reference*]" indicating the relevant page number in the Objector's Bundle.

1.4 This Objection Statement sets out why the Application should fail on a number of grounds. These include the following matters:

1.4.1 an inadequate definition of the locality in which the Site resides;

1.4.2 a failure to prove that lawful sports and pastimes have occurred on the Site for at least 20 years;

1.4.3 a failure to prove that inhabitants have indulged as of right on the Site; and

1.4.4 the motive for the Application being part of a wider effort to stifle any development of the Site, rather than a legitimate claim to the Site as a town or village green.

## 2. INTRODUCTION TO THE OBJECTION STATEMENT

2.1 Pursuant to the Application, the Applicant has applied to register the Site as a town or village green under section 15(3) of the Commons Act 2006 (the "**Act**").

2.2 In order to register the Site as a town or village green, the Applicant must prove that:

2.2.1 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 Site for a period of at least 20 years;

2.2.2 that those inhabitants ceased to do so before the time of the Application but after commencement of section 15(3) of the Act; and

2.2.3 that the Application is made within the relevant period, being one year from the time those inhabitants ceased to indulge as of right on the Site,

(the **"Legal Test"**).

2.3 There are a number of grounds on which the Application fails to satisfy the legal test set out in paragraph 2.2 of this Objection Statement. These are addressed in the following paragraphs of this Objection Statement:

2.3.1 paragraph 3 (*A significant number of the inhabitants of any Locality*);

2.3.2 paragraph 4 (*Indulging "as of right"*);

2.3.3 paragraph 5 (*Twenty Year Period*); and

2.3.4 paragraph 6 (*Motive for the Application*).

## 3. A SIGNIFICANT NUMBER OF THE INHABITANTS OF ANY LOCALITY

3.1 Section 15(3)(a) of the Act notes that any application to register a town or village green must be in respect of "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality".

3.2 The Applicant has defined the locality or neighbourhood within the locality in respect of which the Application is made as "the neighbourhood of Weston electoral ward and Charlcombe Parish within the locality of Bath and North East Somerset" (the **"Locality"**).

3.3 It has been recognised by the English courts that a "locality" must be a legally recognised administrative unit[1]. The 'Localities' specified in the Application are two very different administrative units. While Weston electoral ward and Charlcombe Parish are both legally recognised administrative units, together they do not form a Locality and should not be considered as a locality for the purposes of the Legal Test.

3.4 Further, "any neighbourhood within a locality" must have a sufficient degree of cohesiveness to be identified as a neighbourhood[2]. In the Application, the "neighbourhood of Weston electoral ward and Charlcombe Parish" is not sufficiently cohesive to warrant its designation by the Applicant as a neighbourhood. Weston electoral ward and Charlcombe Parish are two distinct areas, which are not bound by the nature of their communities. Weston electoral ward is a suburban area of Bath with a population of 5,324[3]; by contrast, Charlcombe Parish is a rural area, consisting of a number of villages including Langridge, Upper Langridge, Wooley and Charlcombe. These two areas have little in common besides their proximity. They should not be perceived as sufficiently cohesive enough to constitute a locality, or a neighbourhood within a locality.

3.5 Paragraphs 3.2 to 3.4 of this Objection Statement illustrate that the Applicant has defined the Locality in order to obtain as wide a pool of evidence as possible, rather than to demonstrate a neighbourhood within a locality which satisfies the requirements of the Legal Test.

3.6 The broad and geographically dispersed definition of the Locality used in the application is not sufficiently coherent nor satisfactory to establish that the Site should be registered as a town or village green in respect of the Locality. Therefore, the Application should fail on the locality limb of the Legal Test.

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[1] *R (Laing Homes) v Buckinghamshire CC [2003] PLR 60 paras 129 to 155.*
[2] *R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2003] EWHC 2803 (Admin)*
[3] *"Census 2011 – Local Statistics"*, Bath and North East Somerset Council, available at https://www.bathnes.gov.uk/sites/default/files/census_2011_-_ward_profile_-_weston.pdf

## 4. INDULGING "AS OF RIGHT"

4.1 Section 15(3)(a) of the Act states that the inhabitants of a locality to which the town or village green application relates must have indulged in lawful sports and pastimes "as of right".

4.2 The House of Lords has ruled that whether or not a right exists, "depends on evidence of acquiescence by the landowner giving rise to an inference of a prior grant or dedication"[4]. The evidence submitted in the Objector's Bundle clearly demonstrates that the previous owners of the Site, Susan Hook and Gerald Hook, did not acquiesce to members of the public using the Site. Evidence of this non-acquiescence includes:

4.2.1 the presence of signage on the Site[5];

4.2.2 previous use of the Site as a fenced horse paddock[6]; and

4.2.3 maintenance of the Site, by way of repairing and maintaining fences, stock fencing,[7] and clearing the Site[8].

4.3 Additionally, such use must be made without force. There is clear evidence that access to the Site was made with force:

4.3.1 witnesses have noted that fences were broke down to access the Site[9];

4.3.2 previous access to the Site included damaging fencing[10]; and

4.3.3 anti-social behaviour has taken place on the Site, including vandalism[11] that has been reported to the police/fire brigade when discovered.

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[4] *R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 A.C. 335*
[5] *Witness Statement Matthew Davies / 150; Witness Statement Paul Ealey / 158; Witness Statement Michael Osborne / 217; Witness Statement Kaye Brown / 229; Witness Statement Joanne Grimes / 263; Witness Statement Gerald Hook / 270; Witness Statement Susan Hook / 280*
[6] *Witness Statement Matthew Davies / 150; Witness Statement Paul Ealey / 159; Witness Statement Darren Hook / 213; Witness Statement Michael Osborne / 217; Witness Statement Kaye Brown / 229; Witness Statement Joanne Grimes / 263; Witness Statement Gerald Hook / 269; Witness Statement Susan Hook / 280; Witness Statement Paul Robinson / 297*
[7] *Witness Statement Paul Ealey / 159; Witness Statement Darren Hook / 213; Witness Statement Gerald Hook / 270; Witness Statement Susan Hook / 280*
[8] *Witness Statement Paul Ealey / 160; Witness Statement Darren Hook / 213; Witness Statement Gerald Hook / 269; Witness Statement Susan Hook / 279; Witness Statement Alan Leakey / 287*
[9] *Witness Statement Matthew Davies / 150; Witness Statement Paul Ealey / 160; Witness Statement Darren Hook / 213; Witness Statement Kaye Brown / 229*
[10] *Witness Statement Matthew Davies / 150; Witness Statement Paul Ealey / 160; Witness Statement Darren Hook / 213; Witness Statement Kaye Brown / 229*
[11] *Witness Statement Paul Ealey / 160; Witness Statement Darren Hook / 213; Witness Statement Michael Osborne / 218*

4.4 There is no evidence of the open use of the site 'as of right' in relation to the owners/occupiers of the land.

## 5. TWENTY YEAR PERIOD

5.1 Section 15(3)(a) of the Act states that in order to register the Site as a town or village green, a significant number of the inhabitants of a locality or neighbourhood within a locality must have indulged as of right in lawful sports and pastimes on the Site "for a period of at least twenty years".

5.2 Fencing was put up around the Site by the Objector on 2 November 2018. Therefore, the twenty year period required to be fulfilled in respect of the Application is the period from 2 November 1998 to 2 November 2018.

5.3 It has previously been ruled by the courts that any 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 such as to convey the manifestation of a public right[12].

5.4 In respect of the Applicant's claim that the twenty year period of the Legal Test is satisfied, there is sufficient evidence to suggest that this is not the case, which is summarised for reference below:

5.4.1 Prior to November 2003, it was not possible to access the Site in the ways in which the Applicant's evidence asserts:

(a) access to the Site from the north was not possible until after the footbridge was constructed in March 2002, and the public footpath diverted in November 2003[13];

(b) the hedgerows surrounding the Site were maintained by the previous owners until approximately ten years ago[14]; and

[12] *White v Taylor (No. 2) (1969) 1 Ch 160 per Buckley J at 192 and more recently in R (on the application of Lewis) v Redcar and Cleveland Borough Council and another [2010] 2 All ER 613. (see for example Lord Walker SCJ at para 35 and Lord Hope at para 67)*

[13] *Additional Evidence Document 6 / 403; Additional Evidence Document 7 / 410*

[14] *Witness Statement Darren Hook / 214; Witness Statement Gerald Hook / 270; Witness Statement Susan Hook / 279*

(c) the eastern boundary of the Site was (and still is) protected by a fence separating the Site from Weston All Saints Primary School; and

(d) the southwestern boundary of the Site is accessible by a five-bar gate, which is typically locked and has previously had signs on it, indicating the Site is private and warning trespassers to keep out[15].

5.4.2 A number of witness statements in the Objector's Bundle assert that from 2002 until 2004 it would not have been possible to access the Site from the land known as "The Orchard", as The Orchard was a construction site, secured by fencing[16].

5.4.3 The aerial photography corroborates the Objector witness statements as to the state and use of the land over the relevant period.

5.4.4 The planning application site information in relation to 'the Orchard' housing development corroborates the Objector witness statements.

5.5 The evidence outlined in paragraph 5.4 of this Objection Statement is consistent with the Objector's assertion that access to the Site by members of the public has only occurred in the last fifteen years, after construction of the housing estate which now resides on The Orchard. Therefore, the Application should fail on the twenty year period limb of the Legal Test.

## 6. MOTIVE FOR THE APPLICATION

6.1 There is also a wider point to be made around the Application. Evidence of the Applicant's initial motivation for lodging the Application, shown by social media posts in Additional Evidence Document 2 / 342, illustrate that the Application is part of a wider attempt to stifle any meaningful development of the Site, rather than as part of a legitimate claim that the Site is a town or village green. The merits, or otherwise, of any future application for development or

[15] *Witness Statement Matthew Davies / 150; Witness Statement Darren Hook / 213; Witness Statement Joanne Grimes / 263; Witness Statement Gerald Hook / 269; Witness Statement Susan Hook / 278*
[16] *Witness Statement Tom O'Connor / 303*

change of use of the site would of course be properly addressed in any such application and are irrelevant to the issues in this Application.

6.2 There is a raft of evidence to support the assertion that the motivation behind this application is not properly based upon the use of the land as a town or village green:

6.2.1 The Application claims that there is evidence that the Site has been subject to "a period of continuous recreational use by local residents extending back at least 60 years"[17]. If this is the case, there is a question which arises over why the Applicant (under its previous name as the Broadmoor Lane Resident's Association) did not include the Site in a town and village green application which it submitted on The Orchard in 1999 (the **"Orchard Application"**). The circumstances surrounding the failure to include the Site in the Orchard Application are discussed in the witness Statement of Colin Barrett, who was Chairman of Broadmoor Lane Resident's Association at that time. Mr. Barrett notes that it was not included, because it was not used at the time, due to the inaccessibility of the Site by members of the public[18].

6.2.2 Shortly after the Site was fenced off to the public on 2 November 2018, a number of social media posts were uploaded to Facebook. Excerpts of these social media posts are set out in the Objector's Bundle at Additional Evidence Document 2 / 342. As is evident from these social media posts, the Applicant's clear motive in actions which are being taken in relation to the Site are to stifle any potential development.

6.2.3 The Applicant has utilised other methods to stifle any potential development of the Site. These obstructive tactics have included the Applicant's involvement in the confirmation of a blanket tree preservation order over the Site, the details of which are set out at Additional Evidence Document 12 / 469.

[17] *Additional Evidence Document 12 / 469*
[18] *Witness Statement Colin Barrett / 223*

6.3 The evidence summarised in paragraph 6.2 of this Objection Statement shows that the Application has been made as part of a wider effort to stifle any potential development on the Site, rather than legitimately claim the Site as a town or village green on behalf of a locality. While the subjective opinion of the Applicant as to the status of the land is not relevant to the issue whether there was 'use as of right,'[19] the reasons underlying the claim that the Site is a town or village green is relevant to the weight that should be given to their evidence.

## 7. CONCLUSION

This Objection Statement and the Objector's Bundle illustrate that the Application should fail on the following grounds:

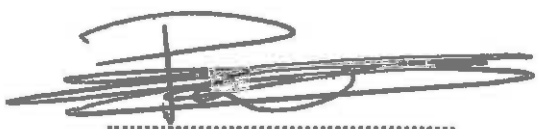
7.1.1 the Applicant has failed to sufficient define the Locality as a locality for the purposes of the Legal Test; .

7.1.2 the Applicant has failed to demonstrate use of the land 'as of right,' and

7.1.3 the Applicant has failed to show that inhabitants have indulged as of right in lawful sports and pastimes for a period of at least 20 years.

STATEMENT OF TRUTH

I believe that the facts stated in this Objection Statement are true.



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Paul Ealey

12/7/2020

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Dated

[19] *R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 A.C. 335*

## APPENDIX

## CASES REFERENCED IN THE OBJECTION STATEMENT

# ON 24 JUNE 1999

**LORD BROWNE-WILKINSON**

My Lords,

I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend, Lord Hoffmann. I agree with it and for the reasons which he gives would allow the appeal and direct the Oxfordshire County Council to register the glebe as a village green.

**LORD STEYN**

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons given by him I would also make the order he proposes.

**LORD HOFFMANN**

My Lords,

The glebe at Sunningwell in Oxfordshire is an open space of about 10 acres near the ancient village church. It used formed part of the endowment of the Rectory. The rector let it for grazing and received the rent. On a reorganisation of church properties in 1978 it was transferred to the Oxford Diocesan Board of Finance ("the Board"). The land slopes upwards towards to the south and is crossed by a largely unfenced public footpath running south from the village towards Abingdon. Local people use the glebe for such outdoor pursuits as walking their dogs, playing family and childrens' games, flying kites, picking blackberries, fishing in the stream and tobogganing down the slope when snow falls.

In 1994 the Board obtained planning permission to build two houses on the northern boundary of the glebe. The villagers were very much opposed. They wanted it preserved as an open space. The parish council applied to the County Council to register the glebe as a town or village green under the Commons Registration Act 1965. It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent on the point. But registration would prevent the proposed development because by section 29 of the Commons Act 1876 encroachment on or inclosure of a town or village green is deemed to be a public nuisance.

Section 22(1) of the Act of 1965 contains a three-part definition of a town or village green. They are usually called classes a, b and c. I shall use the same terminology.

> "[*a*] land 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."

Class *a* includes land which was allotted for exercise and recreation by Act of Parliament or the Inclosure Commissioners when making an order for the inclosure of a common under the Inclosure Act 1845. Before 1845, when commons were inclosed under private Acts of Parliament, it was common for the Act itself to set aside some land for this purpose. There is no suggestion that the glebe was so allotted and the parish council do not rely upon class *a*. Class *b* refers to land which by immemorial custom the local inhabitants are entitled to use for sports and pastimes. This is the traditional village green with its memories of maypole dancing, cricket and warm beer. Immemorial custom means in theory a custom which predates the accession of Richard I in 1189. Although, as I shall in due course explain, the law may presume a custom of such antiquity on evidence which a historian might regard as somewhat slender, the parish council do not rely upon class *b*. They take their stand on class *c*, which was first introduced by the Act of 1965 itself. It is no longer necessary to resort to fictions or presumptions about what was happening in 1189. It is sufficient that the inhabitants of the locality have in fact used the land as of right for lawful sports and pastimes for more than 20 years.

The main purpose of the Act of 1965 was to preserve and improve common land and town and village greens. It gave effect to the Report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd. 462) which emphasised the public importance of such open spaces. Some commons and greens were in danger of being encroached upon by developers because of legal and factual uncertainties about their status. Others were well established as commons or greens but there was uncertainty about who owned the soil. This made it difficult for the local people to make improvements (for example, by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.

The Act of 1965 dealt with these problems by creating local registers of common land and town and village greens which recorded the rights, if any, of the commoners and the names of the owners of the land. If no one claimed ownership of a town or village green, it could be vested in the local authority. Regulations made under the Act prescribed time limits for registrations and objections and the determination of disputes by Commons Commissioners. In principle, the policy of the Act was to have a once-and-for-all nationwide inquiry into commons, common rights and town and village greens. When the process had been completed, the register was conclusive. By section 2(2), no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered.

In the case of greens in classes *a* or *b*, this meant that unless they were registered within the prescribed time-limit, they could not be registered as such thereafter. (There is a question about whether non-registration of a class *a* green also extinguished the prior statutory rights of exercise and recreation, but that need not detain us now.) But a class c green could come into existence upon the expiry of any period of 20 years' user. This might be after the original registration period had expired. Section 13 therefore provided for the amendment of the register in various situations including where "(*b*) any land becomes common land or a town or village green." The Sunningwell Parish Council applied to the Oxfordshire County Council, as registration authority, for an amendment to add the glebe to the register on the ground that it had become a village green by 20 years' user ending on 1 January 1994.

The Board objected to the application. The regulations made under section 13 prescribe no procedure for resolving disputes over applications for amendment. The jurisdiction of the Commons Commissioners was limited to disputes arising out of the original applications, all of which have now been determined. The County Council was left free to decide upon its own procedure for dealing with an application to amend. It decided to hold a non-statutory public inquiry and appointed Mr. Vivian Chapman, a barrister with great experience of this branch of the law, to act as inspector. Mr. Chapman sat for two days in the Village Hall, received written and oral evidence and heard legal submissions. He submitted a report to the County Council in which he made various findings of fact which the County Council accepted. I shall refer to these later. But he recommended that the application be refused on the ground that the user of the land by the villagers had not been shown to be "as of right." In coming to this conclusion, he followed the decision of the Court of Appeal in *Reg. v. Suffolk County Council, Ex parte Steed* (1996) 75 P. & C.R. 102 which held that "as of right" meant that the right must be exercised in the belief that it is a right enjoyed by the inhabitants of the village to the exclusion of all other people. In the present case, the witnesses all said that they thought they had the right to use the glebe. But they did not say that they thought that the right was confined to inhabitants of the village. Some thought it was a general public right and others had no views on the matter. This was held to be fatal to the application.

The parish council applied for judicial review of the County Council's decision. Buxton J. refused leave and the application was renewed before the Court of Appeal (Lord Woolf M.R., Waller and Robert Walker L.JJ.). They decided that they were bound by *Reg. v. Suffolk County Council, Ex parte Steed* to dismiss the application. But they also expressed the view that your Lordships might think that that case was

wrongly decided. The Court of Appeal therefore granted leave to move for judicial review, dismissed the substantive application and gave leave to appeal to your Lordships' House.

The principal issue before your Lordships thus turns on the meaning of the words "as of right" in the definition of a green in section 22(1). The language is plainly derived from judicial pronouncements and earlier legislation on the acquisition of rights by prescription. To put the words in their context, it is therefore necessary to say something about the historical background.

Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment. But the principles upon which they achieve this result may be very different. In systems based on Roman law, prescription is regarded as one of the methods by which ownership can be acquired. The ancient *Twelve Tables* called it usucapio, meaning literally a taking by use. A logical consequence was that, in laying down the conditions for a valid usucapio, the law concerned itself with the nature of the property and the method by which the acquirer had obtained possession. Thus usucapio of a res sacra or res furtiva was not allowed and the acquirer had to have taken possession in good faith. The law was not concerned with the acts or state of mind of the previous owner, who was assumed to have played no part in the transaction. The periods of prescription were originally one year for moveables and two years for immoveables, but even when the periods were substantially lengthened by Justinian and some of the conditions changed, it remained in principle a method of acquiring ownership. This remains the position in civilian systems today.

English law, on the other hand, has never had a consistent theory of prescription. It did not treat long enjoyment as being a method of acquiring title. Instead, it approached the question from the other end by treating the lapse of time as either barring the remedy of the former owner or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment. Thus the medieval real actions for the recovery of seisin were subject to limitation by reference to various past events. In the time of Bracton the writ of right was limited from the accession of Henry I (1100). The Statute of Merton (1235) brought this date up to the accession of Henry II (1154) and the Statute of Westminster 1275 extended it to the accession of Richard I in 1189.

The judges used this date by analogy to fix the period of prescription for immemorial custom and the enjoyment of incorporeal hereditaments such as rights of way and other easements. In such cases, however, the period was being used for a different purpose. It was not to bar the remedy but to presume that enjoyment was pursuant to a right having a lawful origin. In the case of easements, this meant a presumption that there had been a grant before 1189 by the freehold owner.

As time went on, however, proof of lawful origin in this way became for practical purposes impossible. The evidence was not available. The judges filled the gap with another presumption. They instructed juries that if there was evidence of enjoyment for the period of living memory, they could presume that the right had existed since 1189. After the Limitation Act 1623, which fixed a 20 year period of limitation for the possessory actions such as ejectment, the judges treated 20 years' enjoyment as by analogy giving rise to the presumption of enjoyment since 1189. But these presumptions arising from enjoyment for the period of living memory or for 20 years, though strong, were not conclusive. They could be rebutted by evidence that the right could not have existed in 1189; for example, because it was appurtenant to a building which had been erected since that date. In the case of easements, the resourcefulness of the judges overcame this obstacle by another presumption, this time of a lost modern grant. As Cockburn C.J. said in the course of an acerbic account of the history of the English law of prescription in *Bryant v. Foot* (1867) L.R. 2 Q.B. 161, 181:

> "Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed."

The result of these developments was that, leaving aside the cases in which it was possible to show that (a) the right could not have existed in 1189 and (b) the doctrine of lost modern grant could not be invoked, the period of 20 years' user was in practice sufficient to establish a prescriptive or customary right. It was not an answer simply to rely upon the improbability of immemorial user or lost modern grant. As Cockburn C.J. observed, the jury were instructed that if there was no evidence absolutely inconsistent with there having been immemorial user or a lost modern grant, they not merely could but should find the prescriptive right established. The emphasis was therefore shifted from the brute fact of the right or custom having existed in 1189 or there having been a lost grant (both of which were acknowledged to be 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 Corporation* (1867) L.R. 2 C.P. 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. So in *Dalton v. Angus* (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 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."

In the case of easements, the legislature intervened to save the consciences of judges and juries by the Prescription Act 1832, of which the short title was "An Act for shortening the Time of Prescription in certain cases." Section 2 provided:

> "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement . . . when such way or other matter . . . shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such way or other

> matter was first enjoyed at any time prior to such period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated. . ."

Thus in a claim under the Act, what mattered was the quality of enjoyment during the 20 year period. It had to be by a person "claiming right thereto" or, in the language of section 5 of the same Act, which dealt with the forms of pleadings, "as of right". In *Bright v. Walker* (1834) 1 Cr. M. & R. 211, 219, two years after the passing of the Act, Parke B. explained what these words meant. He said that the right 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. In *Gardner v. Hodgson's Kingston Brewery Co. Ltd.* [1903] A.C. 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." (See also *per* Cotton L.J. in *Earl De la Warr v. Miles* (1881) 17 Ch.D. 535, 596.)

My Lords, I pass now from the law concerning the acquisition of private rights of way and other easements to the law of public rights of way. Just as the theory was that a lawful origin of private rights of way could be found only in a grant by the freehold owner, so the theory was that a lawful origin of public rights of way could be found only in a dedication to public use. As in the case of private rights, such dedication would be presumed from user since time immemorial, that is, from 1189. But the common law did not supplement this rule by fictitious grants or user which the jury were instructed to presume. In *Mann v. Brodie* (1881) 10 App.Cas. 378, 385-386, Lord Blackburn said:

> "In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period . . . But this has never been done in the case of a public right of way."

He contrasted the English law on the subject with that of Scotland, which as Lord Watson explained, at pp. 390-391 followed the Roman model:

> "According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. Lord Stair states prescription to be a rule of 'positive law, founded upon utility rather than equity,' and he adds, that, in Scotland, the common rule is by the course of forty years, 'but there must be continued possession free from interruption.' According to Erskine, 'positive prescription is generally defined by our lawyers as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose.'"

In England, however, user for any length of time since 1189 was merely evidence from which a dedication could be inferred. The quality of the user from which dedication could be inferred was stated in the same terms as that required for private rights of way, that is to say, nec vi nec clam nec precario. But dedication did not have to be inferred; there was no presumption of law. In *Mann v. Brodie* Lord Blackburn put the rationale as follows, at p. 386:

> "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

My Lords, I pause to observe that Lord Blackburn 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* (1834) 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* (1881) 6 App.Cas. 740, 773, from acquiescence.

The difficulty in the case of public rights of way was that, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated such use: see *Folkestone Corporation v. Brockman* [1914] A.C. 338. On this point the law on public rights of way differed not only from Scottish law but also from that applicable to private easements. This made the outcome of cases on public rights of way very unpredictable and was one of the reasons for the passing of the Rights of Way Act 1932, of which section 1(1) provided:

> "Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way. . ."

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 Prescription Act 1832. Introducing the Bill into the House of Lords, Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way. (84 H.L. Debates (1931-32), col. 637). It therefore seems safe to assume that "as of right" in the Act of 1932 was intended to have the same meaning as those words in section 5 of the Act of 1832 and the words "claiming right thereto" in section 2 of that Act.

My Lords, this was the background to the definition of a "town or village green" in section 22(1) of the Act of 1965. At that time, there had been no legislation for customary rights equivalent to the Act of 1832 for easements or the Act of 1932 for public rights of way. Proof of a custom to use a green for lawful sports and pastimes still required an inference of fact that such a custom had existed in 1189. Judges and juries were generous in making the required inference on the basis of evidence of long user. If there was upwards of 20 years' user, it would be presumed in the absence of evidence to show that it commenced after 1189. But the claim could still be defeated by showing that the custom could not have existed in 1189. Thus in *Bryant v. Foot* (1867) L.R. 2 Q.B. 161, a claim to a custom by which the rector of a parish was entitled to charge 13 shillings for performing a marriage service, although proved to have been in existence since 1808, was rejected on the ground that having regard to inflation it could not possibly have existed in the reign of Richard I. It seems to me clear that class c in the definition of a village green must have been based upon the earlier Acts and intended to exclude this kind of defence. The only difference was that it allowed for no rebuttal or exceptions. If the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years, the land was a town or village green. But there is no reason to believe that "as of right" was intended to mean anything different from what those words meant in the Acts of 1832 and 1932.

In *Steed's* case Pill L.J. also said (75 P. & C.R. 102, 111-112) that "as of right" in the Act of 1965 had the same meaning as in the Act of 1932. In holding that it required "an honest belief in a legal right to use . . . as an inhabitant . . . and not merely a member of the public" he followed dicta in three cases on the Rights of Way Act 1932 and its successor legislation, section 31(1) of the Highways Act 1980, which I must now examine.

The first was *Hue v. Whiteley* [1929] 1 Ch. 440, a decision of Tomlin J. before the Act of 1932. The dispute was over the existence of a public footpath on Box Hill and the judge found, at p. 444, that for 60 years people had "used the track to get to the highway and to the public bridle road as of right, on the footing that they were using a public way." Counsel for the landowner, in reliance on *Attorney-General v. Antrobus* [1905] 2 Ch. 188 (which concerned the tracks around Stonehenge), argued that the user should be disregarded because people used the path merely for recreation in walking on Box Hill. The judge said, at p. 445, that this made no difference:

> "A man passes from one point to another believing himself to be using a public road, and the state of his mind as to his motive in passing is irrelevant. If there is evidence, as there is here, of continuous user by persons as of right (i.e., believing themselves to be exercising a public right to pass from one highway to another), there is no question such as that which arose in *Attorney-General v. Antrobus*."

The decision in the case was that the reasons why people used the road were irrelevant. It was sufficient that they used it as of right. I rather doubt whether, in explaining this term parenthetically as involving a belief that they were exercising a public right, Tomlin J. meant to say more than Lord Blackburn had said in *Mann v. Brodie* (1881) 10 App.Cas. 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant.

Tomlin J.'s parenthesis was picked up by the Court of Appeal in *Jones v. Bates* [1938] 2 All E.R. 237. The defendant asserting a right of footpath adduced overwhelming evidence of user for many years, including evidence of the plaintiff landowner's predecessors in title that they had never stopped people from using the path because they thought it was a public right of way. The judge in the Hastings County Court nevertheless rejected this evidence as insufficient to satisfy section 1(1) of the Act of 1932. The Court of Appeal by a majority held that he must have misdirected himself on the law (there was no right of appeal on fact from a County Court) and ordered a new trial. But the case contains some observations on the law, including a valuable exposition by Scott L.J. of the background to the Act of 1932. The two majority judgments of Slesser and Scott L.JJ. both cite Tomlin J.'s parenthesis with approval. But the question of whether it is necessary to prove the subjective state of mind of users of the road in addition to the outward appearance of user did not arise and was not discussed.

Slesser L.J., at p. 241, after citing Tomlin J.'s parenthesis, went on to say that "as of right" in the Act of 1932 had the meaning which Cotton L.J. had given to those words in the Act of 1832 in *Earl De la Warr v. Miles* (1881) 17 Ch.D. 535, 596: "not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done." This makes one doubt whether he was concerned with the subjective minds of the users.

Scott L.J., at p. 245 also quoted Tomlin J. with approval but went on to say:

> "It is doubtless correct to say that negatively [the words 'as of right'] import the absence of any of the three characteristics of compulsion, secrecy or licence--'nec vi, nec clam, nec precario,' phraseology borrowed from the law of easements--but the statute does not put on the party asserting the public right the onus of proving those negatives. . ."

Scott L.J. was concerned that the County Court judge had placed too high a burden upon the person asserting the public right. If he proved that the right had been used so as to demonstrate belief in the existence of a public right of way, that was enough. The headnote to *Jones v. Bates* [1938] 2 All E.R. 237 summarises the holding on this point in entirely orthodox terms:

> "The words in the Rights of Way Act 1932, section 1(1), 'actually enjoyed by the public as of right and without interruption,' mean that the way has been used without compulsion, secrecy or licence, nec vi, nec clam, nec precario."

Finally in *Steed's* case Pill L.J. referred to his own discussion of the subject at first instance in *O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42. On the basis of passages from *Jones v. Bates* [1938] 2 All E.R. 237 he had there expressed the view that "as of right" meant user "which was not only nec vi, nec clam, nec precario but was in the honest belief in a legal right to use." But he rejected the further submission that the users should know the procedures by which the right had come into existence.

My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J. in *Hue v. Whiteley* [1929] 1 Ch. 440 has led the courts into imposing upon the time-honoured expression "as of right" a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription. There is in my view an unbroken line of descent from the common law concept of nec vi, nec clam, nec precario to the term "as of right" in the Acts of 1832, 1932 and 1965. It is perhaps worth observing that when the Act of 1832 was passed, the parties to an action were not even competent witnesses and I think that Baron Parke would have been startled by the proposition that a plaintiff asserting a private right of way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like *Steed* when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr. J. G. Riddall's article "A False Trail" in [1997] 61 *The Conveyancer and Property Lawyer* 199.

I therefore consider that *Steed's* case was wrongly decided and that the County Council should not have refused to register the glebe as a village green merely because the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of the village. That was the only ground upon which Mr. Chapman advised the Council to reject the application. But Miss Cameron Q.C., who appeared for the Board, submitted that it should have been rejected for other reasons as well. Although these grounds did not form the basis of any cross-appeal, your Lordships considered that rather than put the parties to the expense of further consideration by the County Council followed by further appeals, it would be convenient to consider their merits now.

The first point concerned the nature of the activities on the glebe. They showed that it had been used for solitary or family pastimes (walking, tobogganning, family games) but not for anything which could properly be called a sport. Miss Cameron said that this was insufficient for two reasons. First, because the definition spoke of "sports and pastimes" and therefore, as a matter of language, pastimes were not enough. There had to be at least one sport. Secondly, because the "sports and pastimes" in class *c* had to be the same sports and pastimes as those in respect of which there could have been customary rights under class *b* and this meant that there had to be some communal element about them, such as playing cricket, shooting at butts or dancing round the maypole. I do not accept either of these arguments. As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class. As for the historical argument, I think that one must distinguish between the concept of a sport or pastime and the particular kind of sports or pastimes which people have played or enjoyed at different times in history. Thus in *Fitch v. Rawling* (1795) 2 H.Bl. 393, Buller J. recognised a custom to play cricket on a village green as having existed since the time of Richard I, although the game itself was unknown at the time and would have been unlawful for some centuries thereafter: see *Mercer v. Denne* [1904] 2 Ch. 538-539, 553. In *Abercromby v. Town Commissioners of Fermoy* [1900] 1 I.R. 302 the Irish Court of Appeal upheld a custom for the inhabitants of Fermoy to use a strip of land along the river for their evening passeggiata. Holmes L.J. said, at p. 314 that popular amusement took many shapes: "legal principle does not require that rights of this nature should be limited to certain ancient pastimes." In any case, he said, the Irish had too much of a sense of humour to dance around a maypole. Class *c* is concerned with the creation of town and village greens after 1965 and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J. in *Reg. v. Suffolk County Council, Ex parte Steed* (1995) 70 P. & C.R. 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right. In the present case, however, Mr. Chapman found "abundant evidence of use of the glebe for informal recreation" which he held to be a pastime for the purposes of the Act.

This brings me conveniently to Miss Cameron's second point, which was that the evidence of user was too broad. She said that the evidence showed that the glebe was also used by people who were not inhabitants of the village. She relied upon *Hammerton v. Honey* (1876) 24 W.R. 603, 604, in which Sir George Jessel M.R. said:

> "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."

That was with reference to a claim to a customary right of recreation and amusement, that is to say, a class *b* green. Class *c* requires merely proof of user by "the inhabitants of any locality." It does not say user *only* by the inhabitants of the locality, but I am willing to assume, without deciding, that the user should be similar to that which would have established a custom.

In my opinion, however, the findings of fact are sufficient to satisfy this test. It is true that people from outside the village regularly used the footpath. It formed part of a network of Oxfordshire Circular Walks. But there was little evidence of anyone other than villagers using the glebe for games or pastimes. Mr. Chapman does record one witness as saying that he had seen strangers enjoying informal recreation there. He summed up the position as follows:

> "The evidence of the applicant's witnesses and of the members of the public who gave evidence was that informal recreation on the glebe as a whole (as opposed to use of the public footpath) was predominantly, although not exclusively, by inhabitants of the village. This made sense because there is nothing about the glebe to attract people from outside the village. The objector accepted that the village was capable of being a 'locality'. . ."

I think it is sufficient that the land is used predominantly by inhabitants of the village.

Miss Cameron's third and final point was that the use of the glebe was not as of right because it was attributable to neighbourly toleration by successive rectors and the Board. She relied upon the following passage in Mr. Chapman's report:

> "It appears to me that recreational use of the glebe is based on three factors. First, the glebe is crossed by an unfenced footpath so that there is general public access to the land and nothing to prevent members of the public straying from the public footpath. Second, the glebe has been owned not by a private owner but by the rector and then the Board, who have been tolerant of harmless public use of the land for informal recreation. Third, the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use and has been tolerated by the tenant or grazier."

I should say that I do not think that the reference to people "straying" from the footpath was intended to mean that recreational user was confined to people who set out to use the footpath but casually or accidentally strayed elsewhere. That would be quite inconsistent with the findings of user which must have involved a deliberate intention to go upon other parts of the land. I think Mr. Chapman meant only that the existence of the footpath made it easy for people to get there. But Miss Cameron's substantial point was based upon the finding of toleration. That, she said, was inconsistent with the user having been as of right. In my view, that proposition is fallacious. As one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right. (See also *per* Dillon L.J. in *Mills v. Silver* [1991] Ch. 271, 281). When proof of a public right of way required a finding of actual dedication, the jury were entitled to find that such user was referable to toleration rather than dedication: *Folkestone Corporation v. Brockman* [1914] A.C. 338. But this did not mean that the user had not been as of right. It was a finding that there had been no dedication despite the user having been as of right. The purpose of the Act of 1932 was to make it unnecessary to infer an actual dedication and, in the absence of specific rebutting evidence, to treat user as of right as sufficient to establish the public right. *Alfred F. Beckett Ltd. v. Lyons* [1967] 1 Ch. 449, in which the court was invited to infer an ancient grant to the Prince Bishop of Durham, in trust for the inhabitants of the county, of the right to gather coal on the sea shore, was another case in which the question was whether an actual grant could be inferred. One of the reasons given by the Court of Appeal for rejecting the claim was that the coal gathering which had taken place could be referable to tolerance on the part of the Crown as owner of the sea shore. But the establishment of a class *c* village green does not require the inference of any grant or dedication. As in the case of public rights of way or private easements, user as of right is sufficient. Mr. Chapman's remarks about toleration are therefore, as he himself recognised, not inconsistent with the quality of the user being such as to satisfy the class *c* definition.

Miss Cameron cautioned your Lordships against being too ready to allow tolerated trespasses to ripen into rights. As Bowen L.J. said in *Blount v. Layard* [1891] 2 Ch. 681n., 691:

> "nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

On the other hand, this consideration, if carried too far, would destroy the principle of prescription. A balance must be struck. In passing the Act of 1932, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use. As Scott L.J. pointed out in *Jones v. Bates* [1938] 2 All E.R. 237, 249, there was a strong public interest in facilitating the preservation of footpaths for access to the countryside. And in defining class *c* town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes. It may be that such user is attributable to the tolerance of past rectors of Sunningwell, but, as Evershed J. said of the origins of a public right of way in *Attorney-General v. Dyer* [1947] Ch. 67, 85-86:

> "It is no doubt true, particularly in a relatively small community . . . that, in the early stages at least, the toleration and neighbourliness of the early tenants contributed substantially to the extent and manner of the use of the lane. But many public footpaths must be no less indebted in their origin to similar circumstances, and if there is any truth in the view (as stated by Chief Justice Cardozo) that property like other social institutions has a social function to fulfil, it may be no bad thing that the good nature of earlier generations should have a permanent memorial."

I would allow the appeal and direct the Oxfordshire County Council to register the glebe as a village green.

**LORD HOBHOUSE OF WOODBOROUGH**

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons given by him I would also make the order he proposes.

**LORD MILLETT**

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I too would allow the appeal and make the order he proposes.

previous

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- Glossary
- Contact us
- Freedom of Information
- Jobs
- Using this website
- Copyright

[2003] All ER (D) 128 (Nov)

# R (Cheltenham Builders Ltd) v South Gloucestershire Council Cheltenham Builders Ltd v South Gloucestershire Council

**Administrative Court**

**Sullivan J**

**10 November 2003**

**Chancery Division**

**Sullivan J**

**10 November 2003**

*Commons – Common land – Registration – Town or village green – Meaning of 'locality' – Commons Registration Act 1965, s 22(1).*

The claimant, a property developer, was the registered proprietor of an area of land (the site) which it acquired from the defendant local authority pursuant to an option granted in November 1996 and exercised in November 1997. An application was made by local residents to the authority, as registration authority, for the registration of the site as a village green. Section 22(1) of the Commons Registration Act 1965 contained a three–part definition of town or village green, as amended by s 98 of the Countryside and Rights of Way Act 2000. The claimant objected to the application. By a decision of 5 September 2002 the authority's public rights of way and commons registration committee (the committee) decided to amend the register of towns and village greens maintained by it under the Act by adding the site as a village green.

The claimant applied for judicial review. It also brought proceedings in the Chancery Division under CPR Pt 8 for an order under s 14 of the Act that the register be amended by the removal of the site, and for a declaration that the site was not a village green. The master ordered that both sets of proceedings should be tried together.

The claimant challenged the decision on the grounds that the committee could not reasonably have concluded that the site had been used for lawful sports and pastimes throughout the relevant period (user), that such user as there had been, had not been by a significant number of the inhabitants of any locality because the area shown edged red on the registration application plan was not a 'locality' for the purposes of the Act (locality) and that the authority could not fairly have decided to register the site as a village green without

having first given the claimant an opportunity to test the evidence (fairness) at a non-statutory public enquiry or a hearing before the committee.

The application would be allowed.

The committee's decision to register the village green was manifestly flawed Whether the end result was achieved under s 14 of the Act or by way of judicial review, the court could not allow the decision to stand.

Whatever might be meant by 'locality' in s 22(1A) the court was satisfied that it did not mean any area that just happened to have been delineated, in however arbitrary a fashion, on a plan. Such an approach would in effect deprive the word 'locality' of any meaning since anywhere could be delineated on a plan. At the very least Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality. There had to be a sufficient cohesive entity that was capable of definition. Merely drawing a line on a plan did not thereby create a locality. Moreover, there was no possible basis upon which the committee could reasonably have concluded that the whole of the site had probably been used for lawful sports and pastimes for 20 years in the light of the views implicitly accepted by the committee. Further, given the findings as to user, the instant case was a case where the application could fairly have been refused without an oral hearing but it could not fairly have been accepted without such a hearing.

Section 22(1) of the Act Commons Registration Act 1965 contained the definition of town or village green 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 any locality have a customary right to indulge in lawful sports and pastimes or (c) on which falls within subsection (1A) of this section. 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.

George Laurence QC and Ross Crail (instructed by Burges Salmon) for the claimant.

Philip Petchey (instructed by Lynne Tucker) for the defendant.

Celia Fox Barrister.

[2003] All ER (D) 117 (Jul)

# *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council and another

[2003] EWHC 1578 (Admin)

**Administrative Court**

**Sullivan J**

**8 July 2003**

*Commons – Common land – Registration – Town or village green – User as of right – Effect of use for annual hay cut – Commons Registration Act 1965, s 22(1).*

In August 2000, a voluntary group applied for three fields to be registered as a village green. The defendant, as registration authority, appointed an independent inspector, who held a public inquiry. He concluded that there had been at least 20 years recreational use, which had been substantial and carried on as of right. He therefore determined that the authority should accede to the application. The authority's regulatory committee accepted that recommendation and resolved to register the fields. The claimant brought proceedings for judicial review of that decision. It contended, inter alia, that: (i) once the use of footpaths around the edges of the fields was discounted, there was insufficient evidence of the use of the entirety of the fields for lawful sport or pastime; (ii) the inspector had erred in concluding that the use of the fields for an annual hay cut for well over half of the 20-year period was not incompatible with the establishment of village green rights and; (iii) the 'local inhabitants' use of the fields for recreational purposes was not 'as of right' since they had expressly acknowledged when responding to consultations relating to planning applications that there were no rights to engage in lawful sports by contending that the land should revert to full agricultural use. Section 22(1) of the Commons Registration Act 1965 defined a village green as 'land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of a locality or on which the inhabitants of a locality have a customary right to indulge in sports or 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'. Section 12 of the Inclosure Act 1857 prevented any nuisance in town or village greens, including the interruption use and enjoyment thereof as a place for exercise or recreation. Section 29 of the 1857 Act reinforced s 12 by providing that the disturbance or interference made otherwise than with a view to the better enjoyment of a village green could result in summary conviction.

The application would be allowed.

(1) While the inspector had considered whether the whole, and not merely the perimeter, of the fields were being used, he had failed to deal with the issue as to the how extensive the use of the fields actually was,

once the use of the footpaths around the boundaries had been discounted, such use being referable to the exercise of public rights of way, and not a right to indulge in informal recreation across the whole of the fields. Those two rights were not necessarily mutually exclusive. A right of way along a defined path around a field could be exercised in order to gain access to a suitable location for informal recreation within a field, however, from the landowner's point of view, it might be very important to distinguish between the two rights. Moreover, from a landowner, or agricultural tenant's point of view there would be less reason to resist walkers who kept to the perimeter of the fields, and it would not be reasonable to expect the landowner or tenant to realise that such persons were, in fact, asserting a right to walk all over the fields.

(2) The occupation of land for the purpose of 'hay cutting' was not to be equated with grass cutting. The former was no difference in principle from harvesting any other crop. Insofar as the latter was carried out 'with a view to the better enjoyment of the village green, it would not be a public nuisance under s 29 of the 1876 Act, nor would it be a criminal offence under s 12. When enacting the definition of 'town or village green' in s 22(1) of the 1965 Act, Parliament had to be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural reasons, such as taking a hay crop, should suffice for the purpose of s 22(1), since upon registration as a village green, some, if not all of those agricultural uses would become unlawful by virtue of ss 12 and 29.

(3) When considering the issue of compatibility with the establishment of a village green, the proper approach was not to examine the extent to which those using the land for recreational purposes were interrupted by the agricultural use of the land, in such a manner that the claimant ought to have been aware that the recreational users believed that they were exercising a public right. The proper starting point was to ask how would the matter have appeared to the claimant. It would not be reasonable for the claimant to have resisted the recreational use of its fields as long as such use did not interfere with their licensee's use of them for taking an annual hay crop. While the licensee was not physically present on the fields for very many days of the year, that was not uncommon in the case of mechanised agriculture. From the landowner's point of view, so long as the local inhabitants' recreational activities did not interfere with the way in which he had chosen to use his land, there would not be any suggestion to him that they were exercising or asserting a public right to use his land for lawful sports or pastimes. If it was possible for the local inhabitants to establish the existence of a village green after 20 years' use in such circumstances, the landowner would then be precluded by ss 12 and 29 of the 1876 Act from continuing to use his land, on an occasional basis, for any purposes which would interrupt or interfere with the local inhabitants' recreational use. It followed that the recreational pastimes could not be said to have taken place 'as of right' since the local inhabitants would have appeared to the landowner to have deferred to his rights to use his land for his own purposes.

(4) In the circumstances, while the failure of the inspector to take into account the express acknowledgement by inhabitants, when responding to consultations relating to planning applications, that there were no rights to engage in lawful sports by contending that the land should revert to full agricultural use, it did reinforce the second ground insofar as it would not have appeared to the landowner that the users of the field were exercising a public right when they had contended that agricultural usage ought to be resumed.

Charles George QC, Paul Hardy and Jeremy Pike (instructed by Layton) for the claimant.

Stephen Morgan (instructed by Buckinghamshire County Council Legal Services) for the defendant.

James Maurici (instructed by the Treasury Solicitor) for the Secretary of State as interested party.

**Judgment**

**[2003] EWHC 1578 (Admin)**

**QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)**

**8 JULY 2003**

MR JUSTICE SULLIVAN

**JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)**

MR JUSTICE SULLIVAN

**Introduction**

1. In this application for judicial review the Claimant, Laing Homes Limited ("Laings")challenges the decision of the Defendant, the Buckinghamshire County Council ("the Council") as the Registration Authority for the purposes of the Commons Registration Act 1965 ("the Act") to register a block of land consisting of three fields at Widiner Farm, Widiner End, High Wycombe, as a village green.

2. Two of the fields, Field 1 (the eastern of the two) and Field 2 (the western) are situated within the Civil Parish of Hughenden (Widiner End Ward). Field 3 which is to the south of, and contiguous with Field 1, is within the Civil Parish of Hazlemere.

3. The combined area of the three fields is 38 acres. -They form part of a larger area, Widmer Farm, which was acquired by Laings in 1963 as part of its land bank, with a view to developing it for residential purposes in the medium-long term. In common with many other land banks held by house-builders, Widiner Farm adjoins the edge of a built up area: the urban. area centred on High Wycombe, is about 6 kilometres away to the south-west.

4. To the north of Fields 1 and 2 is residential development at Widiner End and fronting onto North Road. The gardens of the North Road properties back onto Field 1, which also abuts residential curtilages along its eastern boundary. Field 2 abuts one residential curtilage to the north, but is mostly separated from the gardens behind the housing along North Road by three smaller fields (Fields 4, 5 and 6) which also form part of Widmer Farm. Access to North Road can be obtained via Field 6. At its northeastern corner Field 3 abuts a few residential curtilages, but most of its eastern boundary is separated by a public footpath (FP 11) from the grounds of two local authority schools. The other three sides of the school grounds are surrounded by extensive residential development. To the south and west of the fields there is agricultural land. To the west of Field 2, and separated from it by another field, a bridleway, BW67, runs southwards from Grange Road, off North Road.

5. In 1973 a farmer, Mr Pennington, who had a farm at Brill, some 20 miles away, between Aylesbury and Bicester, was granted a grazing licence of Widiner Farm. The farmhouse was sold off in 1976. In the early years Mr Pennington kept cattle in the fields. His original intention was to graze the pasture land fairly fully, and to this end he made extensive efforts to fence the farm to keep his cattle in and trespassers out. However, repeated problems with trespass caused him to give up keeping cattle in the fields in 1979. He continued to keep some cattle in the three smaller fields (Fields 4, 5 and 6) until about 1982. The cattle would from time to time pass through the northern part of field 2 to get between Field 5 and Field 4, where there was a water trough. Thereafter, Mr Pennington took an annual hay crop from the fields until the early 1990s.

6. On the 12th June 2000 an Inspector confirmed (with modifications) the Buckinghamshire County Council (Footpaths at Widmer End in the parishes of Hazlemere and Hughenden) Definitive Map Modification Order 1999 ("the Footpath Order"). The effect of the Footpath Order was to modify the Definitive Map and Statement for the area by the addition of a number of footpaths, around the edges of Fields 1, 2 and 3 (cutting some corners), across Fields 5 and 6 leading to North Road, and continuing alongside the boundaries of the field to the west of Field 2 to BW67.

7. On the 25th August 2000, Mr Wainman, on behalf of the Grange Action Group ("GAG"), applied for the three fields to be registered as a village green. GAG is a voluntary grouping of a number of local organisations, including parish councils and residents' associations.

8. The Council, as Registration Authority, appointed Mr Alun Alesbury of Counsel as an independent inspector ("the Inspector"). Following a pre-inquiry meeting on the 5th June 2001, he held a public inquiry at Widiner End on six days between the 5th and 13th November and made an accompanied site visit on the 14th November 2001. In his report dated the 22nd March 2002 the Inspector's overall conclusion was:

> "(i) that there has been for at least 20 years before 25th August 2000 recreational use (for "lawful sports and pastimes") of the three fields in question at Widiner Farm, by the inhabitants of the locality best described as the Ecclesiastical Parish of Hazlemere;
>
> (ii) that this recreational use has been substantial for at least the said 20 years, and has been predominantly by the inhabitants of the locality I have referred to;
>
> (iii) that this recreational use has been carried on as of right, openly, without force, without permission express or implied, and not in defiance of any prohibition." (para. 15.1 Inspector's Report, unless otherwise indicated, further references in parenthesis are to chapter or paragraph numbers in the Report.)

9. Accordingly, he recommended that the Council should accede to GAG's application (15.2). On the 8th April 2002 the Council's Regulatory Committee, following a lengthy discussion, accepted the Inspector's recommendation and resolved to register the three fields as a village green.

10. In these proceedings Laings seek a quashing order in respect of the Regulatory Committee's resolution ("the domestic law challenge"). They also seek a declaration under section 4 of the Human Rights Act 1998 that sections 13(3) and 22 of the Act are incompatible with Article 1 of Protocol 1 to the European Convention on Human Rights ("the Convention") ("the human rights challenge").

**The Statutory Framework**

11. The purpose of the Act was "to provide for the registration of common land and of town or village greens; to amend the law as to prescriptive claims to rights of common; and for purposes connected therewith".

12. The relevant provisions are as follows:

Section 1 provides that, "There shall be registered ... land ... which is common land or a town or village green", and rights of common over such land.

13. After the end of a period to be determined by the Minister (which expired on 30th July 1970), section 1(2)(a) provides that:

> "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."

14. Where common land is registered under the Act but no person is registered as the owner under the Act, subsection 1(3) provides that:

> "it shall be vested as Parliament may hereafter determine."

15. Registration Authorities, defined by section 2, are required by section 3 to maintain:

> "(a) a register of common land; and
>
> (b) a register of town or village greens."

16. Section 10 deals with the effect of registration:

> "The registration under this Act of any land as common land or as a town or village green, or of any right of common over such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only."

17. Section 13 makes provision for the amendment of registers:

> "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;"

18. The High Court is given power by section 14 to order rectification of the register.

19. Section 19 gives the minister power to make regulations prescribing the form of the register, and for related matters, such as the procedure to be adopted by registration authorities in dealing with applications for registration.

20. Section 22(1) defines village green as follows:

'town or village green' means [a] land 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 a 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."

21. It is usual to add paragraphs [a]-[c] for ease of reference in cases of this kind, and to refer to the three types of village green as class [a], class [b] and class [c] village greens.

22. The Commons Registration (New Land) Regulations 1969 ("the Regulations"), made under sections 13 and 19 of the Act, deal with the procedures under which land becomes common land or a town or village green.

23. Regulation 3 provides:

> "3(1) Where, after 2nd January 1970, any land becomes common land or a town or village green, application may be made subject to and in accordance with the provisions of these Regulations for the inclusion of that land in the appropriate register and for the regulation of rights of common thereover and of persons claiming to be owners thereof
>
> 3(4) An application for the registration of any land as common land or as a town or village green may be made by any person, and a registration authority shall so register any land in any case where it registers rights over it under these Regulations."

24. An application to register land which became a village green after 2nd January 1970 must be made on Form 30 (Reg.3[7][a]). Part 3 of the Form asks for:

> "Particulars of the land to be registered, i.e. the land claimed to have become a town or village green.
>
> Name by which usually known
>
> Locality
>
> Colour on plan herewith"

25. Part 8 requires the applicant to list the supporting documents sent with the application. The explanatory notes to the Regulations give examples of documents which may be required; they include

> "8(3) Where the land is stated to become a town or village green 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, and there is a declaration by a court of competent jurisdiction to that effect, an office copy of the order embodying that declaration."

26. Regulation 5 prescribes the procedure to be accepted by the registration authority in disposing of an application. On receipt of an application notice has to be given to the owner and occupier (para.5[4][a]) and to the public (para.5[4][b] and [c]). Under paragraph 5(7) the authority may reject an application if it, appears after preliminary consideration not to be duly made, "but where it appears to the authority that any action by the applicant might put the application in order, the authority shall not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

27. The background to the enactment of the 1965 Act, and the manner in which it dealt with village greens was explained by Carnwath J. (as he then was) in *R. v. Suffolk County Council ex p. Steed* (1995) 70 P&CR 487, between pages 489 and 494. His survey of the historical material makes it plain that the 1965 Act was intended to be the first stage in a two-stage legislative process. As a first step, the registers would establish the facts, as to what land was, and was not, common land or a town or village green, and provide a definitive record. In the second stage, Parliament would deal with the consequences of registration: defining what rights the public had over commons or town or village greens so registered: see section 13 (above). Section 15(3) enabled Parliament to "hereafter determine" the number of animals that could be grazed where a registered right of common included grazing rights.

28. In *New Windsor Corporation v. Mellor* (1975) Ch. 380 (cited by Carnwath J. at p.492), Lord Denning M.R. hoped that the second stage legislation "will not be long delayed" (p.392).

29. In 1995 Carnwath J. pointed out that 30 years after the passing of the Act nothing had been done to advance the promised second stage legislation. Eight years further on Parliament has made detailed amendments to the first stage legislation, but has still not grappled with the second stage.

30. Section 98 of the Countryside and Rights of Way Act 2000 (CROW) merely amended the definition of town or village green in section 22(1) of the Act, as follows:

> "98(2) In subsection (1), in the definition of "town or village green" for the words after "lawful sports and pastimes" there is substituted "or which falls within subsection (IA) of this section."
>
> 98(3) After that subsection there is inserted -
>
> (1 A) 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."

31. The amendment came into force on 30th January 2001. The revised definition in the new subsection (IA) makes it clear that the application land must have been used by a *significant* number of the inhabitants. An applicant need not prove that all of the inhabitants used the land, conversely, use by only a few of the inhabitants will not suffice. To this extent the new definition makes explicit the test that had hitherto been adopted in practice by the Courts. The second change, enabling the inhabitants to be not merely of any locality but also of any neighbourhood within a locality, is potentially significant: cf. the decision of Harman J. in *Ministry of Defence v. Wiltshire County Council* (1995) 4 All ER 931 at p.937. However, the Inspector concluded that section 22 as originally enacted applied to GAG's application, which was made on the 25th August 2000, notwithstanding the fact that the amended section 22 had come into force well before the Inquiry commenced in November 2001 (paras. 12.1-12.7).

32. Mr George QC on behalf of Laings submitted that the Inspector's approach was correct, and referred to an *obiter dictum* of HH Judge Hwyl Mosely (sitting as a Deputy Judge of the Queen's Bench Division) in *Caerphilly County Borough Council v. Gwinnutt* (unreported). Mr Maurici on behalf of the Secretary of State for the Environment, Food and Rural Affairs, as an Interested Party also submitted that the Inspector's approach was correct. While not submitting that the Inspector erred in this respect, Mr Morgan on behalf of the Council reserved its position, pointing out that other inspectors had adopted a different approach: see *R. on the application of Alfred McAlpine Homes Ltd. v. Staffordshire County Council* (2002) EWHC 76 Admin, para.23.

33. Before turning to the Inspector's Report it is helpful to mention the nineteenth century legislation relating to village greens.

34. Section 12 of the Inclosure Act 1857 provides, in part:

> **"12 Proceedings for prevention of nuisances in town and village greens allotments for exercise and recreation**
>
> And whereas it is expedient to provide summary means of preventing nuisances in town greens and village greens, and on land allotted and awarded upon any inclosure under the said Acts as a place for exercise and recreation: 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 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 ... forfeit and pay, in any of the cases aforesaid, and for each and every such offence, over and above the damages occasioned thereby, any sum not exceeding [level 1 on the standard scale]..."

35. Section 29 of the Commons Act 1876 reinforces section 12 in cases where a town or village green or recreation ground has a known or defined boundary, as follows:

> **"29 Town and Village Greens**
>
> ... 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, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve 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."

## The Inspector's Report

36. The Inspector's Report is a model of its kind: detailed and comprehensive. It is not possible to do it full justice and keep this judgment within a manageable length. In 22 chapters extending to just over 100 pages the Inspector introduces the application and GAG (Chapter 1), describes the application site (Chapter 2), sets out the legal basis of the proceedings (Chapter 3), identifies the principal issues (Chapter 4), analyses the information to be obtained from twenty-two aerial photographs with dates between 1962 and late 1999 (Chapter 5), introduces the evidence (Chapter 6), sets out in great detail the evidence of each witness called by GAG (Chapter 7) and by Laings (Chapter 8), records- the submissions made on behalf of GAG (Chapter 9) and. Laings (Chapter 10), and then sets out his own conclusions on the Human Rights Act challenge (Chapter 11), CROW (Chapter 12), "Locality" (Chapter 13), and the Principal Issues (Chapter 14).

37. Although the Inspector said that he had concentrated on trying to convey "the flavour of the evidence", and that his report did not purport to be "an exhaustive summary of every single witness" (para.6.5), the report does in fact give a very full account of all the witnesses' evidence. In addition to that evidence, the Inspector had regard to the material accompanying the application, which included numerous questionnaires completed by local people (para.6.1), and to written proofs of evidence prepared for intended witnesses who did not attend the inquiry (due to a desire not to prolong the inquiry and because of personal availability

problems) (para.6.3). With one exception, relating to the Inspector's approach to "locality" in Chapter 3 (see below) Laings do not seek to challenge Chapters 1-10 of the report as an accurate statement of the evidence given, and submissions made, by the parties.

38. Laings' challenge is confined to the Inspector's conclusions in Chapters 11, 13 and 14 of the Report. Chapter 12 in which the Inspector concluded that the new section introduced by CROW was not applicable (see above) is not challenged. Rather than set out lengthy passages from Chapters 11, 13 and 14 of the report I will refer to the relevant extracts when considering the grounds of challenge. Such references will, of necessity, have to be highly selective given that the Inspector's conclusions occupy over twenty pages of his Report.

39. Although the decision to register the three fields as a village green was taken by the Council, not the Inspector, there is nothing to indicate that the Council did not accept the Inspector's findings, reasoning and conclusions. Thus, the domestic law challenge focussed upon the Inspector's report. Before turning to the grounds of challenge it is necessary to consider the effect of registration.

40. Mr George submitted that analysing the effect of registration raised two preliminary issues:

> (i) Whether the Act conferred rights on the local inhabitants, or whether it merely enabled the fields to be placed on a register as a village green with a view to future legislation conferring rights over land?
>
> (ii) Whether a registered village green is subject to section 12 of the 1857 Act and section 29 of the 1876 Act ("the nineteenth century legislation")?

41. On issue (i) conflicting views have been expressed in the Court of Appeal. In the *New Windsor* case (above) Lord Denning M.R. said (*obiter*) of the 20-years user referred to in-section 22(1)

> "But the difficulty about this 20-year user is that the act does not tell us what rights, if any, ensue to the inhabitants by virtue of a 20-year user. It enables the land to be registered as a town or village green, but that mere fact of registration confers no right. And at common law 20-year use gives no rights ... All is left in the air. The explanation is that Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens. This Act twice refers to matters which 'Parliament. may hereafter determine': see section 1(3)(b) and 15(3). I hope that another statute will not be long delayed. But, if there should be delay, I would be tempted to infer from this Act of 1965 that Parliament intended that all land registered as 'town or village green' should be available for sports and pastimes for the inhabitants: and that all land registered as 'common land' should be open to the public at large: so long as that did not interfere with the rights of the commoners or injure the pasture: and that it should be managed and maintained by the local authority at their expense: see sections 8 and 9." (p.391H-392G)

42. Browne L.J. agreed at p.395G

> "I also agree that as the Act stands, without further legislation, such use confers no rights on the public."

43. Brightman L.J. agreed with Lord Denning and Browne L.J. (at p.395H)

44. A contrary view was expressed (*obiter*) by Pill L.J. in *R. v. Suffolk County Council ex p. Steed* (1996) 75 P&CR 102 at pp. 113-115:

> "I find it difficult to conclude other than that Parliament intended, in section 22 to open the way to the creation of new rights ... The analogy is not exact but I see class C as a way of establishing rights just as section 1 (c) of the Rights of Way Act 1932 (now section 31 of the Highways Act 1980) provided a means of proving the existence of a highway ... An actual dedication need not be proved. I would construe the class C definition as having the same effect in making proof of the appropriate use sufficient to create a right."

45. Schiemann and Butler-Sloss L.J.J. agreed (p. 116). *Steed* was overruled by the House of Lords in *R. v. Oxfordshire County Council ex p. Sunningwell Parish Council* (2000) 1 AC 335, but issue (i) (above) was left open by Lord Hoffmann at p.347C:

> "It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent upon the point."

46. All of the parties before me contended that the approach of Lord Denning in the *New Windsor* case was correct. I can deal briefly with this issue because, whatever rights may or may not have been conferred by the Act on the inhabitants of the locality, there is no dispute between the parties that, as a registered village green, the three fields will be subject to the nineteenth century legislation. As Lord Hoffmann observed at p.347C of the Sunningwell decision:

> "...registration would prevent the proposed development because by section 29 of the Commons Act 1876 encroachment and or enclosure of a town or village green is deemed to be a public nuisance."

47. Laings contend, in answer to issue (ii) above, that the nineteenth century legislation will apply once the fields are registered as a village green. The Council and the Secretary of State submit that the nineteenth century legislation applies by virtue of the use of the land for not less than twenty years as a village green, whether or not registration has taken place. For the purposes of the domestic law challenge it does not matter which of these submissions is correct. There is no dispute that the nineteenth-century legislation imposes very severe restrictions upon a landowner's use of land that has been registered as a village green. For the purpose of considering the human rights challenge (below) it is not strictly necessary to decide whether, in addition to these severe restrictions upon the landowner, the Act has conferred rights, or merely the prospect of future rights upon the inhabitants of the locality. That said, if forced to choose between the two approaches I would follow *New Windsor* rather than *Steed*.

48. The only reference in the Act to 20-years user is in section 22(1), an interpretation section, which merely defines "town or village green ... in this Act unless the context otherwise requires." The remainder of the Act is not concerned with amending existing or conferring new rights, but with the registration of existing rights. In this respect it is to be distinguished from the Rights of Way Act 1932 which was "An Act to amend the law relating to public rights of way, and for purposes connected therewith." When Parliament wishes to confer a new right, particularly a right over another person's property, it does so in express terms. Whilst it might be tempting to infer from the delay of nearly 40 years that Parliament intended that all land registered as a town or village green should be available for sports and pastimes for the inhabitants (see Lord Denning at p.392F of *New Windsor*). I do not consider that such an inference can properly be drawn given the clear terms of the Act. If the second phase of legislation is to be introduced it must be done by Parliament, and not by the courts adopting a strained interpretation of the first-phase legislation.

49. As stated above, there is no issue between the parties that, whether by reason of 20-years use or by virtue of the fact of registration, as a registered village green the three fields would be subject to the nineteenth century legislation, which would impose very severe restrictions upon Laings' use of the land, effectively removing its potential for residential development. It is unnecessary to resolve the narrow area of dispute between the parties, whether the nineteenth-century legislation applies by virtue of registration, or as a consequence of 20-years user, for the purposes of determining the domestic law challenge.

**The domestic law challenge**

50. In his submissions Mr George grouped the six grounds of challenge in the Claim Form under four heads, as follows:

> (1) On the evidence as recorded by the Inspector, once the use of the footpaths around the edges of the fields was discounted, there was insufficient evidence of use of the entirety of the three fields for lawful sport and pastimes over the 20-year period beginning in August 1980, from which Laings could reasonably have deduced that those using the fields were asserting a right to use them as a village green. The Inspector had failed to carry out a field-by-field analysis of the recreational use of the fields excluding the use of the footpaths as such by walkers with or without dogs.
>
> (2) The Inspector erred in concluding that the use of the fields for an annual hay cut for well over half of the 20-year period was not incompatible with the establishment of village green rights.
>
> (3) The local inhabitants' use of the fields for recreational purposes was not "as of right" because they had expressly acknowledged, when responding to consultations relating to planning applications/Local Plan proposals that there were no rights to engage in lawful sports and pastimes on the fields, by contending that they should "revert to full agricultural use".
>
> (4) The Registration Authority was not entitled to register a village green for the benefit of the inhabitants of the ecclesiastical parish of Hazlemere, because an ecclesiastical parish cannot be a "locality" for the purposes of section 22(1) of the Act, because there was unfairness in the late identification of the ecclesiastical parish as the relevant locality, and because there was no evidence of any nexus between the use of the fields for lawful sports and pastimes and the ecclesiastical parish.

**Analysis and Conclusions**

**Ground (2): Agricultural Use**

51. I begin with ground (2) because the Inspector recognised that it was of critical importance:

> '14.46 Thus in the end the resolution of the present application stands or falls, in my judgment, on this point. The view which I have formed is that the annual cutting of grass and its collection as hay on each of the three application fields for well over half of the key 20 year period is not incompatible with recognising the establishment of village green rights, , which is otherwise clearly warranted here. The same goes for the very low level of use by grazing animals (minimal in Fields 1 and 3, slightly more in Field 2) which I have concluded might have been encountered, at some times, during parts of the first two or three years of the 20 year period.
>
> 14.47 If I am wrong on this point, and these. things are incompatible with the establishment of a village green under the 1965 Act, then I make it plain that my overall conclusion and recommendation would have to be changed completely. However in my judgment the "low level" agricultural activities which Mr Pennington undertook on the subject fields from August 1980 onwards *were* compatible with the establishment of village green rights."

52. The Inspector's conclusions as to the nature and extent of Mr Pennington's "low level agricultural activities" are not in dispute. Having concluded that 1979 was the last year when cattle were kept on the farm, in-

cluding Fields 1 and 3, to any significant extent, and that "any presence of cattle in Fields 1 and 3 from and including 1980 onwards would have been minimal"(14.36) the Inspector said in paragraphs 14.37 and 14.38:

> 14.37 An annual hay crop would generally be taken from those of the fields which had not had cattle on them in the grass-growing season, until the early 1990s. Thus from summer 1980 (and possibly previously, from Mr Pennington's own evidence) a summer hay crop would usually be taken from Fields 1 and 3, and it can reasonably be assumed that for most of those years, until Mr Pennington gave up, a hay crop would be taken from Field 2 as well.
>
> 14.38 The methods used to gather a crop of hay from a grass field were explained in some detail by Mr Pennington, as were the preparatory steps of harrowing/rolling/ fertilising which are carried out in the spring. These matters were not in any real dispute."

53. Mr Pennington's explanation of the various steps is summarised in paragraphs 8.60-8.68 of the Inspector's Report. Harrowing the three fields could be done in a day. After harrowing, rolling the fields with a three-ton. roller would take about two days. Fertiliser would be applied using a "spinner", a job that was easily done in a day. This preparatory work would be done sequentially over a period of four days usually (in the cattle years) before the cattle arrived, but occasionally after they had come. When the grass was ready, it would be cut and crimped by a flail mower/conditioner. This job would take two days if all three fields were mowed. Children could not play safely in a field whilst a flail mower was being used, and people were sometimes asked to leave the fields because of the danger. The hay would then be spread out to dry by a "hay bob", this process being repeated over two or more days depending on the weather. The bobbed hay would be placed into "wind rows" and then baled. In the early days, before balers improved, baling Field 3 (the largest field) would take two days. The bales would be collected into blocks, Field 3 would take one day, Fields 1 and 2 slightly less; they would then be loaded onto lorries and removed. Loading from Field 3 would take two days and from Fields 1 and 2 a little less. A very approximate figure of 2,400-2,500 bales (seven or eight lorry loads) might be taken from the fields altogether.

54. In paragraph 14.40 the Inspector said:

> "14.40 I have registered the point that none of the Applicant's witnesses claimed to have the right to stop the haymakers from carrying out their activities. They would "steer clear" of Mr Pennington's equipment while it was in use, to whatever extent was appropriate to the apparent danger; they would not deliberately interfere with the cut hay laid out to dry before collection. Likewise, though this was less discussed in the evidence, they would "steer clear" of any cattle they happened to see in the fields (the evidence however suggested that encounters with cattle were minimal)."

55. In paragraph 14.41 he posed the key question:

> '14.41 Are haymaking, and possible occasional encounters with a small number of grazing animals (particularly in Field 2) in the early years, incompatible with village green status, and in particular with establishing village green rights?"

56. At the outset of his "Conclusions on the Principal Issues - Fact and Law" the Inspector said that the case was "far from straightforward". In paragraph 14.2 he identified one area of particular concern:

> "14.2 One area of particular concern to me, but on which I received comparatively little assistance from the case and authorities cited to me by the parties, is the extent to which the exercise, and "generation by prescription" of village green rights for sports and pastimes can be compatible with the continued carrying out of some level of 'agricultural' activity on the land concerned, in the shape of hay cutting and/or grazing. All parties were agreed, and it seems obvious, that village green rights are incompatible with arable use of land. Common sense

suggests that they are unlikely to be generated on enclosed land which is intensively used for pasturing animals. However Widmer Farm is not one of those easy cases."

57. Having said that he was "not assisted by the 1965 Act at all" the Inspector set out his reasons for answering the key question in the negative:

"14.41 ... Common sense suggests that someone has. to keep the grass down on any village green which consists of the normal grassy area which one typically expects. It would be a rare village green where the grass could be kept short enough on a permanent basis simply by the actions of human feet. No doubt with many established village greens it will be the local inhabitants themselves, perhaps through their Parish Council, who keep the grass cut. However, when a village green is being established through usage it seems to me almost inevitable that it will be the landowner, or-his tenant or licensee, who does such cutting of the grass as does take place, whether by mechanical means or by some level of grazing which is compatible with the village green uses.

14.42 The fact that people on the fields in practice have to get out of the way of the equipment being used to cut the grass and collect the hay does not seem to me to argue strongly in any particularly direction; people routinely have to get out of the way of the sort of mowing equipment which is used to keep the grass down on playing fields and other recreation areas, including established town or village greens. The same principle would seem to apply to the fact that most people would tend to avoid close contact with any grazing beasts they happened to see on a "village green" area.

14.43 Nevertheless I do not find this an easy question. I am assisted however by the fact that in a number of the leading cases on village greens it seems to have been assumed without question that there in no inherent incompatibility between grazing at least, and village green rights. Most notably, in the Sunningwell case itself, in the House of Lords: [2000] AC 335, at p.358, Lord Hoffmann. expressly quotes from the report of the Inspector, Mr Vivian Chapman, who had held the inquiry in that case:

'Third, the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use and has been tolerated by the tenant or grazier.'

It seems to me inconceivable that Lord Hoffmann or the House of Lords (or indeed Mr Chapman) should be taken as having missed some obvious point that village green use is automatically incompatible with the land being grazed by the animals of the tenant or grazier. It was also noted by the Court of Appeal in *New Windsor v. Mellor* [1975] Ch. 380, at p.390 that. the area concerned there ('Bachelors' Acre') had at one point in its history been let as a pasture, while still being subject to rights for 'recreations and amusement'.

14.44 My attention was also drawn to *Gadsen* on the law of Commons, where at section 13.07 under the sub-heading 'Greens and rights of common' there is some discussion of how village green rights can be compatible with rights of common (which presumably would include grazing), and with the taking of hay. I do not find it easy to relate the passage clearly to the present case, but it certainly does not displace the view I have formed that there is nothing inherently incompatible between village green use and either a moderate level of grazing or the cutting of the grass for hay.

14.45 I was also asked to consider Section 12 of the *Inclosure Act 1857*, which among other things prohibits the leading or driving of any cattle or animal on a town or village green 'without lawful authority'. It seems to me that the answer to this must be that the owner of the land concerned, or his tenant or licensee, does have the lawful authority to place his cattle on the green, at least in any manner which is not incompatible with village green rights. The converse would

> be that village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing, or indeed hay-cutting, on the land."

58. I do not find the first and second of these reasons persuasive. Mowing an established village green to facilitate its use for lawful sports and pastimes would not be in breach of section 12 of the 1857 Act, and being "with a view to the better enjoyment of such town or village green" would not be deemed to be a public nuisance by section 29 of the 1876 Act. It is not to be equated with the agricultural use of a field for the purpose of taking a hay crop. Land which is used to grow grass which is then cut and used for .silage and hay falls within -the definition of land "cultivated ... with a view to a harvest" in Council Regulation (EEC) 1765/92: *Wren v. DEFRA*, Times Law Reports, 4th December 2002. It might be one of the least intensive forms of cultivation, but it is still the growing of a crop with a view to harvesting it.

59. Preparatory steps, harrowing, rolling, fertilising, are taken with a View to encouraging the crop to grow, notwithstanding the fact that long grass may discourage many lawful sports and pastimes until it is cut (see e.g. para.7.71). Gathering a hay crop, with the activities of mowing, bobbing, wind rowing, baling, stacking, loading and removal, will interrupt the use or enjoyment of a field "as a place for exercise and recreation". Not merely do people have to keep out of the way of the machinery when it is in use, they may not disturb the mown hay whilst it is drying, when it has been aligned in wind rows, and when it has been baled. Getting out of the way of machinery which is being operated so as to facilitate the use of land for lawful sports and pastimes (mowing/rolling a playing field) is wholly consistent with the assertion of a right to use the land as a village green. Getting out of the way of machinery which is being operated for an agricultural purpose, to facilitate the taking of a hay crop from the land which will inhibit its use for lawful sports and pastimes, whilst the grass is growing, whilst it is dried and aligned for baling after cutting, when it has been baled, and whilst the bales are collected is not consistent with the assertion of such a right.

60. I agree with the Inspector that it is inconceivable that the House of Lords would have missed an obvious point: that village green use is "automatically incompatible with the land being grazed by the animals of a tenant or grazier". In the *Sunningwell* case there was little discussion of the extent of the grazing; the Inspector merely recorded his conclusion that the "rough grazing", which he had described as being by "a handful of horses", had not conflicted with the use of the glebe for informal public recreation. That is not surprising, since neither the extent of the grazing use, nor its effect on the recreational use of the glebe were raised as issues by the objector before the Inspector, or in the House of Lords. The use of Bachelors' Acre as pasture, referred to by Lord Denning in the *New Windsor* case (p.388) appears to have preceded the 1857 Act (which prohibited without lawful authority leading or driving cattle on village greens), and in any event was, after 1817, always expressly subject to the Bachelors' right to use the land "for all lawful recreations and amusements". (p.390)

61. The passage in *Gadsen* referred to by the Inspector effectively acknowledges that there may be a conflict between recreational use and rights of common and seeks to reconcile the conflicting interests as follows:

> "On principle it must be that the recreational use in such circumstances is subservient to the rights of the owner of the land and the commoners ... In the event of conflicting priorities, the original property rights of owners and commoners should prevail. Thus, for example, if the land is traditionally cut for hay, the existence of the recreational use will not allow inhabitants to enter and spoil the hay. On the other hand it also seems, as a matter of principle, that the owners of the land, or rights over the land, may not exercise their rights in such a way as to wilfully inhibit or prevent the rights of recreation."

62. The only authority cited in support of this eminently sensible approach is *Fitch v. Fitch* (1797) 2 Esp. 543. In that case the inhabitants of a parish had a customary right to play lawful games and pastimes at all times of the year in the Plaintiffs close. The close was used for growing grass. After the grass was mown the Defendants had "trampled down the grass, thrown the hay about, and mixed gravel through it, so as to render it

of no value". In response to the Defendants' contention that they were justified in removing any obstruction to the free exercise of their right, Heath J. said:

> "The custom appears to be established. 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."

63. This supports the proposition that the use of land for growing a hay crop was not incompatible with the existence of a customary right to indulge in lawful sports and pastimes on the land: see also *Fitch v. Rawling* (1795) 2 H.Bl 394. Prior to the enactment of the nineteenth-century legislation the two rights could coexist; each right was conditional upon it not being exercised in such a way as to deliberately obstruct the exercise of the other.

64. Since the enactment of section 12 of the 1857 Act it has not been possible to establish such conditional rights. Rights of common can no longer be created by prescription over a village green: if the grazing is with the owner's permission it will not be "as of right", and if it is "without lawful authority" it will be a criminal offence and thus will not give rise to a prescriptive right: see *Massey v. Boulden* (2003) 2 All ER 87, per Simon Brown LJ at paragraph [9].

65. Moreover, section 12 makes any act "to the interruption of the use or enjoyment [of a village green] as a place for exercise and recreation ..." a criminal offence. Whatever may be the position in relation to those customary rights which had been established by 1857, where haymaking and recreational use were able to coexist, no such rights can have been established after the enactment of section 12. If a village green is established, any other use involving acts which would interrupt its use for enjoyment and recreation are effectively prohibited. It is difficult to see how the various steps that are necessary to gather a hay crop (as opposed to mowing grass to keep it short and useable for recreational purposes) could be said not to amount to such an interruption.

66. Section 29 of the 1876 Act, to which the Inspector did not refer, makes any effective agricultural use of a village green even more difficult. The erection of fencing ("inclosure"), or a shelter or water trough ("any erection") to facilitate the use of the land for grazing would be prohibited, as would ploughing and re-seeding ("disturbance or interference ... with the soil"). The occupation of the soil for the purpose of taking a grass crop, involving the steps described -by Mr Pennington (above), would not be "with a view to the better enjoyment of [the] village green", and would thus be deemed to be a public nuisance.

67. Mr George submitted that the words "without lawful authority" in section 12 were a recognition that pre-existing commoners' rights of grazing could continue, and were not an acknowledgement of the landowner's right to graze cattle on a village green. I agree with the Inspector (14.45) that section 12 permits the landowner (or his tenant or licensee) "to place his cattle on the green at least in any manner which is not incompatible with the village green rights". I further agree that "the converse would be that [even after 1857] village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing Given the restrictions imposed by sections 12 and 29 (above) such grazing would have to be very low key indeed (as was the case in the *Sunningwell* in order to be lawful and compatible with the establishment of village green rights.

68. For the reasons set out above I do not agree with the Inspector's conclusion that village green rights can be established where land is being used for the growing, and cutting, drying, baling etc. of a hay crop. The Inspector refers at the end of paragraph 14.45 to "hay cutting". The occupation of land for the purpose of

"hay cutting" is not to be equated with grass cutting. The former is no different in principle to the harvesting of any other crop. Insofar as the latter is carried out "with a view to the better enjoyment of [the] village green" as such, it will not be a public nuisance under section 29, nor will it be a criminal offence under section 12. When enacting the definition of "town or village green" in section 22(1) of the Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of section 22(1), since upon registration as a village green (if not after 20 years use) some, if not all, of those lawful agricultural activities would become unlawful by virtue of sections 12 and 29. Moreover, the prospect of improving the land agriculturally, by fencing, or by ploughing or re-seeding, would be lost.

69. On behalf of the Council Mr Morgan submitted that the question of whether a particular use by a landowner is incompatible with the establishment of a village green right is a matter of fact and degree. The issue is whether the use was such as to interfere sufficiently with the use for lawful sports and pastimes to indicate that the use was not enjoyed as of right. This appears to have been the Inspector's approach in Chapter 14 of his Report. At the beginning of that chapter he concluded that Mr Pennington visited Widmer Farm very much less frequently than three times a week (the figure claimed by Mr Pennington), and after cattle ceased to be on the fields he visited them "*very* infrequently ... except when specific activities such as harrowing/rolling/fertilising or hay-making, were being undertaken" (14.4-14.15).

70. He then analysed the extent of the use of the fields for lawful sports and pastimes and concluded that there was "abundant evidence of continuous use by local people of the whole surface of these fields for at least the 20-year period required ... The overall picture is one of substantial levels of use for recreational activities" (14.25). In paragraph 14.23 he left:

> "until later the question foreshadowed earlier, of what the legal consequences are when the evidence suggests *both* a village green user *and* some modest level of 'agricultural' type activity coexisting on the land for a significant part of the prescription period."

71. He dealt with that question in paragraphs 14.29-14.47. The principal conclusions are set out above. In paragraph 14.39 he identified:

> "The real question, and the key question for me in terms of advising the County Council, is what effect this level of 'agricultural' activity in the fields has on the proposition that the village green type uses, which I have already found were being carried on extensively and openly from at least 1979 and probably earlier, truly were 'as of right' and sufficiently continuous."

72. Thus the Inspector was considering the effect of the "agricultural" activity upon the &&village green type uses". Mr Morgan submitted that on the facts found by the Inspector,

> "the evidence was that the agricultural activities would have had very little effect on the lawful sports and pastimes being carried out on the application site".

73. I readily accept that the question is one of fact and degree in each case. Such questions are to be determined by the Council as Registration Authority, and the Court will not substitute its own judgment if the Council has, in adopting the approach set out in the Inspector's Report, correctly directed itself in law. In deciding whether the use for lawful sports and pastimes was being enjoyed "as of right" for the purposes of section 22(1), I do not consider that it was appropriate to look at the question from the standpoint: "did the agricultural use interfere sufficiently with the use of the land for lawful sports and pastimes?" The extent to which the use of the land for recreational purposes has been interrupted during the 20-year period is certainly a relevant factor. In the only village green case in which the extent of the recreational use was in issue, *Mills-*

*try of Defence v. Wiltshire County Council* [1995] 4 All ER 931, Harman J. at p.935d, referred to a decision of Buckley J. in a commons case, *White v. Taylor (No.2)* (1969) 1 Ch 160 at 192:

> "To make good a prescriptive claim in this case it is not necessarily for the claimant to establish that he and his predecessors have exercised the right claimed continuously. This is a-profit of a kind that, of its nature, would only be used intermittently. Flocks would not, for instance, be on the down at lambing time ... But 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."

74. Harman J. therefore concluded that for the purposes of section 22(1)

> "one has to have here a user of the land of such a character and degree of frequency as to indicate an assertion of a right by a claimant".

75. In *Sunningwell*, Lord Hoffmann said:

> "I agree with Carwath J. in *Reg. V. Suffolk County Council Ex parte Steed* (1995) 70 P. & C.R. 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right" (p.357D).

76. Although there are references in Lord Hoffmann's speech to "the quality of enjoyment" (p.351F) and "the quality of user" (p.352F), their Lordships were not concerned with the extent of the recreational use of the glebe in that case, but with the meaning of the words "as of right" in section 22(1), and specifically with the question whether those words meant that the right had to have been exercised in the belief that it was a right enjoyed by the inhabitants of Sunningwell. The witnesses for the parish council had not said that they thought that the right was confined to the inhabitants of the village. This was held to be fatal to the application (p.3481-1-349C). The House of Lords decided that registration should not have been refused on this ground (P.356E).

77. At the beginning of his review of the historical background, Lord Hoffmann contrasted the approach to prescription under Roman Law, which was not concerned with the acts or state of mind of the former owner; and that under English Law, which approached the question from the other end, by treating lapse of time as barring the former owner's remedy, or giving rise to a presumption that he had done some act which conferred a lawful title (p.349D-H).

78. Under English Law the focus is not upon how matters would have appeared to the person seeking to acquire the right by long usage, but upon "how the matter would have appeared to the owner of the land" (p.352H-353A).

79. Referring to the requirement that long user had to be *nec vi, nec clam* and *nec precario*, Lord Hoffmann explained that:

> "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 the user and in the third, because he had consented to the user, but for a limited period."

80. He cited *Mann v. Brodie* (1885) 10 App.Cas. 378, and Bright v. Walker (1834) 1 C.M. & R. 211:

> "In *Mann v. Brodie* Lord Blackburn put the rationale as follows, at p.386: 'where there has been evidence of a user by the public so long and in such manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

and

> "the user by the public must have been, as Parke B. said in relation to the private rights of way in *Bright v. Walker* 1 C.M & R. 211, 219, 'openly and in the manner that a person rightfully entitled would have used it."

81. In *Steed* the Court of Appeal had followed dicta in three earlier cases, including *Hue v. Whitely* (1929) 1 Ch 440, a decision of Tomlin J. Lord Hoffmann (at p.354F) doubted whether

> "Tomlin J. meant to say more than Lord Blackburn had said in *Mann v. Brodie*, 10 App.Cas. 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is irrelevant."

82. Thus, the proper approach is not to examine the extent to which those using the land for recreational purposes were interrupted by the landowner's agricultural activities, but to ask whether those using the fields for recreational purposes were interrupting Mr Pennington's agricultural use of the land in such a manner, or to such an extent, that Laings should have been aware that the recreational users believed that they were exercising a public right. 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.

83. The Inspector noted that "none of the applicant's witnesses claimed to have the right to stop the haymakers from carrying out their activities. They would "steer clear of Pennington's equipment while it was in use ... they would not deliberately interfere with the cut hay laid out to dry before collection" (14.40, see also the evidence of GAG's witnesses recorded at 7.5, 7.8, 7.17, 7.20, 7.32, 7.38, 7.56, 7.60 "the fanner carrying out activities such as mowing or harrowing in the fields would plainly have had priority over anyone involved in recreational activities", and 7.74).

84. I appreciate that Mr Pennington was not physically present on the fields for very many days in the year. That is not uncommon now that agriculture has become more mechanised. A landowner may choose to use his land for only a few days a year for a variety of non-agricultural purposes: e.g. as an overflow car park, a reserve playing field, or an occasional camping or caravan site. If the local inhabitants also use such land for lawful sports and pastimes, there may be very little interruption of their recreational use if the issue is looked at from their point of view. From the landowner's point of view, so long as the local inhabitants' recreational activities do not interfere with the way in which he has chosen to use his land - provided they always make way for his car park, campers or caravans, or teams playing on the reserve field, there will be no suggestion to him that they are exercising or asserting a public right to use his land for lawful sports and pastimes.

85. If it was possible for the local inhabitants to establish the existence of a village green after 20-years use in such circumstances (because there had been virtually no interruption of their recreational activities), the

landowner would then be prohibited by the nineteenth-century legislation, sections 12 and 29, from continuing to use his land, on an occasional basis, for any purpose which would interrupt or interfere with the local inhabitants' recreational use. I do not believe that Parliament could have intended that such a user for sports and pastimes would be "as of right" for the purposes of section 22. 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.

86. 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 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 Mr Pennington'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.

87. I have dealt with ground (2) at some length, because if I am correct in concluding that this ground succeeds, that is sufficient to dispose of this application in the Claimant's favour, as the Inspector said: "the present application stands or falls ... on this point". In my view, for the reasons set out above, the Inspector and the Council should have concluded that GAG's application fell on this ground.

**Ground (1): Use for lawful sports and pastimes**

88. Having reviewed the evidence, the Inspector's conclusions as to the nature and extent of the local inhabitants' use of the land were as follows:

> "14.23 I thus conclude that that which the local inhabitants were doing on the application land, from the late 1970s through until the application in August 2000, they were doing without force, openly, without permission express or implied, and not in defiance of any express prohibition. Thus *prima facie* they were doing these things "as of right", in the terms of the statute. However I recognise that in dealing with this aspect of the matter I have run ahead of the question whether what they were doing on the land was of the nature of "indulging in lawful sports and pastimes", and sufficiently extensive and continuous to meet the requirements of the 1965 Act. This is what I now turn to...
>
> 14.24 I entirely take the point that some of the evidence was from people whose own regular habits involved walking round the paths that developed around the field boundaries, and that because of the nature of the vegetation on site some of the activities mentioned, such as blackberrying, must have taken place on or near to those boundaries and footpaths. Likewise the evidence, and common sense suggested, that certain activities such as cycling by children would tend to be confined to the field margins at certain times, when the grass in the middle of the fields was somewhat longer and awkward to cycle in.
>
> 14.25 However, it seems to me, from the evidence which was given at the Inquiry, from the additional written material, and from the numerous returned questionnaires (accepting that those latter two categories have less weight than evidence tested by cross-examination) that there is abundant evidence of continuous use by local people of the whole surface of these fields for at least the 20-year period required. I am conscious of what was said in the House of Lords in *Sunningwell* as to the nature of "lawful sports and pastimes" in modern times. Here, in addition to the dog walking and playing with children there referred to, there was evidence about general walking (i ..e. without dogs), children playing by themselves, kiteflying, bird watching, fami-

ly games, football and other ball games, cycling, regular games by the local Scouts and Guides (particularly in Fields 2 and 3), picnicking, and many other activities besides. I entirely accept that not all of these things would be going on in all the fields at all times, and that some of the activities probably waxed and waned according to fashion, and the predominant age groups of the local people using the fields during any particular period. However the overall period is one of substantial levels of use for recreational activities.

14.26 ...

14.27 Clearly the point, mentioned in Sunningwell, that the user must not be so trivial and sporadic as not to give the appearance of user as of right, needs careful consideration in a case where a large area is claimed. It seems to me however, as indicated above, that there is abundant evidence of regular, continuous user of these fields by local people for a variety of lawful recreations and pastimes for the purpose of the Act. I do not consider that the fact that these fields do not look like the conventional "picture postcard" village green is relevant to whether they meet the requirements for that status."

89. His conclusion as to the extent to which Laings were aware of these activities is contained in paragraph 14.2 1:

"I have considered the argument advanced by Laings in this regard. I have some difficulty with the proposition that an absentee landlord with an almost absentee grazing licensee can rely on that absentee status to claim that they ought not or could not be taken to have notice of activities carried out quite extensively and openly on their land. In my view that is not the correct approach in village green cases under the 1965 Act. However, as already indicated, I find that Laings and Mr Pennington did during the relevant period have ample actual notice that local people were coming onto the land, and at least constructive notice that they were using it in ways which could potentially give rise to a village green claim (e.g. not just sticking to fixed footpaths but using it more informally and generally)."

90. In the light of these conclusions Mr George accepted that, at first sight, the Claimant had an uphill task in establishing a relevant error of law for the purposes of ground (1) (above). In these conclusions the Inspector was resolving disputed questions of fact, having heard the witnesses give evidence. The Claimant did not contend that GAG had to prove use of the fields each day, or even each week throughout the 20-year period, nor was it necessary to prove the use of every square yard of the 38 acres. However, Mr George submitted that in an application for registration of a village green under s.22(1) it had to be shown:

(a) that the use was sufficiently frequent throughout the day, as opposed to frequent at certain times and infrequent at others,

(b) that throughout the day the frequent use extended to the great majority of each of the three fields,

(c) that in analysing continuity, frequency and extent, use by walkers with or without dogs should be excluded if it merely took place around the edges of the fields (along the public footpaths confirmed in the Footpath Order in June 2000) or diagonally across them.

91. In respect of (a) the Inspector had failed to specifically address the question whether during the majority of daylight hours there was normally recreational activity on the Fields. In respect of (b) he had failed to undertake a field-by-field analysis of the various uses and did not explain how he had reached the conclusion that recreational activities had extended across all three fields for 20 years: e.g. there was no evidence of Cub Scouts' use after 1987 (7.67), and prior to 1987 the Cub Scout use was mostly on part only of Field 3 (7.68), and was confined to 6.00-7.15pm (7.74). 92. In respect of (c) the Inspector had correctly recorded Laings' submissions. Relying upon *White v. Taylor* (10.7) Laings had contended that "... in the present case it

would be necessary to show a continuous village green use of all three fields and not just their perimeters, and not just such walking or dog walking as would give rise to a right of way as opposed to anew village green" (10.8). In closing submissions Laings presented an analysis which sought to distinguish between the use of the footpaths around the edges of the fields and other uses off the footpaths (10.16-10.22). The Inspector did not explain why he disagreed with that analysis, and in his conclusions (above) he appeared to have included all the walking and dog walking on the footpaths as evidence of the use of the fields for lawful sports and pastimes. If one asked how the matter would have appeared to Laings (*Sunningwell*, p.352H), the use of the footpaths as such would not have suggested to a reasonable owner that the users believed that they were exercising a right to engage in lawful sports and pastimes across the whole of the 38 acres.

93. Although the Claimant's skeleton argument contained a detailed analysis of what activities on the fields were, or were not, seen by Mr Pennington and Mr Pantling (the Claimant's planning consultant from 1982), Mr George did not dissent from the proposition that the Inspector's approach in the second and third sentences in paragraph 14.21 (above) was correct. Laings could not take advantage of the fact that it was "an absentee landlord with an almost absentee grazing licensee". The test is an objective one: how would the local inhabitants' use of the fields have appeared to a reasonable landowner?

94. 1 do not accept the Claimant's proposition (a)(above). It is not suggested that it is supported by any authority, and it would appear to be an attempt to impose a more onerous test than that set out in the *Ministry of Defence* and *Sunningwell* cases (above). The Inspector realised that the level of use would vary, at different times of the day and on different days:

> "I have already acknowledged that some of the regular users had a tendency to go on the land in the early mornings, the evenings or at weekends, but this is by no means true of all users" (14.20).

95. I accept Mr Morgan's submission that since village green uses are, by their very nature, leisure related, it would be most surprising if there was a requirement that lawful sports and pastimes should be carried on sufficiently frequently -throughout daylight hours at all times of the year. Most recreational activities will, by their very nature, be enjoyed by the local inhabitants outside normal working hours, at the weekend and during the school holidays. Outdoor recreation is likely to be more frequent in the summer than in the winter. A similar pattern of use would have been expected on customary village greens. When the custom was first established working hours would have been much longer, and the time available for recreation on the village green correspondingly shorter.

96. With regard to proposition (b), the Inspector did consider whether there was sufficient evidence of use of the whole, as opposed to merely part of the fields, and concluded:

> "that there is abundant evidence of continuous use by local people of *the whole* surface of these fields for at least the 20- year period required"(14.25, my emphasis).

97. In reaching that conclusion, he accepted that not all of the activities listed in paragraph 14.25 "would be going on on all the fields at all times". Subject to point (c) (below) the Inspector was entitled to reach that conclusion. Many of the witnesses who gave evidence made it clear that their own use of the application site was not confined to one field, but extended to all three fields: see e.g. the evidence of Miss Edgson (7.2), 7.4); Mrs Lancaster (7.6); Mr Pattenden (7.13, 7.16); Mr Cassell (7.33); Mr McCarthy (7.49); and Mr Wainman (7.84). Other witnesses referred in- general terms to their use of "the fields", and to seeing others using the fields. There were numerous access points around all three fields, and those who confined their use to one field did so as a matter of convenience of access and preference, and not in response to a perception that the other fields were closed to them. Having carefully recorded all the evidence, the Inspector was not obliged to go through a "field-by-field analysis" before reaching the conclusions in paragraphs 14.23-14.27 (above).

98. In response to the Claimant's proposition (c) (above) Mr Morgan submitted that it was artificial to "subtract" the use of the footpaths from the other recreational uses. Dog walking may be one of the main functions of a village green (*Sunningwell* p.357D). The Inspector was aware of the footpath evidence. He specifically referred to Laings' argument at the Footpath Inquiry when the period 1979-1999 was being considered that:

> "the fields would appear to have been used on an informal basis with no definitive line taken" (14.20).

99. Mr Morgan submitted that the Inspector did distinguish between the use of the paths that developed around the field boundaries (14.24) and the use of the three fields as a whole (14.25).

100. The evidence at the Footpath Inquiry was potentially significant, because the supporters of the Order were, in effect, contending that they had used the defined paths for 20 years or more prior to 1998, and had not simply roamed at will over the fields:

> "The claimed footpaths provided useful shortcuts between Hazelmere and facilities of Widmer End in or near Grange Road, and to North Road. They were also used for recreation and, especially, for exercising dogs" (para.22, Footpath Inspector's decision letter).

101. The Footpath Inspector rejected Laings' objection to the Order in paragraph 39 of his decision letter:

> "Laings assert that there is informal use by the public of the fields, but no specific footpath routes. I accept from signs of use on the ground and from my observations of members of the public in the fields in the course of my site visits, that public use of the fields is not restricted to the footpaths claimed in the Order. Nevertheless, the routes of the claimed footpaths are discernible on the. ground, and there is unchallenged evidence of considerable weight that their routes have been in such use as to satisfy Section 31 of the 1980 Act. Use of other parts of the fields would not, in my view, affect the accrual of public rights over the claimed footpaths."

102. As noted above, the Footpath Order confirmed the existence of footpaths all around the perimeters of each of the three fields (the paths cut across the south western corners of Fields 1 and 3). For obvious reasons, the presence of footpaths or bridleways is often highly relevant in applications under section 22(1) of the Act: land is more likely to be used for recreational purposes by local inhabitants if there is easy access to it. But it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way - to walk, with or without dogs, around the perimeter of his fields - and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.

103. Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?

104. The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at p.358E of *Sunningwell*. I do not consider that the dog's wanderings or the owner's attempts

to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.

105. While the Inspector was not obliged to carry out a field-by-field analysis, he was obliged to grapple with the principal point made in the Claimant's analysis: that looking at the 20-year period, walking, including dog walking, was the principal activity, and that it was largely confined to the footpaths around the perimeter of the fields. If that use was discounted, the other activities over the remainder of the fields were not of such a character and frequency as to indicate an assertion of a right over the entirety of the 38 acres for 20 years, not least because the other paths (across the fields) only began to evolve after 1993 and so were not claimed as footpaths (10. 17). In paragraph 14.24 the Inspector appears to have accepted the Claimant's analysis, up to a point: noting that in addition to walking on the paths that developed around the .field boundaries, some of the other activities such as blackberrying would have taken place on or near the boundaries, rather than across the fields as a whole.

106. But when the Inspector concluded in paragraph 14.25 that there was abundant evidence of continuous use by local people of the whole surface of the fields he relied "in addition to the dog walking and playing with children" referred to in *Sunningwell*, also upon "general walking (i.e. without dogs)" as being among the many activities that took place on the fields.

107. Thus the Inspector considered whether the whole, and not merely the perimeter of the fields was being used, but he did not deal with the issue raised in the Claimant's analysis: how extensive was the use of the fields if the use of the footpaths around their boundaries for walking and dog walking (making allowance for the fact that dogs off the lead may stray, see 10.18) was discounted, such use being referable to the exercise of public rights of way, and not a right to indulge in informal recreation across the whole of the fields.

108. I accept that the two rights are not necessarily mutually exclusive. A right of way along a defined path around a field may be exercised in order to gain access to a suitable location for informal recreation within the field. But from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.

109. I do not suggest that it will be necessary in every case where a footpath crosses or skirts an application site under the Act to distinguish between the exercise of a right of way and the use of a site for informal recreation. The footpath may be lightly used as such and the evidence of non-footpath use may be substantial. But the present case is most unusual in that there were recently confirmed footpaths around the perimeters of all three Fields. These footpaths were not lightly used. The Footpath Inspector had concluded that there was "unchallenged evidence of considerable weight that their routes have been in such use as would satisfy section 31 of the [Highways Act] 1980". The Claimants drew the Inspector's attention to evidence from one of GAG's witnesses "that the majority of people in the fields stuck to the boundary footpaths" (10.16).

110. It is no accident that the Inspector's list of activities in paragraph 14.25 commenced with dog walking and general walking (i.e. without dogs). On any view of GAG's evidence set out by the Inspector in Chapter 7 of his Report these were the principal activities throughout the 20-year period. A number of the other activities were very occasional, such as kite flying, or of limited duration, e.g. use by the Cub Scouts appears to have ceased in 1987 (7.67). I do not underestimate the difficulties confronting the Inspector but he does appear to have relied upon the extensive use of the perimeter footpaths as such, for general and dog walking, in reaching his conclusion that there was abundant evidence of the use of the whole of the fields for lawful sports and pastimes for the 20-year period (14.25). To Laings, as a reasonably vigilant, and not an absentee, landowner those walkers would have appeared to be exercising public rights of way, not indulging in lawful sports and pastimes as of right. For these reasons the claim also succeeds on ground (1).

111. I have dealt with grounds (1) and (2) separately, but there is an overlap to this extent. Walkers, whether with or without dogs around the perimeter of the fields would have been less likely to have interfered with Mr Pennington's use of the fields for growing a hay crop. From the landowner's or agricultural tenant or licensee's point of view there would be less reason to resist walkers who kept to the perimeter of the fields. They would be safely out of the way even whilst machinery was being operated. It would not be reasonable to expect the landowner or tenant to realise that such persons were, in fact, asserting a right to walk all over the fields, through the grass whilst it was growing, or the hay whilst it was being cut, was drying and/or being baled.

**Ground 3: Residents' Representations**

112. A number of the local residents who gave evidence before the Inspector, including Mr Wainman who had made the application on behalf of GAG, knew that the fields were owned by Laings and were being held for future residential development (7.36, 7.58, 7.73 and 7.93).

113. Part 8 of the GAG's application for registration referred to a supporting document "The Case for Registration of Three Fields at Widmer Farm, Widmer End As Village Green", a paper compiled by members of GAG. Under the heading "Name of Claimed Land (Q5)", paragraph 4.1.4 of the paper says:

> "Figure 4.1.4 shows the variation in name given by the respondents. It shows that most respondents referred to the area simply as "The fields" - often with some locational prefix e.g. "The school fields". The term H7 refers to proposals in a draft Wycombe Local Plan in the 1960s where Grange Farm, Terriers Farm, Rockalls Farm together with these fields of Widmer Farm were proposed for housing development. These proposals were rejected and the term H7 long since removed from official documentation, but it lives on in the memories of the local population who strongly opposed the development proposals."

114. In 1988 Mr Hiscock, one of GAG's witnesses, had written a letter protesting about a planning application on the fields. His letter did not make any reference to the use of the fields for recreation (7.73). During consultations on the emerging Local Plan in 1997 the Hazlemere Residents' Association submitted a document opposing residential development, and arguing that Widiner Farm should "revert to full agricultural use" (7.93). Mr Wainman accepted responsibility for this document. A similar document was submitted by the Widiner End Residents' Association in 1999. It contended that the agricultural land in the area (including Widmer Farm) should continue to be used for agriculture, and not be "fossilised as a country park" (7.94). Both of these Associations were participating organisations in GAG (1.5).

115. Thus, those closely involved with GAG, including Mr Wainman, had known throughout the 20-year period that they had no rights over the fields. They knew that their use of the fields was precarious, and would be brought to an end by Laings as soon as it could obtain planning permission for residential development. It was not submitted on behalf of the Claimant that mere knowledge by the users of the fields that their recreational activities were not as of right would be sufficient to prevent the user being as of right:

> "... an inquiry into the subjective state of mind of the users of the [fields] would be contrary to the whole English theory of prescription, which ... depends upon evidence of acquiescence by the landowner..." (*Sunningwell*, p. 354G)

116. It was accepted that the Court is concerned with "outward appearance" to the landowner, and not with "the individual states of mind" of users, or with their "inward belief' (p.35613). *Steed's* case had been wrongly decided because the Court of Appeal had required applicants to "depose to their belief that the right to games and pastimes attached to them as inhabitants of the village" (p.356E). However, it was submitted that *Sunningwell* does not deal with the position where users publicly express their inward belief that their use is not by right. If a user claiming a prescriptive right has, during the 20-year period, conceded that he has no

entitlement to the claimed right, his use cannot be "as of right": see *Patel v. W.H. Smith* (Eziot) Lt [1987] 1 MR 853 in which a prescriptive right to park vehicles had been claimed.

117. In *Mills v. Silver* (1991) Ch 271, where there was a claim to a prescriptive right of way, Dillon L.J. said at p.28417:

> "There is then *W.H. Smith (Eziot) Ltd* [1987] 1 MR 853 where the defendants claimed a prescriptive right to park vehicles on the plaintiffs' property and the plaintiffs sought an interlocutory injunction. It appears from the judgment of Balcombe LJ, at p.861A-B, that the plaintiffs had been persistently asserting in correspondence that the defendants had no right to park cars there and the defendants had been in the correspondence in practice conceding that and negotiating for a licence to park. Therefore it was held that the user by parking could not have been user as of right. That seems to me, with all respect to be correct; it was difficult for the defendants to assert their user by parking had been as of right, when their solicitors had written in 1978, "Our clients appreciate that they do not have a right to park on the yard in question."

118. In the present case there was no such express concession to Laings by any of the participating organisations in GAG, but Laings argued that the representations made by Mr Hiscock and the two Residents' Associations in 1988, 1997 and 1999 (above) were nevertheless relevant because they were part of the picture, the "outward appearance", being presented to the landowner. Local inhabitants were using the fields, but at the same time they were making representations in public consultations opposing residential development, not on the basis that they were entitled to use the fields for lawful sports and pastimes, but on the basis that the fields should be more effectively used for agriculture. To set the representations in 1997 and 1999 in context it will be remembered that Mr Pennington _had ceased to take a hay crop from the fields in the early 1990s.

119. The Inspector recorded the Laings' submission in paragraph 10.32:

> "It was suggested that throughout the relevant period Laings knew that most of the users of the fields were aware of and opposed to its plans to develop the fields in a way wholly incompatible with the creation of a village green. Nothing in the *Sunningwell* decision suggests that such actual knowledge by the owner is irrelevant to the question of the objective appearance to the owner. That point simply was not argued in the *Sunningwell* case."

120. He responded to this submission in paragraph 14.22:

> "I am not persuaded that the fact that *some* local people were aware that from time to time Laings would put in planning applications, or local plan submissions, aimed at securing eventual residential development of the Widiner fields, should be taken as some kind of general notice from Laings to all the local inhabitants that they (Laings) did not intend to acquiesce in the establishment of village green rights. That seems to me to be at odds with the approach of the House of Lords in *Sunningwell*, and wrong in principle. I do not believe it is right that some sort of inquest has to be carried out as to whether local people would, if they had thought about it during the relevant period, have surmised that the landowner would or would not have viewed their activities with favour, because of his long-term ambitions for the land in question. What matters is what the local people actually did on the land, whether they did it openly, and sufficiently extensively, without breaking in, and so forth, not an analysis of their mental state, or that of those of them who happen to follow local planning debates. It also appears to be true, as the Applicants observed, that quite a lot of successful village green applications occur in circumstances where the landowner harbours or has revealed development ambitions for the land concerned."

121. I agree with the Inspector that it would be at odds with *Sunningwell* and wrong in principle to treat the fact that some of the users of the fields were aware of Laings' planning applications as some kind of general notice *from* Laings to the local inhabitants that Laings did not intend to acquiesce in the establishment of village green rights. I further agree that what matters is what local people actually did on the land and not an analysis of the mental state of those who happened to follow planning debates.

122. But this misses the point that was being made on behalf of Laings: what message was being conveyed to Laings as landowner by the words, as well as the deeds of the users of the fields? There was no express concession as in *Patel*. Unlike a private claim to a prescriptive right, where the Claimant may make such a concession, an application under section 22(1) is a claim that a public right exists and it is difficult to see who could make a concession which would effectively bind all the local inhabitants. However, in deciding whether a user has been indulging in lawful sports and pastimes on land "openly and in a manner that a person rightfully entitled would have used it" (*Sunningwell* p.353A), I see no reason why public statements made by that user as to the existence, or otherwise of the right should not be admissible for the purpose of deciding "how the matter would have appeared to the owner of the land".

123. Unlike inward beliefs, public statements may contribute, together with deeds, to the presentation of an "outward appearance".

124. Mr Morgan submitted that an objection to development proposals made under one statutory regime - Town and Country Planning - could not sensibly be regarded as a concession made in the context of another statutory regime - the Act - which operates independently of the planning regime. Opposition to planning applications has been the spur for a number of applications under the Act, including the application in *Sunningwell* (p.347B).

125. I accept that the context in which a public statement is made will be relevant. The existence or non-existence of a right may be irrelevant in a particular statutory context. If so, failure to mention the right will be of no significance. But it does not follow that a statement must be discounted merely because it was made in the context of a different statutory regime. If a statement is equivocal it will be disregarded for that reason. Mr Hiscock's letter falls into that category: the fact that he did not mention the use of the fields for recreation when objecting to a planning application in 1988 does not assist Laings: the failure might well have been due to an oversight on his part.

126. What of the Residents' Associations' responses to public consultation in 1997 and 1999? An objection to residential development is not inconsistent with an assertion of a right to use the fields for recreational purposes. But the representations went further: in addition to objecting to residential development, the Associations were contending that the fields should be more effectively used for agriculture. Viewed in isolation, this might not appear to be particularly significant, but the representations were capable of contributing to the overall picture that was being presented to Laings as landowners. The extent to which they did so would have been a matter for the Inspector to determine, had he approached the issue in this way.

127. Mr Pennington had taken an annual hay crop off the fields until the mid-1990s. The Associations' public response to the cessation of this agricultural use was not to argue that the fields were being used, and should be retained for recreational purposes, but that they should revert to "full agricultural use". Thus the representations were consistent with the apparent acceptance by the local inhabitants of Laings' right to use the fields for agricultural purposes.

128. The Inspector's failure to consider this aspect of Laings' case would not, on its own, have been a justification for allowing this application, but it does tend to reinforce Laings' ground (2) (above). Why should it have appeared to Laings that the users of the fields believed that they were exercising a public right if, following their non-interference with Mr Pennington's taking of a hay crop, they (or Associations representing

significant numbers of them) contended that agricultural use should be resumed following Mr Pennington's departure?

**Ground (4): Locality**

129. I can deal with this ground quite shortly because I am in complete agreement with the Inspector's conclusions on this issue.

130. The entries in part 3 of GAG's application on Form 30 were as follows:

> "Name by which [the claimed village green is] usually known: The Fields of Widmer Farm
>
> Locality: Widmer End, Buckinghamshire
>
> Colour on plan herewith: Green."

131. Paragraph 4.1.3 of the Case for Registration listed as a supporting document in Part 8 of Form 30 provided more details of "Locality":

> "There are some minor differences of opinion as to what constitutes the locality but most agree it includes the Widmer End ward of Hughendon Parish and the Park and Brackley ward of Hazlemere Parish. It should be noted that the fields are bounded on two sides by the dwellings of those wards of the Parish Councils areas and on the other two sides by agricultural land. They are thus not generally visible to casual passers by using roads in the area. Village Green designation is claimed on the evidence therefore of the residents of the two Parish wards noted above and not by the general public."

132. Before the Inspector, Laings argued that since a village green can be registered only if there has been 20 years use for lawful sports and pastimes by the inhabitants of a qualifying locality, identification of the locality was a pre-requisite to registration.

133. There is no dispute that the locality for the' purposes of section 22(1) has to be an area recognised by the law:

> "Such units have in the past been occasionally boroughs, frequently parishes, both ecclesiastical and civil, and occasionally manors, all of which are-entities known to the law, -and where there is a defined body of persons capable of exercising the rights or granting the rights" Per Harman J. at p.937 of the *Ministry of Defence* case.

134. In *Steed*, Carnwath J. said that "locality" in section 22(l):

> "should connote something more than a place or geographical area - rather a distinct and identifiable community such as might reasonably lay claim to a town or village green as of right." (p.501)

135. Laings argued that against this background the reference to "Locality" in Part 3 of Form 30 required an applicant to identify the locality whence the inhabitants claiming to have indulged in lawful sports and pastimes on the application land came.

136. The Inspector described this argument as:

"wholly without merit and wrong. It is obvious that the particulars sought in Part 3 are only in relation to identifying the correct location and extent of the claimed land and have nothing to do with the section 22 issue at all"(3.8).

137. I agree, Part 3 is headed "Particulars of the land to be registered, i.e. the land claimed to have become a town or village green." Given the importance of the locality in the statutory scheme it might have been desirable to require an applicant to provide information about the locality served by the village green in the prescribed form, but Form 30 does not require the provision of such information.

138. The Case For Registration explained that village green designation was being claimed by the residents of Widmer End Ward of Hughenden Parish and the Park and Brackley Ward of Hazlemere Parish. Had that remained the position, Laings would have had a good prospect of persuading the Inspector that there was no qualifying locality; either because electoral wards are not localities, or if they are, because the wards constituted two localities, and the inhabitants of one would not be inhabitants of the other. These arguments were advanced in Laings' written objection to the application.

139. In response to these arguments GAG's opening statement on the first day of the Inquiry contended that the Wards of Widiner End in Hughenden and Park and Brackley were certain:

"So too is the Ecclesiastical Parish of Hazlemere. Similarly the Civil Parishes of Hughendon are certain."

140. It was further submitted that the users lived in the houses which were in "a tightly connected group around the village green". Four possible descriptions of the locality were set out. They included:

"That the users are in the locality of the Ecclesiastical Parish of Hazlemere..."

141. A plan showing the boundary of the ecclesiastical parish was difficult to obtain, and one was not produced until the final day of the Inquiry, shortly before closing submissions. Despite the belated arrival of the plan Laings was able to respond in. its final submission:

"10.78 The Applicants at the Inquiry had made reference for the first time to the Ecclesiastic Parish of Hazlemere as being a possible locality. While Laings accept than an Eccelsiastical Parish could be a locality in former times, there is no basis in modem secular times for regarding a religious division as a locality for the purpose of village green rights. Harman J. in *MOD v Wiltshire* does not purport to say that there can now be prescription in favour of an Ecclesiastical Parish; all he was doing was stating that in the past it could be in favour of an Ecclesiastical Parish.

10.79 It should be regarded as very curious that priority should now be put on the Ecclesiastical Parish when it was not even mentioned in the application or supporting material; only in the Applicants' closing submissions had the Ecclesiastical Parish been put as a priority.

10.80 In any event it was suggested that on the evidence there was a minimal relationship between use of the application site and the Hazlemere Ecclesiastical Parish, whose boundary extends way beyond the principal user of the application site. None of the Applicants' witnesses had actually suggested that all of the inhabitants of the Ecclesiastical Parish are now entitled to rights over the new village green. Such a claim would be not only contrary to the Applicants' original application form and the way their case was first presented; it would also be considerably more burdensome to Laings than the present usage or that of a smaller locality."

142. Mr George submitted to me, as he had submitted to the Inspector, that it was not permissible for GAG to amend the description of the qualifying locality -from that contained in paragraph 4.1.3 of the case for Registration. The Inspector rejected that submission saying:

> "3.9 It is clear from the scheme of the Act and the Regulations that the question of what is the relevant 'locality' (or if appropriate "neighbourhood within a locality") in the Section 22 sense is a matter of *fact* for the Registration Authority to determine (albeit in accord with correct legal principles) in the light of all the evidence, which may indeed contain a number of conflicting views on the topic. There is no requirement in the Form or Regulations for an applicant to commit himself to a legally correct (or any) definition of the "Section 22 locality" (or 'neighbourhood')."

143. He reiterated this conclusion in paragraph 13.1 of the Report when dealing with "Locality". I agree with the Inspector. The purpose of giving notification of an application to the owner and occupier and to the public (see Regulation 5 of the Regulations, above) is to elicit further evidence and information, in addition to that contained in the application. Form 30 is not to be treated as though it is a pleading in private litigation. A right under section 22(1) is being claimed on behalf of a section of the public. The Registration Authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence.

144. Mr George submitted that Laings were prejudiced by the late identification of the Ecclesiastical Parish as the qualifying locality because it was not possible to prepare to meet GAG's case on locality on the basis on which it was ultimately decided by the Inspector. He accepted that Laings did not ask the Inspector for an adjournment. Laings did complain about the late introduction of Hazlemere Ecclesiastical Parish as a possible qualifying locality, because the Inspector reported in paragraph 3.10:

> "Laings have not been in the slightest degree prejudiced or misled. They knew from the outset what the applicants' position was, and indeed fully took up the opportunity presented by the Inquiry to address the question of what the relevant locality might or might not be for the purposes of Section 22 of the 1965, a matter which I consider later in this report."

145. I agree that there was no prejudice. Laings were represented at the Inquiry by leading and junior counsel. The Inquiry commenced on 5th November and did not conclude until 13th November. There was ample time for Laings to decide how it wished to respond to GAG's case in relation to the Hazlemere Eccelesiastical Parish. Laings did respond in some detail: see paragraphs 10.78-10.80 of the report (above). If it had been felt that there was inadequate time to make a proper response, then an adjournment could have been sought.

146. The Inspector considered:

> "whether any apparent "locality" which emerges from the evidence is legally capable of amounting to a section 22 locality"(1 3.2)

with great care and in considerable detail in paragraphs 13.3-13.25 of his report.

147. GAG had submitted that:

> "the safest way of interpreting the correct locality in this case is the Ecclesiastical Parish of Hazlemere. It is clear that the predominant amount of users come from that area."(9.25)

148. In paragraph 13.21 the Inspector accepted that point:

> "I accept the point made by GAG that it is obvious whether one takes as the putative "locality" the combined *civil* wards of Park and Brackley (Hazlemere) and Widmer End (Hughenden), or the ecclesiastical parish of Hazlemere, in either case the evidence shows that the overwhelmingly predominant element of village green types use of the fields has been by inhabitants of the area concerned."

149. Those conclusions are challenged by Laings on two grounds. First, it is submitted that in the secular world of the late twentieth century Parliament in 1965 could not have envisaged that an ecclesiastical parish would constitute a qualifying locality for the purposes of registering a new class [c] village green. Harman L's reference to ecclesiastical parishes in the *Ministry of Defence* case (above) as having "in the past" supported a class [b] village green is not an authority for the proposition that an ecclesiastical parish is capable of being a qualifying locality for a new class [c] green.

150. The Inspector rejected that argument, saying in paragraphs 13.23 and 13.24:

> "... in my judgment "locality" as long as it is certain enough is not something which must be regarded in modern times as a concept restricted to current local government boundaries (which is rather what Laings' were suggesting in argument). Such a view is not consistent with quite modern authority in the shape of *MOD v Wilts* case (whatever may be status of that decision more generally after *Sunningwell*). It seems to me, as a matter of judgment, that in many rural and semi-rural/edge of urban areas of the ecclesiastical parish continues to be of just as much significance to the lives of its inhabitants as the civil parish and the doings of civil parish councils. I agree with GAG that this is not just a matter which affects active regular churchgoers, but is potentially relevant to such matters as qualification for church schools, or to get married, or christened, etc., in the Parish Church.
>
> The ecclesiastical parish in this case clearly is quite a coherent area, and is precisely the area from the built up core of which the "users" of the fields do predominantly come. The ecclesiastical parish is clearly certain. In my judgment, as a matter of fact, the Ecclesiastical Parish of Hazlemere is the best and most appropriate way of identifying the relevant "locality" here in the sense meant by Section 22 of the 1965 Act; I attach to the back of this report a map showing the information I was given as to the boundaries of that ecclesiastical parish."

151. Again, I agree. In 1965 Parliament was trying to make it less, not more difficult to establish the existence of village green rights. Ecclesiastical parishes are entities known to the law, they have defined boundaries, and since they have frequently been used in the past as qualifying localities for customary village greens it is difficult to see on what basis Parliament could have intended that they should not be so used for the purpose of establishing the existence of new class [c] village greens.

152. Second, it is submitted that even if the Inspector was entitled to conclude that an ecclesiastical parish could be a qualifying locality, there was no nexus between the Hazlemere Ecclesiastical Parish and the claimed rights, save for residence within the parish. There was no evidence that any of the users, if challenged, would have attributed their recreational use of the fields to residence within the ecclesiastical parish.

153. In my view this is a thinly veiled attempt to revive the argument that was rejected by the House of Lords in *Sunningwell*. In effect, the Claimant is complaining that "the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of [the Ecclesiastical Parish of Hazlemere]".

154. Since the Inspector was not concerned with the individual states of mind of the users, he did not have to consider whether they would have attributed their recreational use of the fields to residence within any particular area. It was sufficient for the purposes of section 22 that, as the Inspector concluded, the "over-

whelmingly predominant element of village green types of use of the fields has been by inhabitants of the area concerned".

155. Accordingly, I would reject ground (4) of the challenge to the Council's decision, but allow the application on grounds (1), (2) and (3), for the reasons set out above.

**The Human Rights Challenge**

156. Before the Inspector Laings argued that registration of the fields as a village green would amount to a de facto deprivation of property without compensation, contrary to Article 1 of Protocol 1 to the Convention ("Article V"). Laings' submissions under the Human Rights Act 1998 ("the 1998 Act") are set out in paragraphs 10.86-10.92 of the Report. In paragraph 11. 1 the Inspector said that he was:

> "not persuaded that there is any force in Laings' argument that there is any inherent or fundamental conflict between the village green registration provisions of the *Commons Registration Act 1965* and the *Human Rights Act 1998*, including the "convention rights" which the latter brought directly into English law for the first time. I agree with the Applicants that even if it can be said that registration of land as a village green potentially interferes with the peaceful enjoyment by a landowner of his possessions, i.e. the land concerned, and so raises the issue of *Article 1 of the First Protocol of the Human Rights Convention* (included in *Part II of Schedule 1* to the *1998 Act*) the proviso set out within that Article is obviously applicable to a case like this.

157. He amplified his reasoning in paragraphs 11.2-11.5 of the Report. Before me Mr George submitted that section 22(1) of the Act was incompatible with Article 1:

> (a) Registration interfered with Laings' peaceful enjoyment of its possessions.
>
> (b) The degree of interference was such as to amount to a de facto deprivation of possessions without compensation: Laings was effectively deprived of all meaningful use of its land.
>
> (c) Alternatively, registration was a most severe interference with property rights going well beyond a mere "control of use".
>
> (d) While the deprivation/interference/control was authorised under domestic law by the Act, it was not lawful for the purposes of Article 1 because "the quality of the law", as contained in the Act, was not "compatible with the rule of law", in that the Act did not provide "protection in the form of procedural safeguards from arbitrariness".
>
> (e) Since the aim of the registration procedure in the Act was not clear, it could not be said that the interference was in pursuit of a legitimate aim, or what public, as opposed to local, interest was being served by the interference.
>
> (f) In view of the absence of compensation, and the draconian effects of registration, effectively sterilising Laings' land bank for all time, the Act did not strike a fair balance between the general interest and the protection of Laings' rights as landowner, and imposed an "excessive burden" upon Laings.

158. The Secretary of State for the Environment, Food and Rural Affairs was joined as an Interested Party in relation to the claim for a declaration of incompatibility. On behalf of the Secretary of State, Mr Maurici submitted that:

> (a) The village green registration procedures in the Act did not engage Article 1 at all, being closely analogous to the acquisition of rights by prescription or adverse possession.

(b) If Article 1 was engaged, registration did not amount to a deprivation of property, but to a control of use, albeit "a very strong control".

(c) The Act was not incompatible with the rule of law. It was legitimate for States to frame legal rules to promote legal certainty, the law relating to prescription (and, by analogy, registration) promoted that end. There were ample procedural safeguards: an informal inquiry coupled with the availability of judicial review.

(d) Registration pursued a legitimate aim in the public interest: to resolve uncertainties as to the existence of rights over land which has been used for recreation purposes for many years, and to secure the use of such land for recreation and exercise by persons living in the locality. A measure may be in the public interest even though it benefits only a section of the public.

(e) The Act struck a fair balance between the interests of the landowner and the general interest. Compensation was not essential where there was merely a control of use or other form of interference falling short of deprivation.

However draconian, the effects of registration were less serious than the consequences of a successful claim of adverse possession.

159. On behalf of the Council, Mr Morgan adopted Mr Maurici's submissions.

160. These wide ranging submissions fortified by the citation of numerous authorities, took up much of the five-day hearing between 25th March and 2nd April. At the conclusion of the hearing the parties asked for judgment to be deferred pending the decision of the House of Lords in *Wilson v. First County Trust* (No.2) 2001 3 W.L.R. 42 (CA). I agreed, since at that time it was hoped that their Lordships' decision would be available by the end of May. When it became clear that this would not be the position, the parties agreed that I should proceed to give judgment. Since I have concluded that the domestic law challenge succeeds there will be no interference with Laings' peaceful enjoyment of its possessions, and it is unnecessary to resolve the issues relating to Article 1. Having expended so much time and energy on their submissions under the human rights challenge, the parties understandably expressed a wish during the hearing that I should resolve those issues whatever might be my conclusions under the domestic law challenge.

161. The arguments relating to Article 1 were very wide ranging and raised important issues of principle. I realise that the parties will be disappointed, but I do not consider that it would be appropriate for me, at first instance, to seek to resolve the many disputed issues relating to Article I on a purely hypothetical basis. Success for the Claimant on certain of its criticisms of the Inspector's Report under the domestic law challenge - for example, failure to distinguish between the use of footpaths as such and the use of the fields for lawful sports and pastimes - might have left open the substantive issues under Article 1, since the defect under domestic law could have been remedied by remitting the matter for rehearing by the same, or another Inspector. But Laings' success on ground (2) is fatal to the case for registration as a village green. It would not be right to exercise the discretionary jurisdiction conferred by section 4(2) of the 1998 Act in circumstances where there has been, and can be, no breach of the Claimant's rights under the Convention.

162. Setting aside all the other issues of principle (above), the answer to the question whether a particular interference with property rights places a disproportionate burden upon a landowner will be largely, if not wholly, fact-dependant. Preventing a landowner who has been using his land for agricultural purposes for all or part of the last 20 years from continuing to use it for such purposes, is one thing; preventing a landowner who has made no effective use of his land for the last 20 years from recommencing any use, save for rough grazing, is another.

**Conclusion**

163. For these reasons I decline to make a declaration under the 1998 Act. The issues in the human rights challenge do not arise, because the claim succeeds, and the Regulatory Committee's resolution dated the C April 2002 must be quashed, on grounds (1), (2) and (3) of the domestic law challenge.

# R (on the application of Lewis) v Redcar and Cleveland Borough Council and another

[2010] UKSC 11

**SUPREME COURT**

**LORD HOPE DP, LORD RODGER, LORD WALKER, LORD BROWN AND LORD KERR SCJJ**

**18–20 JANUARY, 3 MARCH 2010**

*Commons – Registration – Town or village green – User as of right – Application made by local inhabitants to register part of land used as golf course as town green – Local inhabitants claiming user 'as of right' to land – Inspector recommending rejection of application on grounds that use by local inhabitants not 'as of right' and 'deferring' to use by golf club – Local authority accepting inspector's recommendation – Whether local inhabitants' use of land 'as of right' – Commons Act 2006, s 15(4).*

L and other local residents applied for registration of an area of open land owned by the local authority as a town or village green under s 15(4)[a] of the Commons Act 2006 on the basis that 'a significant number of 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'. The area of land in issue (the disputed land) at the relevant time included part of a golf course. The remainder included areas of rough ground which had been used by local residents for informal recreation such as dog walking and children's play. The inspector appointed by the registration authority found that the relationship between the golfers and the local recreational users was generally cordial and that the reason why the golfers and local residents got on so well was because the local people 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 inadvertantly impede play, a shout of "fore" would be enough to clear the course. I find that recreational use of [the disputed land] by local people overwhelmingly deferred to golfing use'. The inspector concluded that the recreational user of the disputed land was not 'as of right' because it deferred to extensive use of the land by the golf club. He recommended that the application for registration be dismissed. The authority accepted his advice and rejected the application. L applied for judicial review. The judge dismissed the application on the basis that the local residents' deference to the golfers had prevented their user being 'as of right'. The Court of Appeal dismissed L's appeal and he appealed to the Supreme Court.

**Held** – It was well established that user 'as of right' was sufficiently described by the tripartite test nec vi, nec clam, nec precario (not by force, nor stealth, nor the licence of the owner) and that the question was how the matter would have appeared to the owner of the land. In the instant case it was difficult to

* Section 15, so far as material, is set out at [1], below



see 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 deference—toward members of the golf club who were out playing golf. Although the residents had acted towards the golfers with courtesy and common sense the fact remained that they had been regularly, in large numbers, crossing the fairways as well as walking on the rough. A reasonably alert owner could not have failed to recognise that that user was the assertion of a right and would mature into an established right unless the owner took action to stop it. Accordingly, the inspector had misdirected himself as to the significance of perfectly natural behaviour by the local residents. The appeal would therefore be allowed (see [36], [38], [49], [66], [67], [71], [75]–[79], [84], [85], [87], [93]–[97], [106]–[109], [115], [116], below).

*R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 applied.

Decision of the Court of Appeal [2009] 4 All ER 1232 reversed.

**Notes**

For registration under the Commons Act 2006, see 12 *Halsbury's Laws* (5th edn) (2009) paras 521–588.

For the Commons Act 2006, s 15, see 7(2) *Halsbury's Statutes* (4th edn) (2008 reissue) 212.

**Cases referred to in judgments**

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

*Bright v Walker* (1834) 1 Cr M & R 211, 149 ER 1057, [1824–34] All ER Rep 762.

*Costagliola v English* (1969) 210 EG 1425.

*Cumbernauld and Kilsyth DC v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44, HL; *affg* 1992 SC 357, Ct of Sess.

*Dalton v Henry Angus & Co, Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740, [1881–85] All ER Rep 1, HL.

*Eaton v Swansea Waterworks Co* (1851) 17 QB 267, 117 ER 1282.

*Fitch v Fitch* (1797) 2 Esp 543, 170 ER 449.

*Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, HL.

*Henderson v Volk* (1982) 35 OR (2d) 379, Ont CA.

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

*Humphreys v Rochdale Metropolitan BC* (18 June 2004, unreported).

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

*Mercer v Woodgate* (1869) LR 5 QB 26.

*Mills v Colchester Corp* (1867) LR 2 CP 476.

*New Windsor Corp v Mellor* [1975] 3 All ER 44, [1975] Ch 380, [1975] 3 WLR 25, CA.

*Oxfordshire CC v Oxford City Council* [2006] UKHL 25, [2006] 4 All ER 817, [2006] 2 AC 674, [2006] 2 WLR 1235; *rvsg in part* [2005] EWCA Civ 175, [2005] 3 All ER 961, [2006] Ch 43, [2005] 3 WLR 1043; *rvsg* [2004] EWHC 12 (Ch), [2004] 1 EGLR 105, [2004] Ch 253, [2004] 2 WLR 1291.

*Pye (J A) (Oxford) Ltd v UK* (2005) 19 BHRC 705, ECt HR.

*R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335, [1999] 3 WLR 160, HL.

*R v Suffolk CC, ex p Steed* [1997] 1 EGLR 131, CA; *affg* [1995] 2 EGLR 233.

*R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 All ER 160, [2004] 1 AC 889, [2003] 3 WLR 1306.

*R (on the application of Godmanchester Town Council) v Secretary of State for*



*Environment, Food and Rural Affairs, R (on the application of Drain) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, [2007] 4 All ER 273, [2008] 1 AC 221, [2007] 3 WLR 85.

*R (on the application of Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 1578 (Admin), [2003] 3 EGLR 70.

*Rhins District Committee of Wigtownshire CC v Cuninghame* 1917 2 SLT 169, Ct of Sess.

*Sturges v Bridgman* (1879) 11 Ch D 852, CA.

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

**Cases referred to in list of authorities**

*A-G v Horner* (1885) 11 App Cas 66, HL.

*Arnold v Blaker* (1871) LR 6 QB 433, Ex Ch.

*Betterment Properties (Weymouth) Ltd v Dorset CC* [2007] EWHC 365 (Ch), [2007] 2 All ER 1000; *affd* [2008] EWCA Civ 22, [2008] 3 All ER 736, [2009] 1 WLR 334.

*De la Warr (Earl) v Miles* (1881) 17 Ch D 535, [1881–5] All ER Rep 252, CA.

*Dowty Boulton Paul Ltd v Wolverhampton Corp (No 2)* [1973] 2 All ER 491, [1976] Ch 13, [1973] 2 WLR 618, CA.

*Field Common Ltd v Elmbridge BC* [2005] EWHC 2933 (Ch).

*Flynn v Harte* [1913] 2 IR 322, Ir KBD.

*Jones v Bates* [1938] 2 All ER 237, CA.

*Keefe v Amor* [1964] 2 All ER 517, [1965] 1 QB 334, [1964] 3 WLR 183, CA.

*Marquis of Bute v M'Kirdy & M'Millan Ltd* 1937 SLT 241, Ct of Sess.

*Miller v Emcer Products Ltd* [1956] 1 All ER 237, [1956] Ch 304, [1956] 2 WLR 267, CA.

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

*Save Britain's Heritage v Secretary of State for the Environment* [1991] 2 All ER 10, [1991] 1 WLR 153, HL.

*Simplex GE (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, CA.

*Simpson v A-G* [1904] AC 476, HL.

*South Bucks DC v Porter* [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953.

*Thomas v British Railways Board* [1976] 3 All ER 15, [1976] QB 912, [1976] 2 WLR 761, CA.

*Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945, [2009] 1 WLR 776.

**Appeal**

Kevin Paul Lewis appealed with permission of the Supreme Court given on 7 December 2009 from the decision of the Court of Appeal (Laws, Rix and Dyson LJJ) on 15 January 2009 ([2009] EWCA Civ 3, [2009] 4 All ER 1232) dismissing his appeal from the decision of Sullivan J on 18 July 2008 ([2008] EWHC 1813 (Admin), [2008] All ER (D) 264 (Jul)) refusing his application for judicial review of the decision of the General Purposes and Village Greens Committee of Redcar and Cleveland Borough Council to reject the application to register part of the land in Redcar known as Coatham Common as a town or village green under the Commons Act 2006. The respondent borough council was the registration authority and the freehold owner of the relevant land. Persimmon Homes (Teeside) Ltd appeared as an interested party. The facts are set out in the judgment of Lord Walker.

*[2010] 2 All ER 613 at 616*

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

*George Laurence QC* and *Rodney Stewart Smith* (instructed by *Rachel Dooris*, Middlesbrough) for the respondent.

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

*Judgment was reserved.*

**3 March 2010. The following judgments were delivered.**

**LORD WALKER SCJ.**

**[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, 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 s 15(4). It was suggested in argument that (because of the 'deeming' provision in sub-s (7)) it was also, or alternatively, made under sub-s (2). In any case it was a valid application, and neither sub-s (5) nor sub-s (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 s 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 2006 Act.

**[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 2006 Act) as to town and village greens: *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335 (*Ex p Sunningwell*), *R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 All ER 160, [2004] 1 AC 889 (*Beresford*'s case) and *Oxfordshire CC v Oxford City Council* [2006] UKHL 25, [2006] 4 All ER 817, [2006] 2 AC 674 (the *Oxfordshire* case). 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 2006 Act (which is still not fully in force) makes important changes in the law, but does not directly affect the issue of deference.

**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 s 15 of the 2006 Act. 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 clubhouse and a leisure centre (the clubhouse 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 eighteenth holes, and a small practice area.

**[6]** The inspector's report dated 14 March 2006 described the boundaries in more detail and contained (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 s 15 of the 2006 Act 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 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 the *Oxfordshire* case (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] EWCA Civ 3, [2009] 4 All ER 1232, [2009] 1 WLR 1461), but they are of such central importance that they need to be set out again. Paragraph 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 eighteenth 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]** Paragraph 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]** Paragraphs 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:

> '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]** Paragraph 221 (in the part of the report applying the law to the facts as found) referred to the decisions of Sullivan J in *R (on the application of Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 1578 (Admin), [2003] 3 EGLR 70 and Judge Howarth in *Humphreys v Rochdale Metropolitan BC* (18 June 2004, unreported):

> 'Leaving aside the public footpath, I consider that the reasoning in [the *Laing Homes* case] and [*Humphreys*' case] 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 [s 12 of the Inclosure Act 1857] and [s 29 of the Commons Act 1876] 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 (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 (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.'

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], [2008] All ER (D) 264 (Jul) 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 s 15 of the 2006 Act.

**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 8 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 the *Laing Homes* case [2003] 3 EGLR 70, and on Lord Hoffmann's opinion in the *Oxfordshire* case [2006] 4 All ER 817 at [57]. He granted leave to appeal, commenting, 'deference is judge-made law, judge-made by me'.

**[16]** The Court of Appeal (Laws, Rix and Dyson LJJ) unanimously dismissed the appeal in reserved judgments handed down on 15 January 2009: [2009] 4 All ER 1232. 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 (s 12 of the Inclosure Act 1857 and s 29 of the Commons Act 1876) which had formed part of the grounds of decision in the *Laing Homes* case, 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 makes it sufficient to plead enjoyment 'as of right' (while s 2 refers to a way 'actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years'). Section 31 of the Highways Act 1980 refers to use of a way being 'actually enjoyed by the public as of right and without interruption for the full period of 20 years'. Section 22(1A) of the 1965 Act, as substituted by the 2000 Act, refers simply to inhabitants indulging in lawful sports and pastimes 'as of right' for at least 20 years.

**[18]** Both *Ex p Sunningwell* [1999] 3 All ER 385, [2000] 1 AC 335 and *Beresford*'s case [2004] 1 All ER 160, [2004] 1 AC 889 were concerned with the meaning of 'as of right' in the 1965 Act. In *Ex p Sunningwell* Lord Hoffmann discussed the rather unprincipled development of the English law of prescription. He explained ([1999] 3 All ER 385 at 391, [2000] 1 AC 335 at 350–351) that by the middle of the nineteenth 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 Corp* (1867) LR 2 CP 476 at 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 (on the application of Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs, R (on the application of Drain) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, [2007] 4 All ER 273, [2008] 1 AC 221).

**[19]** In *Ex p Sunningwell* 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 CC, ex p Steed* [1997] 1 EGLR 131 was overruled. That was the context in which Lord Hoffmann stated in a passage ([1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 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 at 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* (1834)



> 1 Cr M & R 211 at 219, 149 ER 1057 at 1060], "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 Henry Angus & Co, Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740 at 773, [1881–85] All ER Rep 1 at 30, from acquiescence.'

**[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 238 and 239 per Lord Davey and Lord Lindley respectively. Other citations are collected in *Gale on Easements* (18th edn, 2008) p 242 (paras 4–80, 4–81). The proposition was described as 'clear law' by Lord Bingham of Cornhill in *Beresford*'s case [2004] 1 All ER 160 at [3]. The opinion of Lord Rodger of Earlsferry (at [55]) is to the same effect. So is that of Lord Scott of Foscote (at [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 the *Laing Homes* case [2003] 3 EGLR 70, 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 *Ex p Sunningwell* quoted in [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 JG Riddall 'Miss Tomkins and the Law of Village Greens' [2009] 73 Conv 326). I propose to look next at the *Laing Homes* case itself, and then to consider how far the respondents can claim much more long-established roots for the doctrine of deference which the *Laing Homes* case articulates.

**[22]** The *Laing Homes* case 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 chal-

lenged 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 (at [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 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 [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 Laing that those using the fields believed that they were exercising a public right that it would have been reasonable to expect Laing 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 [56] and [57], and by the judge himself at [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 fertilised, and again for a few days during hay-making. But there are only the most passing references by the judge (at [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 [88]–[111]. The judge commented (at [111]) 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 [103]–[110]).

**[26]** There are some dicta about the *Laing Homes* case in Lord Hoffmann's opinion in the *Oxfordshire* case [2006] 4 All ER 817. Lord Rodger and I expressed general agreement with Lord Hoffmann, but did not comment on this point. Lord Hoffmann observed (at [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 having been inconsistent with use for sports and pastimes for the purposes of s 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] 4 All ER 1232 at [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, 170 ER 449 is venerable authority for that. That is not to say that the *Laing Homes* case 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*, 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 ((1797) 2 Esp 543 at 544–545, 170 ER 449 at 449–450) is a forthright declaration of the need for co-existence 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 *Ex p Sunningwell* [1999] 3 All ER 385 at 391, [2000] 1 AC 335 at 350–351, quoted at [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.

**[31]** The first of the old authorities relied on by Mr Laurence was *Bright v Walker* (1834) 1 Cr M & R 211 at 219, 149 ER 1057 at 1060, 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 (at 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 s 2 of the 1832 Act satisfied.

**[34]** In *Bridle v Ruby* [1988] 3 All ER 64, [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 ([1988] 3 All ER 64 at 70, [1989] QB 169 at 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, 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 *Ex p Sunningwell* [1999] 3 All ER 385, [2000] 1 AC 335 (see [18] and [19], above).

**[35]** The last authority calling for mention on this point is *Cumbernauld and Kilsyth DC v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 (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 366):

> '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 pub-

lic 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 1992 SC 357 at 359–361). 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 a general public use of a town centre pedestrian thoroughfare' (at 363). The House of Lords upheld this decision. It is worth noting that Lord Jauncey of Tullichettle stated (1993 SC (HL) 44 at 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 *Ex p Sunningwell* [1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 352–353, 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 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 at 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 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 the *Oxfordshire* case [2006] 4 All ER 817. 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 at [2004] EWHC 12 (Ch), [2004] 1 EGLR 105, [2004] Ch 253). In the House of Lords both Lord Scott and Baroness Hale of Richmond regarded some of the questions raised as unnecessary, academic and inappropriate (see [91]–[103] and [131]–[137] per Lord Scott and Baroness Hale respectively). 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:

> '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.' (See [45].)

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

**[44]** Lord Hoffmann noted (at [46]) that registration is conclusive evidence of the matters registered, but '[i]n 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 2006 Act 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 ss 2(2) and 3(4). But s 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 Pt 2 of the 2006 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 the *Oxfordshire* case [2006] 4 All ER 817 at [48], that although the 1965 Act 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:

> '[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 s 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 1965 Act provides for the registration of
>
> *[2010] 2 All ER 613 at 629*
>
> 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 s 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 *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 396–397, [2000] 1 AC 335 at 357).
>
> [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 dealt with the Victorian statutes as I have already mentioned (see [54]–[57]).

**[46]** Lord Scott (thinking it right to express a limited view on this issue) disagreed (at [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 the *Oxfordshire* case, I find that I agree with almost all that Lord Hoffmann said in the paragraphs that I have quoted. He had already, in *Ex p Sunningwell* [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 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 sort of informal recreation which may be the main function of a village green'. The only point on which I differ from Lord Hoffmann is the point which Lord Scott picked up (at [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 co-exist 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 guerrilla warfare against development of open land. The House of Lords has (both in *Beresford*'s case and the *Oxfordshire* case) 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 2006 Act Parliament has made it easier, rather than more difficult, to register a green. There is also the prospect (as Lord Hope mentions at [56], below) of further legislation, which might possibly make provision for the management of greens on lines comparable to those proposed for commons in Pt 2 of the 2006 Act. As it is, district councils have power under s 1 of the Commons Act 1899 to make by-laws for the preservation of order on commons, which are defined (in s 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" ' (see Gray and Gray *Elements of Land Law* (5th edn, 2009) p 674 (para 5.2.72), citing Megarry J in *Costagliola v English* (1969) 210 EG 1425 at 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 s 1 of the 2006 Act (if then in force in Redcar and Cleveland) or under the applicable transitional provisions.

**LORD HOPE DP.**

**[50]** This appeal relates to an application 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 dismissed the application but granted permission to appeal: [2008] EWHC 1813 (Admin), [2008] All ER (D) 264 (Jul). On 15 January 2009 the Court of Appeal (Laws, Rix and Dyson LJJ) dismissed the appeal: [2009] EWCA Civ 3, [2009] 4 All ER 1232, [2009] 1 WLR 1461. The applicant now appeals to this court. The interested party, 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 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 co-existed 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 clubhouse 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: see [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: see [2008] All ER (D) 264 (Jul) at [41]. The Court of Appeal agreed with that approach: see [2009] 4 All ER 1232 at [54] and [64]–[65] per Dyson and Rix LJJ respectively. 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 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 s 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were 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 s 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 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 (on the application of Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 1578 (Admin) at [27]–[29], [2003] 3 EGLR 70 at [27]–[29], referring to what Carnwath J said in *R v Suffolk CC, ex p Steed* [1995] 2 EGLR 233, 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 Corp v Mellor* [1975] 3 All ER 44 at 51, [1975] Ch 380 at 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 CC v Oxford City Council* [2006] UKHL 25 at [48], [2006] 4 All ER 817 at [48], [2006] 2 AC 674 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 it (at [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 Environment, Food and Rural Affairs (DEFRA), 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: see 716 HL Official Report (5th series) written answers cols *197, 198*. 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.

**Previous authority**

**[57]** I agree with Lord Walker that in none of the three decisions of the House of Lords to which he refers (see [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 CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [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 (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 All ER 160, [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 the *Oxfordshire* case [2006] 4 All ER 817



at [125] the land was described by Lord Walker as an overgrown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in north-west 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. He said of the effect of registration (at [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.' In para [59], where he distinguished the *Oxfordshire* case from the decision of the European Court of Human Rights in *J A Pye (Oxford) Ltd v UK* (2005) 19 BHRC 705, 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 in 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: see [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: see [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 (at [51]) to a ruling on the point which, on the facts of that case, did not arise.

**[60]** The only case which directly addresses the question of deference is the *Laing Homes* case [2003] 3 EGLR 70, in which Sullivan J quashed the resolution that the land should be registered. As Dyson LJ observed in the Court of Appeal ([2009] 4 All ER 1232 at [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.

*[2010] 2 All ER 613 at 634*

**[61]** After referring to passages in Lord Hoffmann's speech in *Ex p Sunningwell* 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 (at [82]):

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

He said (at [84]) 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. He said (at [85]):

> '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]** He added these words (at [86]):

> '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 half the 20-year period should have suggested to Laing that those using the fields believed that they were exercising a public right that it would have been reasonable to expect Laing 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.

*[2010] 2 All ER 613 at 635*

**The section 15 questions**

**[64]** The application in this case was made under s 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 sub-ss (2), (3) and (4) of s 15. The definition of the phrase 'town or village green' in s 22(1) of the 1965 Act, as amended by s 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 *Ex p Sunningwell* [1999] 3 All ER 385 at 390–392, [2000] 1 AC 335 at 349–351, of the background to the definition of 'town or village green' in s 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, Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740 at 773, [1881–85] All ER Rep 1 at 30] 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 governs the presumption or inference of a grant or covenant rest upon acquiescence ..." '

Section 2 of the Prescription Act 1832 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: see *Bright v Walker* (1834) 1 Cr M & R 211 at 219, 149 ER 1057 at 1060 per Parke B. In *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229 at 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 s 1(1) of the Rights of Way Act 1932, Lord Hoffmann said in *Ex p Sunningwell* [1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 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 s 2 of the 1832 Act.
>
> *[2010] 2 All ER 613 at 636*
>
> Introducing the Bill into the House of Lords (HL Debates), 7 June 1932, col 737, Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way (84 HL Debates (1931–32) col 637). 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 s 5 of the 1832 Act and the words "claiming right thereto" in s 2 of that Act.'

He concluded ([1999] 3 All ER 385 at 394, [2000] 1 AC 335 at 354) that there was no reason to believe that 'as of right' in s 22(1) of the 1965 Act was intended to mean anything different from what those words meant in the Acts of 1832 and 1932. The same can be said of the meaning of those words in s 15 of the 2006 Act.

**[67]** In the light of that description it is, I think, possible to analyse the structure of s 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, 170 ER 449. 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 *Beresford*'s case [2004] 1 All ER 160 at [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 [53], above) is: No.

**[68]** Mr Charles George QC for the appellant 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 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, 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 (see [2009] 4 All ER 1232 at [48]–[49]).

**[69]** I agree with Mr George that all the authorities show that there are only three vitiating circumstances: see *Gardner*'s case [1903] AC 229 at 238 and 239 per Lord Davey and Lord Lindley respectively, *Ex p Sunningwell* [1999] 3 All ER 385 at 391, [2000] 1 AC 335 at 350 per Lord Hoffmann, *Beresford*'s case [2004] 1 All ER 160 at [3], [16] and [55] per Lord Bingham of Cornhill, Lord Scott of Foscote and Lord Rodger of Earlsferry respectively, and Riddall and Trevelyan *Rights of Way: A Guide to Law and Practice* (4th edn, 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 Homes* case [2003] 3 EGLR 70 at [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 indorsed, 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 s 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, Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740 at 774, [1881–85] All ER Rep 1 at 29 Fry J, having stated ((1881) 6 App Cas 740 at 773, [1881–85] All ER Rep 1 at 29) 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 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)* [1968] 1 All ER 1015 at 1032, [1969] 1 Ch 160 at 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] 4 All ER 817 at [50],



that the rational construction of s 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 *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 396–397, [2000] 1 AC 335 at 357).'

As he put in the passage referred to in *Ex p Sunningwell*, 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 co-existed with the owner's use of the land during the 20-year period, the relationship of co-existence is ended when registration takes place.

**[73]** In *Fitch v Fitch* (1797) 2 Esp 543, 170 ER 449, 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 co-exist 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] 4 All ER 817 at [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 plough the soil in the due course of husbandry. Cockburn CJ said (at 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 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 co-existence 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] 4 All ER 817 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: see the *Laing*



*Homes* case [2003] 3 EGLR 70 at [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 co-exist 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 co-exist.

**[76]** Of course, the position may be that the two uses cannot sensibly co-exist 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 co-exist over the same land there may be occasions when they cannot practically be enjoyed simultaneously: see Rowena Meager 'Deference and user as of right: an unholy alliance' Rights of Way Law Review (October 2009) 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: see Philip Petchey 'R (Lewis) v Redcar and Cleveland BC' Rights of Way Law Review (March 2009) 139, p 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.

**[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.

*[2010] 2 All ER 613 at 640*

**LORD RODGER SCJ.**

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

**[80]** As Lord Walker 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 s 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-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 co-exist 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 co-exist after registration, then, like Lord Walker, 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 says in [47], above.

**[85]** Under s 15 of the 2006 Act 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 CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [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 *Ex p Sunningwell* 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 2006 Act. 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, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said (at 863):

> '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.' (My emphasis.)

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, Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740 at 786, [1881–85] All ER Rep 1, 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 1832 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 edn, 2008) p 244 (para 4–84), suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.

**[91]** In *Ex p Sunningwell* [1999] 3 All ER 385 at 391, [2000] 1 AC 335 at 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 DC v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44 at 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'. Cf Dyson LJ, [2009] EWCA Civ 3 at [49], [2009] 4 All ER 1232 at [49], [2009] 1 WLR 1461. 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 connection with a public right of way in *Rhins District Committee of Wigtownshire CC v Cuninghame* 1917 2 SLT 169 at 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 *Ex p Sunningwell* [1999] 3 All ER 385 at 395–396, [2000] 1 AC 335 at 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 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. 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 SCJ.**

**[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 Redcar and 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 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 s 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 previ-

ously 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 CC v Oxford City Council* [2006] UKHL 25, [2006] 4 All ER 817, [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' (at [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' (at [59]). To my mind, however, these are not inconsistent with the position which I have suggested arises on registration and, indeed (also at [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 [105]) himself appears to have understood the other members of the Committee to have decided that registration of land as a green—

> '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 [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 [2006] 2 AC 674 at 675) 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 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 co-existence 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 (Admin) at [40], [2008] All ER (D) 264 (Jul) at [40] '[that] there was overwhelmingly "give" on the part of the local users and "take" on the part of the golfers' (see [2009] EWCA Civ 3 at [51], [2009] 4 All ER 1232 at [51], [2009] 1 WLR 1461).

**[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 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, Lord Walker and Lord Kerr 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 SCJ.**

**[109]** For the reasons given by Lord Hope, Lord Rodger, Lord Walker and Lord Brown 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 ([2009] EWCA Civ 3, [2009] 4 All ER 1232, [2009] 1 WLR 1461) and Sullivan J ([2008] EWHC 1813 (Admin), [2008] All ER (D) 264 (Jul)) dismissed the application for judicial review.

**[110]** The critical question in this case centres on the meaning to be given to the words 'as of right' in s 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 (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60 at [3], [2004] 1 All ER 160 at [3], [2004] 1 AC 889. It is also clear that they do not need to believe that they have a right: see below. As Lord Walker said in *Beresford*'s case at [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 DC v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 at 370.

**[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 CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335. 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 benefiting 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 has said (at [69], above), 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 ... 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 acknowledgment 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 s 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 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.

**[115]** For the reasons that Lord Hope and Lord Walker 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 CC v Oxford City Council* [2006] UKHL 25, [2006] 4 All ER 817, [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 [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, Lord Walker and Lord Brown 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.*

Robert Chan Barrister.

# REGINA v. OXFORDSHIRE COUNTY COUNCIL AND ANOTHER, Ex parte SUNNINGWELL PARISH COUNCIL

**[HOUSE OF LORDS]**

**1999 April 19, 20, 21, 22; June 24**

**Lord Browne-Wilkinson, Lord Steyn, Lord Hoffmann, Lord Hobhouse of Woodborough and Lord Millett**

*Commons - Town or village green - Customary right - Land used predominantly by villagers for informal recreation - Whether belief in existence of right exclusive to villagers necessary - Whether use for "sports and pastimes" - Whether landowner's toleration barring claim - Commons Registration Act 1965 (c. 64), ss. 13(b), 22(1)*

A parish council applied to the county council pursuant to section 13 of the Commons Registration Act 19651 for registration of 8 glebe land as a village green. They relied, under section 22(1), on 20 years' user ending on 1 January 1994. The landowner objected, and the county council decided to hold a non-statutory public inquiry with a barrister acting as inspector. The inspector found that there had been abundant use of the glebe for informal recreation, which he held to be a pastime for the purposes of the Act, that the informal recreation had been predominantly, though not exclusively, by inhabitants of the village and that successive

1 Commons Registration Act 1965, s. 13(b): see post, p. 348D.

S. 22(1): see post, p. 347D.



landowners had been tolerant of that use. He recommended that the application be refused on the ground that the use had not been shown to be "as of right" in the sense of a right exercised in the belief that it was enjoyed by the villagers to the exclusion of all other people. The county council resolved that the application be rejected. The parish council applied for leave to apply for judicial review of the resolution. Buxton J. refused the application. The Court of Appeal, on a renewed application, granted leave to apply but refused the substantive application.

On appeal by the parish council:-

*Held*, allowing the appeal and declaring the glebe to be a village green, that "as of right" in section 22(1) of the Act of 1965, reflecting the common law concept of nec vi, nec clam, nec precario, did not require subjective belief in the existence of the right; that "sports and pastimes" was a composite phrase and proof of an activity that could properly be regarded as a sport or a pastime in modern times, including the informal recreation found by the inspector, was sufficient; that it was sufficient that the land was used predominantly, rather than exclusively, by inhabitants of the village; and that toleration by the landowner was not fatal to a finding that user had been as of right (post, pp. **346F-G, 355G-356A, 358B, 359A-B**).

*Hue v. Whiteley* [1929] 1 Ch. 440 considered.

*Reg. v. Suffolk County Council, Ex parte Steed* (1996) 75 P. & C.R. 102, C.A. overruled.

Decision of the Court of Appeal reversed.

The following cases are referred to in the opinion of Lord Hoffmann:

*Abercromby v. Town Commissioners of Fermoy* [1900] 1 I.R. 302, C.A.

*Attorney-General v. Antrobus* [1905] 2 Ch. 188

*Attorney-General v. Dyer* [1947] Ch. 67; [1946] 2 All E.R. 252

*Beckett (Alfred F.) Ltd. v. Lyons* [1967] Ch. 449; [1967] 2 W.L.R. 421; [1967] 1 All E.R. 833, C.A.

*Blount v. Layard* [1891] 2 Ch. 681n., C.A.

*Bright v. Walker* (1834) 1 C.M. & R. 211

*Bryant v. Foot* (1867) L.R. 2 Q.B. 161, D.C.

*Dalton v. Angus & Co.* (1881) 6 App.Cas. 740, H.L.(E.)

*De la Warr (Earl) v. Miles* (1881) 17 Ch.D. 535, C.A.

*Fitch v. Rawling* (1795) 2 H.Bl. 393

*Folkestone Corporation v. Brockman* [1914] A.C. 338, H.L.(E.)

*Gardner v. Hodgson's Kingston Brewery Co. Ltd.* [1903] A.C. 229, H.L.(E.)

*Hammerton v. Honey* (1876) 24 W.R. 603

*Hue v. Whiteley* [1929] 1 Ch. 440

*Jones v. Bates* [1938] 2 All E.R. 237, C.A.

*Mann v. Brodie* (1885) 10 App.Cas. 378, H.L.(Sc.)

*Mercer v. Denne* [1904] 2 Ch. 534

*Mills v. Colchester Corporation* (1867) L.R. 2 C.P. 476

*Mills v. Silver* [1991] Ch. 271; [1991] 2 W.L.R. 324; [1991] 1 All E.R. 449, C.A.

*O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42; [1998] J.P.L. 468, C.A.

*Reg. v. Suffolk County Council, Ex parte Steed* (1995) 70 P. & C.R. 487; (1996) 75 P. & C.R. 102, C.A.

The following additional cases were cited in argument:

*Attorney-General ex rel. Yorkshire Derwent Trust Ltd. v. Brotherton* [1991] Ch. 185; [1991] 2 W.L.R. 1; [1992] 1 All E.R. 230, C.A.; [1992] 1 A.C. 425; [1991] 3 W.L.R. 1126; [1992] 1 All E.R. 230, H.L.(E.)

*[2000] 1 A.C. 335 Page 337*

*Bell v. Wardell* (1740) Will. 202

*Bourke v. Davis* (1889) 44 Ch.D. 110

*Bridle v. Ruby* [1989] Q.B. 169; [1988] 3 W.L.R. 191; [1988] 3 All E.R. 64, C.A.

*Buckinghamshire County Council v. Moran* (1988) 86 L.G.R. 472; [1990] Ch. 623; [1989] 3 W.L.R. 152; [1989] 2 All E.R. 225, C.A.

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

*Fairey v. Southampton County Council* [1956] 2 Q.B. 439; [1956] 3 W.L.R. 354; [1956] 2 All E.R. 843, C.A.

*Goodman v. Mayor of Saltash* (1882) 7 App.Cas. 633, H.L.(E.)

*Jaques v. Secretary of State for the Environment* [1995] J.P.L. 1031

*Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* [1937] 2 K.B. 77; [1936] 2 All E.R. 422

*Ministry of Defence v. Wiltshire County Council* [1995] 4 All E.R. 931

*Montgomerie & Co. Ltd. v. Wallace-James* [1904] A.C. 73, H.L.(Sc.)

*Reg. v. Oakes* [1959] 2 Q.B. 350; [1959] 2 W.L.R. 694; [1959] 2 All E.R. 92, C.C.A.

*Reg. v. Secretary of State for the Environment, Ex parte Billson* [1999] Q.B. 374; [1998] 3 W.L.R. 1240; [1998] 2 All E.R. 587

*Reg. v. Secretary of State for the Environment, Ex parte Cowell* [1993] J.P.L. 851, C.A.

*Reg. v. Secretary of State for the Environment, Ex parte O'Keefe* (1997) 96 L.G.R. 100, C.A.

*Sturges v. Bridgman* (1879) 11 Ch.D. 852, C.A.

*Sze To Chun Keung v. Kung Kwok Wai David* [1997] 1 W.L.R. 1232, P.C.

*The Rye, High Wycombe, Bucks., In re* [1977] 1 W.L.R. 1316; [1977] 3 All E.R. 521

*Virgo v. Harford* (unreported), 11 August 1892, Wills J. (Bristol Summer Assizes); 27 March 1893, Mathew J. (Bristol District Registry)

APPEAL from the Court of Appeal.

This was an appeal by Sunningwell Parish Council by leave of the Court of Appeal (Lord Woolf M.R., Waller and Robert Walker L.JJ.) from their judgment and order on 24 November 1997 granting a renewed application by the parish council for leave to apply for judicial review of a resolution of the first respondents, Oxfordshire County Council, passed on 22 October 1996 but dismissing the substantive application. Buxton J., on 11 July 1997, had refused the parish council leave to apply.

By their application, the parish council sought judicial review in the form of an order of certiorari to remove into the High Court and quash the county council's resolution, and/or a declaration that the county council should have acceded to the parish council's application dated 9 November 1995 and registered Sunningdale Glebe as a village green, and/or an order of mandamus either to oblige the county council to register the glebe as a village green or to reconsider the application.

The facts are stated in the opinion of Lord Hoffmann.

***George Laurence Q.C.*** and ***W. D. Ainger*** for the parish council. Land on which local inhabitants indulge in "lawful sports and pastimes" is land on which they indulge either in lawful sports only (being also lawful pastimes) or in lawful pastimes (not being sports) only or in both lawful sports and lawful pastimes. The informal recreational activities (without



any communal activities) relied on by the parish council before the inspector are sufficient to constitute pastimes.

Class c in section 22(1) of the Act of 1965 should be construed consistently with classes a and b so far as possible. In particular, (i) the same sports and/or pastimes that can be the subject of class b customary rights should be held capable of acquisition under class c, there being no reason as a matter of language to differentiate the terms and there being every reason, in the interests of contextual consistency, to construe the expression in the same way in the two classes; (ii) the phrase "sports and pastimes" in classes b and c should take its flavour from the possibly wider phrase "exercise or recreation" used in class a and be given a wide interpretation; (iii) the dictum in *Mills v. Colchester Corporation* (1867) L.R. 2 C.P. 476, 486 would apply to any claimed class b customary right. The meaning to be given to the expression "as of right" in class c should be consistent with it. [Reference was also made to *Hammerton v. Honey* (1876) 24 W.R. 603, 604.]

To hold that the only activities which can fall within "sports and pastimes" must be organised or communal or structured in some way would cast doubt on the correctness of numerous decisions of the commons commissioners. In any event, it does not follow, logically or as a matter of language, from the fact that a customary right exists to serve the inhabitants of a locality that the only activities that can lead to the recognition of a class b or c right must be communal ones. It is impossible to draw a satisfactory dividing line between activities carried on by small, perhaps family, groups and those carried on communally. [Reference was made to *Abercromby v. Town Commissioners of Fermoy* [1900] 1 I.R. 302, 314; *Bell v. Wardell* (1740) Will. 202; *Bourke v. Davis* (1889) 44 Ch.D. 110 and *Gadsden, The Law of Commons* (1988), p. 385 para. 13.24.]

> "Sports and pastimes" should be construed as applying to all manner of pastimes (or even just one pastime), whether or not including any sport. The phrase used in the Act of 1965 derives from its use in the old cases. The point of adding pastimes to sports is to emphasise that use of the land for "mere" pastimes will do. The emphasis is therefore on what is permitted (i.e., all manner of pastimes including sports) rather than on positively requiring use not merely for non-sport pastimes but also for sports. "Sports and pastimes" is plainly meant to be a portmanteau phrase employed to prevent anybody having to argue about whether a particular activity is a sport or a pastime. It would be unsatisfactory if land could not be registered as a town or village green on the basis of informal recreation activity: see *Reg. v. Suffolk County Council, Ex parte Steed* (1995) 70 P. & C.R. 487, 503. The phrase "exercise or recreation" in class a is used equally loosely. The only instances known of allotment (see the Inclosure Act 1845 (8 & 9 Vict. c. 118)) of land falling within class a are allotments for "exercise and recreation:" cf. *In re The Rye, High Wycombe, Bucks* [1977] 1 W.L.R. 1316, 1320-1321. In all three classes the relevant phrase is to be construed as meaning "and/or."

If "sports and pastimes" is to be construed as the second respondents contend, smaller greens that are physically incapable of accommodating both sports and other pastimes (whether communal or not) will in practice be excluded from qualifying under class c (and would likewise have been



excluded under class b). Many greens are believed to have been registered in the past on the basis of informal recreational activities. These registrations would be shown to have been erroneous. [Reference was made to *Virgo v. Harford* (unreported), 11 August 1892; *Hunter, The Preservation of Open Spaces, and of Footpaths, and Other Rights of Way* (1896), pp. 181-182: Bennion, "Threading the Legislative Maze" (1999) 163 J.P. 264 and *Halsbury's Laws of England*, 4th ed. reissue, vol. 12(1) (1998), paras. 621-623, pp. 174-176.]

For local inhabitants to indulge in sports and pastimes on land "as of right" is to indulge in them on it for those purposes without force (peaceably), without secrecy (openly) and without permission *as*

*if* they have the right (i.e. in such manner as to convey the impression that they are claiming the right) to do so. It is not necessary that they genuinely believe themselves to have the right so to indulge. The words "openly used ... without protest or permission" in the definition of "town and village greens" recommended in the Report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd. 462), p. 128, para. 403, are precisely what are comprehended in the Latin expression "nec vi, nec clam, nec precario" and in the expression "as of right" in the definition in section 22(1) of the Act of 1965. Roman lawyers, in relation to "clam," could only have had in mind someone who knew that he had no right to be there, so "clam" is inconsistent with any need for honest belief.

The 20-year period mentioned in class c probably derived either from the common law relating to acquisition of customary rights or from the Rights of Way Act 1932. By parity of reasoning, it would be sensible to construe the expression "as of right" in class c as it would be understood in relation to a claim to customary rights at common law (see *Mills v. Colchester Corporation*, L.R. 2 C.P. 476, 486) or by reference to the use of the expression in statutes, e.g., the Prescription Act 1832 (2 & 3 Will. 4, c.71) and the Act of 1932 (section 1). The Act of 1932 was modelled on the Act of 1832: see *per* Lord Buckmaster (H.L. Debates), 7 June 1932, cols. 635-637; *Attorney-General ex rel. Yorkshire Derwent Trust Ltd. v. Brotherton* [1991] Ch. 185, 200F-G; [1992] 1 A.C. 425, 436G-H, 438A-B, 441G, 442D, 446B-D, 447B; *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* [1937] 2 K.B. 77; *Jones v. Bates* [1938] 2 All E.R. 237, 251F and *Fairey v. Southampton County Council* [1956] 2 Q.B. 439, 465. Although the phrase "as of right" appears only in section 5 of the Act of 1832, the expression in section 2 "claiming right thereto" had the same meaning: see *Gardner v. Hodgson's Kingston Brewery Co. Ltd.* [1903] A.C. 229, and *Jones v. Bates* [1938] 2 All E.R. 237, 251E-F. The classic exposition of user of a right of way *otherwise* than "as of right," as used in section 5 of the Act of 1832 in *Bright v. Walker* (1834) 1 C.M. & R. 211, 219 was merely exposition of the common law position, confirmed by the Act of 1832, that use, to be "as of right," had to be peaceable, open and without permission (nec vi, nec clam, nec precario): see *Gale on Easements*, 16th ed. (1997), pp. 209-210; pars. 4-64, 4-65; *Mills v. Colchester Corporation*, L.R. 2 C.P. 476, 486; *Gardner v. Hodgson's Kingston Brewery Co. Ltd.* [1903] A.C. 229, 238; *Eaton v. Swansea Waterworks Co.* (1851) 17 Q.B. 267, 275, 276; *Earl De la Warr v. Miles* (1881) 17 Ch.D. 535, 596; *Sturges v. Bridgman* (1879) 11 Ch.D. 852, 863; *Dalton v. Angus & Co.*



(1881) 6 App.Cas. 740, 773 and J. G. Riddall, "A False Trail" [1997] Conv. 199. None of these authorities speaks of the necessity for there to be any belief by claimants in the existence of the claimed right. Neither did the first authority under the Act of 1932 do so: see *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* [1937] 2 K.B. 77, 82-84. Tomlin J.'s construction of "as of right" in *Hue v. Whiteley* [1929] 1 Ch. 440, 445 (see *Jones v. Bates* [1938] 2 All E.R. 237, 241C, 245G-H, 251F; *O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42, 53; *Reg. v. Secretary of State for the Environment Ex parte O'Keefe* (1997) 96 L.G.R. 100, 115; *Alfred F. Beckett Ltd. v. Lyons* [1967] Ch. 449, 469; *Reg. v. Secretary of State for the Environment, Ex parte Cowell* [1993] J.P.L. 851, 857; *Jaques v. Secretary of State for the Environment* [1995] J.P.L. 1031, 1037 and *Reg. v. Secretary of State for the Environment, Ex parte Billson* [1999] Q.B. 374, 393D-F) was heresy. The distinction made by Farwell J. in *Jones v. Bates* between users who are regardless of the rights of the owner and those who genuinely believe that they are exercising a public right is a false one. The true distinction is between those who use the land or way as if they have the right to do so, i.e., in the manner in which a person rightfully entitled would have used it (see *Bright v. Walker*, 1 C.M. & R. 211, 219) and those who do not so use it. Farwell J.'s distinction between users who think they have the express or tacit licence of the owner and those who genuinely believe they are exercising a public right is also false. The true distinction is between cases where the owner has in fact given his consent and cases where he has not. So long as the use has been carried out in such a way or manner as to assert a permanent right, it is wholly irrelevant that in fact users happened to believe that they were entitled to be on the land by reason of some revocable licence: see *Earl De la Warr v. Miles*, 17 Ch.D. 535, 594 and *Bridle v. Ruby* [1989] Q.B. 169.

177D-E. The principle in those cases is to be preferred to that in *Jones v. Bates*, being consistent with the earlier authorities. The law seeks to give effect to long-standing usage, not only whatever the motive with which the use is enjoyed (*Hue v. Whiteley* [1929] 1 Ch. 440) but also whatever the state of mind (if any) of users as to whether they have the right to be doing what they are doing (*Earl De la Warr v. Miles* (1881) 6 App. Cas. 740 and *Bridle v. Ruby* [1989] Q.B. 169). There is no *harm* in claimants having a genuine belief, but there is no need for them to have it. For acts of enjoyment to amount to the assertion of the relevant claimed right (i.e., a private or public right of way or a right in the local inhabitants to indulge in sports and pastimes on a green) it is the nature of the acts themselves, not the belief with which users happen to carry them out, that has the capacity to be interpreted as claiming a right.

For local inhabitants to be able to acquire an honest belief in the right to use would necessarily involve a prior period of use (probably quite a few years) during which users had no such honest belief. If there were a need for users to have a genuine belief in their right to use a green for sports and pastimes, their actual user would thus need in practice to exceed 20 years in order that the 20-year period itself should throughout be accompanied by the requisite belief. It is unlikely that Parliament envisaged such having to be proved either under the Act of 1965 or the Highways Acts. That there has been no challenge to the *Hue v. Whiteley*



belief test in the Highways Acts cases may be because in most cases (as in the present) claimants in fact do have (or say they have) a belief in their right to indulge in their sports and pastimes or to pass and repass along a claimed way. [Reference was made to section 34(1) of the Highways Act 1959 and *Mills v. Silver* [1991] Ch. 271, 281-282, 288D-E, 290C-D.]

To hold that no belief is required would not impinge on any other area of the law such as adverse possession or prescription. [Reference was made to *Buckinghamshire County Council v. Moran* (1988) 86 L.G.R. 472; [1990] Ch. 623, 644C; *Sze To Chun Keung v. Kung Kwok Wai David* [1997] 1 W.L.R. 1232, 1235H; *Stroud's Judicial Dictionary of Words and Phrases*, 5th ed. (1986), vol. 4, pp. 2291-2292 and *Words and Phrases Legally Defined*, 3rd ed. (1990), p. 98.]

Even if belief in the existence of the claimed right is necessary, there is no need for belief, in addition, that it is as inhabitants of the locality (i.e. exclusive of the general public) that the right is or may be enjoyed. It is enough if the belief required is merely consistent with the claimed right. Belief that non-inhabitants, viz., the general public, are also entitled to indulge in sports and pastimes on the land, where it exists, is res inter alios acta. It is irrelevant, because such additional belief is not inconsistent with the primary belief.

A two-headed belief test would also be, in practice, impossible to fulfil: it is too specialised. How is any individual local inhabitant to recognise his fellow users as local, as opposed to non-local, inhabitants? (There is, in relation to any particular local user, a total of 64 possible combinations of states of mind.) If the evidence is that only (or mostly) local inhabitants have indulged in the activities, that satisfies the wording of the class c definition. The only justification for a belief test of "as of right" may be that those who have to believe in what they are doing may bring home to the landowner more effectively that a right is being asserted. If, this is correct, a landowner who sees local people using his land for sports and pastimes who happen to entertain the belief that the whole world is entitled to be there is more, not less, likely to be aware that a right is being asserted. So it is not unjust, on a belief theory of "as of right," to permit enjoyment by local inhabitants who have that wide belief to give rise to the right claimed. It is true that the rights that class c creates would not extend to the general public. Once the green was established, the landowner would be entitled to put up an appropriate notice and turn any members of the general public off. But the fact that, in so doing, he would be contradicting the locals' previously-held belief that anybody was entitled to

use the green is no reason for denying the protection of the Act of 1965 to cases where the requirements of class c are otherwise satisfied.

***Ainger*** following. As to the difference (if any) between "exercise or recreation" and "sports and pastimes," in the definition of "town or village green" in section 22(1) of the Act of 1965 there is no clear answer, but section 15 of the Inclosure Act 1845 (8 & 9 Vict. c. 118) suggests that Parliament then thought it appropriate to provide that a town or village green (i.e. land used by custom for sports and pastimes) could be allotted as part of an inclosure award and therein be directed to be held in trust for "exercise *and* recreation;" so Parliament appears to have thought that "sports and pastimes" and "exercise and recreation" were either

*[2000] 1 A.C. 335 Page 342*

synonymous or that "exercise and recreation" was a wider concept (it being unlikely that Parliament would have intended to restrict an existing lawful user).

***Sheila Cameron Q.C.*** and ***Charles Mynors*** for the second respondents, the Oxford Diocesan Board of Finance. The strict approach taken in *Hammerton v. Honey*, 24 W.R. 603 to the category of persons who can substantiate the existence of a custom is also exemplified in earlier authorities: see, e.g. *Fitch v. Rawling* (1795) 2 H.B. 393. These authorities demonstrate that a customary right could be established for the inhabitants of a defined locality (for example, a village or parish) and that the evidence of usage had to substantiate a claim of a right based in the inhabitants which could fail if the usage was indiscriminate, in the sense of including outsiders. In assessing a claim under class c of section 22(1) of the Act of 1965 it is necessary to adopt the same strict approach in relation to the category of persons who can acquire a right. Class c is analogous to class b in this respect. The Court of Appeal in *Reg. v. Suffolk County Council, Ex parte Steed*, 75 P. & C.R. 102, 111 were correct in holding that the evidential safeguards in the authorities dealing with the establishment of a customary right (class b) should be imported into a class c case.

The Royal Commission, in formulating its recommended definition of a town or village green for the purpose of registration under new legislation (Report of the Royal Commission on Common Land 1955-1958 (Cmnd: 462), p. 128, para. 403) was influenced by the glossary definition (Appendix VI) that it had used for its studies and Report. The important common theme is that both "the place" (in the second limb of the definition) and the "unenclosed open space" (in the third) are ones specially for "inhabitants." Although the words "place" and "unenclosed open space" in the Commission's suggested definition have been replaced by "land" in the definition included in the Act of 1965, the elements or "classes" in that statutory definition reflect those in the Commission's definition and the emphasis remains on "the inhabitants of any locality." [Reference was made to *Ministry of Defence v. Wiltshire County Council* [1995] 4 All E.R. 931, 933-934 and *Halsbury's Laws of England*, 4th ed. reissue, vol. 12(1), pp. 155, 159, paras. 601, 604.]

There was no evidence of communal activities by the villagers on the glebe. There was no activity similar to those in the authorities dealing with a customary right in the inhabitants of a locality. The villagers already have the benefit of an area of land expressly given to them in 1912 as a recreation ground. This is used as a cricket field and has a play area for small children. Consequently there has been no need for the villagers to look to the glebe for the purpose of any communal games, quite apart from its physical unsuitability as sloping ground. Evidence of a succession of individuals or small family groups indulging in informal recreational activities, also indulged in by outsiders, does not constitute evidence of the character required to substantiate a claim of right on behalf of the village. As the benefit of "village green" status is to accrue to the villagers, so, in order for the burden of a right vested in the villagers to be established against the landowner, the past and present usage must be demonstrated to be by the villagers as a body, as distinct from all and sundry.

*[2000] 1 A.C. 335 Page 343*

The words "sports and pastimes" (see the definitions in the *New Oxford Dictionary of English* (1998)), rather than some more general phrase such as "recreationial activities" or, as in the Inclosure Act 1845, "exercise and recreation," were used by Parliament following the Royal Commission's recommended, wording for the purpose of the registration of a town or village green. The activities that can qualify as "unlawful sports and pastimes" are the same in relation to the statutory class c as in relation to the Commission's class b, because class c refers to "*such* sports and pastimes" The authorities relating to claims to customary rights to "lawful sports and pastimes" are of relevance also to claims under class c. The difference between classes b and c in the statutory definition relates to the period of time during which the inhabitants have to show that they have indulged in the sports and pastimes on the particular piece of land in question. The combination of games and other activities was present in the Commission's glossary definition and indicates that the fact that sport was engaged in by villagers was perceived to be an essential feature of a village green. The statutory class c has greater clarity than the Commission's class c since that referred to "used by the inhabitants for all or any such purposes," whereas the statutory definition requires the inhabitants to have indulged in "such sports *and* pastimes," not either of them in the alternative. As a matter of statutory interpretation, the literal meaning of an enactment is to be preferred wherever possible. The words "sports and pastimes" in classes b and c are to be contrasted with the words "exercise or recreation" in class a. They have distinct and different meanings. The statutory definition similarly requires evidence of indulging in "sports *and* pastimes," i.e. sports as well as other pastimes. To say that evidence as to indulging in pastimes other than sports is sufficient is effectively to substitute the word "or" for the word "and" in the definition: see *Reg. v. Oakes* [1959] 2 Q.B. 350. In the present case there is no absurdity resulting from the strict interpretation of the word "and" in the definition; it follows that there is no reason to depart from the requirement that, under class b or class c, it is necessary to show evidence of sports as well as merely pastimes. Parliament used "or" in class a in the phrase "exercise or recreation." If it had intended that classes b and c should have related to "sports *or* pastimes," as opposed to "sports *and* pastimes," it would have said so.

Sports, including team games such as cricket and football, played by villagers on a regular basis over a long period of time would be a form of usage of the land that would be readily observable by the owner of the land, or likely to be reported to him, and thus, if not opposed, capable of founding a claim to a right in the villagers. Such a use could be enjoyed along with other uses (including pastimes) indulged in by local inhabitants, but it is a combination of sports and pastimes that has to be proved in order to satisfy the statutory definition in class c.

Alternatively, if "sports and pastimes" should be interpreted disjunctively, then proof of either "sports" or "pastimes" still has to show the existence of a sufficiently strong communal element to justify an inference of a right enjoyed by inhabitants of a locality, albeit, having regard to the dictionary definition of "pastime," informal recreational activities can fall within the meaning of that word. The earlier authorities

*[2000] 1 A.C. 335 Page 344*

illustrate the communal nature of the principal activity or activities relied on in proof of the custom. The approach adopted in decisions of the Commons Commissioners supports the point that more is required than informal recreation by individuals or very small groups. It is the nature of the "sports" and the "pastimes" together, and the character of their exercise by inhabitants as a body, that are the material factors. Quantum of usage cannot convert a pastime into a sport if the activity does not come within the ordinary meaning of that word. The oral evidence as summarised in the inspector's report justified his conclusion that the recreational activities were of an informal nature. The reference to ball games did not indicate otherwise. [Reference was made to *Getting Greens Registered* (1995), Appendix 2.]

The words "as of right" were included in class c in preference to those suggested in the Royal Commission: "without protest or permission from the owner of the fee simple." The words "as of right" have been used at common law in relation to claims to customary rights, and, in legislating for the registration of village greens, where the elements in class b and class c were the same except for the period of time over which usage had to be proved, it can properly be inferred that Parliament was applying the same test in relation to the proof of a claim to a village green under class c (20 years) as applied under class b (by custom). The words have long been used to differentiate between a claim to a legal right and a right already established in law. It is the incipient nature of a claim to a new right that necessitates proof, by those asserting the right, that what has been done over the relevant period of time is not explicable on the facts by reasons other than the right asserted.

Further, the user for a 20-year period within class c must be no less "habitual" than in the case of a custom: see *Hammerton v. Honey*, 24 W.R. 603. The fact that an activity has been indulged in occasionally does not mean that it has been indulged in frequently. There is uncertainty both as to the time at and the part of the glebe (which does cover four hectares) on which each activity took place. The fragmentary nature of the evidence distinguishes it from that contemplated by Sir George Jessel M.R. that is, usage habitually by inhabitants as a body.

In examining a "claim of right," all the circumstances in the case have to be taken into account, particularly to see whether there is any "leave or licence:" see *Goodman v. Mayor of Saltash* (1882) 7 App.Cas. 633, 639. The elements to be substantiated in support of an assertion that usage has been of right have been expressed in different languages at different periods of time: see *Mills v. Colchester Corporation*, L.R. 2 C.P. 476, 486 and *Montgomerie & Co. Ltd. v. Wallace-James* [1904] A.C. 73, 76, 85, 90. In accordance with the approach in the latter case, the inspector was correct to consider (i) the history of the glebe (ownership by the Church, and the role of the rector), (ii) the nature of the glebe (physically and by reference to the recreational activities taking place); and (iii) the "surroundings of the spot in dispute" (the public footpath, from which the straying took place). "As of right" has been interpreted more strictly in the decided cases than just "as if they had a right."

As to tolerance and the belief of persons asserting the existence of a right on the basis of long user, see *Alfred F. Beckett Ltd. v. Lyons* [1967]



Ch. 449, which demonstrates that, where on the facts in relation to a claim *on behalf of inhabitants* the court finds that the explanation of the usage lies in tolerance, then it is correct to conclude that a claim as of right has not been proved. The inspector was correct in concluding that the rector and the second respondent had tolerated the use, bearing in mind that he also properly took into account that the use was the consequence of wanderings from the footpath, which in practice would not be capable of being monitored or controlled. A paternalistic rector caring for his parishioners would have permitted children from the school to play on the glebe, and it would have been bizarre for him to have turned off any adults whom he saw picking blackberries or throwing a ball to a child or grandchild. Similarly, a churchwarden tenant of the glebe would have been most unlikely to seek to restrain informal recreation, provided it did not interfere with the grazing of his animals. A proper inference by implication is that the rector permitted use of the glebe whilst it was his property and that, when the inspector referred to tolerance, he had that in mind. As to the possibility of landowners erecting notices, see section 31 of the Highways Act 1980.

The belief approach adopted in *Alfred F. Beckett Ltd. v. Lyons* is correct, because it enables the tribunal to make an assessment as to whether it is possible in a particular case to substantiate a claim "as of right" on behalf of the inhabitants of a locality as a body. The traditional elements of "openly and peacefully and without seeking permission," still need to be considered. No tribunal

could reasonably conclude that a claimant has an "honest belief in a legal right to use" land (*Reg. v. Suffolk County Council, Ex parte Steed*, 75 P. & C.R. 102, 112) if the use is secret, by force or by permission. But, having concluded that the use has been open, peaceful and without first obtaining permission, the tribunal also has to make an overall assessment of all the facts of the case, including alternative explanations for the usage: see, for comparison, *Attorney- General v. Dyer* [1947] Ch. 67, 85 and *Jones v. Bates* [1938] 2 All E.R. 237, 248, 252. The claim in this case is on behalf of a body of inhabitants. It is for that reason that the evidence of a belief that the usage was as a villager of Sunningwell is relevant: see *Reg. v. Suffolk County Council, Ex parte Steed*, 75 P. & C.R. 102, 112. The Court of Appeal was right in *Steed*, and the inspector's conclusion was therefore correct on the evidence. The oral evidence given at the inquiry did not reveal any belief in usage as a villager. In relation to the credibility of the claim by the villagers, the inspector was also correct to note that there was no assertion of any claim, either existing or potential, to the land having been a town or village green either when parts of the glebe had been enclosed and sold in 1982 and 1984, or at the two planning inquiries relating to it in 1991 and 1994.

The inspector was correct in regarding the public footpath across the glebe as a critical factor both as a matter of fact and as a matter of law. The evidence before him was that considerable use was made of it. It was used by all sorts of people who were not villagers. It could be inferred that people from neighbouring villages gained access to the glebe by way of it, as did the villagers. Whilst the registration of a footpath on the definitive map is conclusive evidence that there is a highway over which the public have a right of way on foot, the right is one of passage only along the



length of the footpath. There is no right to wander at large, no jus spatiandi (a possible subject matter of a grant or prescription). Exceptional rights to promenade in a particular place do not detract from this general principle. *Abercromby v. Town Commissioners of Fermoy* [1900] 1 I.R. 302 related to land designed, constructed, and laid out solely for the purpose of walking and promenading and subsequently used at all times for that purpose. That is altogether different from an ordinary field used occasionally by private individuals.

The balance between protecting the interests of owners of land and recognising valid rights vested in the public or a section of the public has to be carefully maintained. If "wanderings and strollings" from a public footpath can now be relied on to substantiate a claim to a village green capable of registration, consideration would have to be given to fencing alongside all such footpaths. That would not only impose a considerable burden on the Church and other landowners but would also mean that informal access to fields in the countryside might well be substantially restricted in the future. Evidence of straying from a public footpath, as in the present case, cannot properly be relied on in substantiation of a claim by the inhabitants of a locality to register a village green under class c. The owner of land cannot be expected to monitor every person straying off the footpath to ensure that a claim is not subsequently made, differentiating inhabitants of the locality from other members of the public who have acted in the same way. Action of that kind would be repressive as well as unduly burdensome for the landowner, and would be contrary to the established principles of English law, namely, that landowners should not be forced to be "churlish" lest their good nature be misconstrued and used against them to create burdens on their proprietary rights: see *Blount v. Layard* [1891] 2 Ch. 681n. and *Ministry of Defence v. Wiltshire County Council* [1995] 4 All E.R. 931, 936B.

The county council were not represented.

***Laurence Q.C.*** in reply. Tolerance should be equated with acquiescence, not permission. It could not be equated to permission here. [Reference was made to *Alfred F. Beckett Ltd. v. Lyons* [1967] Ch. 449 and *Halsbury's Laws of England*, 4th ed reissue, vol. 12(1) p.198: para. 646.]

Their Lordships took time for consideration.

24 June. LORD BROWNE-WILKINSON My Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend, Lord Hoffmann. I agree with it and for the reasons which he gives would allow the appeal and direct the Oxfordshire County Council to register the glebe as a village green.

LORD STEYN .My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons given by him I would also make the order he proposes.

LORD HOFFMANN My Lords, the glebe at Sunningwell in Oxfordshire is an open space of about 10 acres near the ancient village church. It used to form part of the endowment of the rectory. The rector let it for grazing

*[2000] 1 A.C. 335 Page 347*

and received the rent. On a reorganisation of church properties in 1978 it was transferred to the Oxford Diocesan Board of Finance ("the board"). The land slopes upwards to the south and is crossed by a largely unfenced public footpath running south from the village towards Abingdon. Local people use the glebe for such outdoor pursuits as walking their dogs, playing family and children's games, flying kites, picking blackberries, fishing in the stream and tobogganing down the slope when snow falls.

In 1994 the board obtained planning permission to build two houses on the northern boundary of the glebe. The villagers were very much opposed. They wanted it preserved as an open space. The parish council applied to the county council to register the glebe as a town or village green under the Commons Registration Act 1965. It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent on the point. But registration would prevent the proposed development because by section 29 of the Commons Act 1876 (39 & 40 Vict. c. 56) encroachment on or inclosure of a town or village green is deemed to be a public nuisance.

Section 22(1) of the Act of 1965 contains a three-part definition of a "town or village green." They are usually called classes a, b and c. I shall use the same terminology.

> "[a] land 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."

Class a includes land which was allotted for exercise and recreation by Act of Parliament or the inclosure Commissioners when making an order for the inclosure of a common under the Inclosure Act 1845 (8 & 9 Vict. c.118). Before 1845, when commons were inclosed under private Acts of Parliament, it was common for the Act itself to set aside some land for this purpose. There is no suggestion that the glebe was so allotted and the parish council do not rely upon class a. Class b refers to land which by immemorial custom the local inhabitants are entitled to use for sports and pastimes. This is the traditional village green with its memories of maypole dancing, cricket and warm beer. Immemorial custom means in theory a custom which predates the accession of Richard I in 1189. Although, as I shall in due course explain, the law may presume a custom of such antiquity on evidence which a historian might regard as somewhat slender, the parish council do not rely upon class b. They take their stand on class c, which was first introduced by the Act of 1965 itself. It is no longer necessary to resort to fictions or presumptions about what was happening in 1189. It is sufficient that the inhabitants of the locality have in fact used the land as of right for lawful sports and pastimes for more than 20 years.

The main purpose of the Act of 1965 was to preserve and improve common land and town and village greens. It gave effect to the Report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd. 462) which emphasised the public importance of such open spaces. Some commons and greens were in danger of being encroached upon by



developers because of legal and factual uncertainties about their status. Others were well established as commons or greens but there was uncertainty about who owned the soil. This made it difficult for the local people to make improvements (for example, by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.

The Act of 1965 dealt with these problems by creating local registers of common land and town and village greens which recorded the rights, if any, of the commoners and the names of the owners of the land. If no one claimed ownership of a town or village green, it could be vested in the local authority. Regulations made under the Act prescribed time limits for registrations and objections and the determination of disputes by Commons Commissioners. In principle, the policy of the Act was to have a once-and-for-all nationwide inquiry into commons, common rights and town and village greens. When the process had been completed, the register was conclusive. By section 2(2), no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered.

In the case of greens in classes a or b, this meant that unless they were registered within the prescribed time-limit, they could not to be registered as such thereafter. (There is a question about whether non-registration of a class a green also extinguished the prior statutory rights of exercise and recreation, but that need not detain us now.) But a class c green could come into existence upon the expiry of any period of 20 years ' user. This might be after the original registration period had expired. Section 13 therefore provided for the amendment of the register in various situations including where "*(b)* any land becomes common land or a town or village green ..." The Sunningwell Parish Council applied to the Oxfordshire County Council, as registration authority, for an amendment to add the glebe to the register on the ground that it had become a village green by 20 years' user ending on 1 January 1994.

The Board objected to the application. The regulations made under section 13, the Commons Registration (New Land) Regulations 1969 (S.I. 1969 No. 1843), prescribe no procedure for resolving disputes over applications for amendment. The jurisdiction of the Commons Commissioners was limited to disputes arising out of the original applications, all of which have now been determined. The county council was left free to decide upon its own procedure for dealing with an application to amend. It decided to hold a non-statutory public inquiry and appointed Mr. Vivian Chapman, a barrister with great experience of this branch of the law, to act as inspector. Mr. Chapman sat for two days in the village hall, received written and oral evidence and heard legal submissions. He submitted a report to the county council in which he made various findings of fact which the county council accepted. I shall refer to these later. But he recommended that the application be refused on the ground that the user of the land by the villagers had not been shown to be "as of right." In coming to this conclusion, he followed the decision of the Court of Appeal in *Reg. v. Suffolk County Council, Ex parte Steed* (1996) 75 P. & C.R. 102 which held that "as of right" meant that the right must be exercised in the belief that it is a right enjoyed by the inhabitants of the



village to the exclusion of all other people. In the present case, the witnesses all said that they thought they had the right to use the glebe. But they did not say that they thought that the right was confined to inhabitants of the village. Some thought it was a general public right and others had no views on the matter. This was held to be fatal to the application.

The parish council applied for judicial review of the county council's decision. Buxton J. refused leave and the application was renewed before the Court of Appeal (Lord Woolf M.R., Waller and Robert Walker L.JJ.). They decided that they were bound by *Reg. v. Suffolk County Council, Ex parte Steed* to dismiss the application. But they also expressed the view that your Lordships might think that that case was wrongly decided. The Court of Appeal therefore granted leave to move for judicial review, dismissed the substantive application and gave leave to appeal to your Lordships' House.

The principal issue before your Lordships thus turns on the meaning of the words "as of right" in the definition of a green in section 22(1) of the Act of 1965. The language is plainly derived from judicial pronouncements and earlier legislation on the acquisition of rights by prescription. To put the words in their context, it is therefore necessary to say something about the historical background.

Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment. But the principles upon which they achieve this result may be very different. In systems based on Roman law, prescription is regarded as one of the methods by which ownership can be acquired. The ancient *Twelve Tables* called it usucapio, meaning literally a taking by use. A logical consequence was that, in laying down the conditions for a valid usucapio, the law concerned itself with the nature of the property and the method by which the acquirer had obtained possession. Thus usucapio of a res sacra or res furtiva was not allowed and the acquirer had to have taken possession in good faith. The law was not concerned with the acts or state of mind of the previous owner, who was assumed to have played no part in the transaction. The periods of prescription were originally one year for moveables and two years for immoveables, but even when the periods were substantially lengthened by Justinian and some of the conditions changed, it remained in principle a method of acquiring ownership. This remains the position in civilian systems today.

English law, on the other hand, has never had a consistent theory of prescription. It did not treat long enjoyment as being a method of acquiring title. Instead, it approached the question from the other end by treating the lapse of time as either barring the remedy of the former owner or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment. Thus the medieval real actions for the recovery of seisin were subject to limitation by reference to various past events. In the time of Bracton the writ of right was limited by reference to the accession of Henry I (1100). The Stat-

ute of Merton 1235 (20 Hen. 3, c. 4) brought this date up to the accession of Henry II (1154) and the Statute of Westminster I 1275 (3 Edw. 1, c. 39) extended it to the accession of Richard I in 1189.



The judges used this date by analogy to fix the period of prescription for immemorial custom and the enjoyment of incorporeal hereditaments such as rights of way and other easements. In such cases, however, the period was being used for a different purpose. It was not to bar the remedy but to presume that enjoyment was pursuant to a right having a lawful origin. In the case of easements, this meant a presumption that there had been a grant before 1189 by the freehold owner.

As time went on, however, proof of lawful origin in this way became for practical purposes impossible. The evidence was not available. The judges filled the gap with another presumption. They instructed juries that if there was evidence of enjoyment for the period of living memory, they could presume that the right had existed since 1189. After the Limitation Act 1623 (21 Jac. 1, c. 16), which fixed a 20-year period of limitation for the possessory actions such as ejectment, the judges treated 20 years' enjoyment as by analogy giving rise to the presumption of enjoyment since 1189. But these presumptions arising from enjoyment for the period of living memory or for 20 years, though strong, were not conclusive. They could be rebutted by evidence that the right could not have existed in 1189; for example, because it was appurtenant to a building which had been erected since that date. In the case of easements, the resourcefulness of the judges overcame this obstacle by another presumption, this time of a lost modern grant. As Cockburn C.J. said in the course of an acerbic account of the history of the English law of prescription in *Bryant v. Foot* (1867) L.R. 2 Q.B. 161, 181:

> "Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed."

The result of these developments was that, leaving aside the cases in which (a) it was possible to show that the right could not have existed in 1189 and (b) the doctrine of lost modern grant could not be invoked, the period of 20 years' user was in practice sufficient to establish a prescriptive or customary right. It was not an answer simply to rely upon the improbability of immemorial user or lost modern grant. As Cockburn C.J. observed, the jury were instructed that if there was no evidence absolutely inconsistent with there having been immemorial user or a lost modern grant, they not merely could but should find the prescriptive right established. The emphasis was therefore shifted from the brute fact of the right or custom having existed in 1189 or there having been a lost grant (both of which were acknowledged to be 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 Corporation* (1867) L.R. 2 C.P. 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. So in *Dalton v. Angus & Co.* (1881) 6App.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 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."

In the case of easements, the legislature intervened to save the consciences of judges and juries by the Prescription Act 1832 (2 & 3 Will 4, c. 71), of which the short title was "An Act for shortening the Time of Prescription in certain cases." Section 2 (as amended by the Statute Law Revision (No. 2) Act 1888 (51 & 52 Vict. c. 57), section 1, Schedule and the Statute Law Revision Act 1890 (53 & 54 Vict. c. 33), section 1, Schedule 1) provided:

> "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement ... when such way or other matter ... shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated ..."

Thus in a claim under the Act, what mattered was the quality of enjoyment during the 20-year period. It had to be by a person "claiming right thereto" or, in the language of section 5 of the same Act (as amended by the Act of 1888), which dealt with the forms of pleadings, "as of right." In *Bright v. Walker* (1834) 1 C.M. & R. 211, 219, two years after the passing of the Act, Parke B. explained what these words meant. He said that the right 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. In *Gardner v. Hodgson's Kingston Brewery Co. Ltd.* [1903] A.C. 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." (See also *per* Cotton L.J. in *Earl De la Warr v. Miles* (1881) 17 Ch.D. 535, 596.)

My Lords, I pass now from the law concerning the acquisition of private rights of way and other easements to the law of public rights of way. Just as the theory was that a lawful origin of private rights of way could be found only in a grant by the freehold owner, so the theory was that a lawful origin of public rights of way could be found only in a



dedication to public use. As in the case of private rights, such dedication would be presumed from user since time immemorial, that is, from 1189. But the common law did not supplement this rule by fictitious grants or user which the jury were instructed to presume. In *Mann v. Brodie* (1885) 10 App.Cas. 378, 385-386, Lord Blackburn said:

> "In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period ... But this has never been done in the case of a public right of way."

He contrasted the English law on the subject with that of Scotland, which as Lord Watson explained, at pp. 390-391, followed the Roman model:

> "According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. Lord Stair states prescription to be a rule of 'positive law, founded upon utility rather than equity,' and he adds, that, in Scotland, the

> common rule is by the course of 40 years, 'but there must be continued possession free from interruption.' According to Erskine, 'positive prescription is generally defined by our lawyers as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose.'"

In England, however, user for any length of time since 1189 was merely evidence from which a dedication could be inferred. The quality of the user from which dedication could be inferred was stated in the same terms as that required for private rights of way, that is to say, nec vi, nec clam, nec precario. But dedication did not have to be inferred; there was no presumption of law. In *Mann v. Brodie* Lord Blackburn put the rationale as follows, at p. 386:

> "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

My Lords, I pause to observe that Lord Blackburn 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 C.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.

The difficulty in the case of public rights of way was that, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated such use: see *Folkestone Corporation v. Brockman* [1914] A.C. 338. On this point the law on public rights of way differed not only from Scottish law but also from that applicable to private easements. This made the outcome of cases on public rights of way very unpredictable and was one of the reasons for the passing of the Rights of Way Act 1932, of which section 1(1) provided:

> "Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ..."

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 Act of 1832. Introducing the Bill into the House of Lords (H.L. Debates), 7 June 1932, col. 637, Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way. It therefore seems safe to assume that "as of right" in the Act of 1932 was intended to have the same meaning as those words in section 5 of the Act of 1832 and the words "claiming right thereto" in section 2 of that Act.

My Lords, this was the background to the definition of a "town or village green" in section 22(1) of the Act of 1965. At that time, there had been no legislation for customary rights equivalent to the Act of 1832 for ease-

ments or the Act of 1932 for public rights of way. Proof of a custom to use a green for lawful sports and pastimes still required an inference of fact that such a custom had existed in 1189. Judges and juries were generous in making the required inference on the basis of evidence of long user. If there was upwards of 20 years' user, it would be presumed in the absence of evidence to show that it commenced after 1189. But the claim could still be defeated by showing that the custom could not have existed in 1189. Thus in *Bryant v. Foot*, L.R. 2 Q.B. 161, a claim to a custom by which the rector of a parish was entitled to charge 13s. for performing a marriage service, although proved to have been in existence since 1808, was rejected on the ground that having regard to inflation it could not possibly have existed in the reign of Richard I. It seems to me clear that class c in the definition of a village green must have been based upon the earlier Acts and intended to exclude this kind of defence. The only



difference was that it allowed for no rebuttal or exceptions. If the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years, the land was a town or village green. But there is no reason to believe that "as of right" was intended to mean anything different from what those words meant in the Acts of 1832 and 1932.

In *Reg. v. Suffolk County Council, Ex parte Steed*, 75 P. & C.R. 102, 111-112 Pill L.J. also said that "as of right" in the Act of 1965 had the same meaning as in the Act of 1932. In holding that it required "an honest belief in a legal right to use ... as an inhabitant ... and not merely a member of the public" he followed dicta in three cases on the Act of 1932 and its successor legislation, section 31(1) of the Highways Act 1980, which I must now examine.

The first was *Hue v. Whiteley* [1929] 1 Ch. 440, a decision of Tomlin J. before the Act of 1932. The dispute was over the existence of a public footpath on Box Hill and the judge found, at p. 444, that for 60 years people had "used the track to get to the highway and to the public bridle- road as of right, on the footing that they were using a public way." Counsel for the landowner, in reliance on *Attorney-General v. Antrobus* [1905] 2 Ch. 188 (which concerned the tracks around Stonehenge), argued that the user should be disregarded because people used the path merely for recreation in walking on Box Hill. The judge said, at p. 445, that this made no difference:

> "A man passes from one point to another believing himself to be using a public road, and the state of his mind as to his motive in passing is irrelevant. If there is evidence, as there is here, of continuous user by persons as of right (i.e., believing themselves to be exercising a public right to pass from one highway to another), there is no question such as that which arose in *Attorney-General v. Antrobus*."

The decision in the case was that the reasons why people used the road were irrelevant. It was sufficient that they used it as of right. I rather doubt whether, in explaining this term parenthetically as involving a belief that they were exercising a public right, Tomlin J. meant to say more than Lord Blackburn had said in *Mann v. Brodie*, 10 App.Cas. 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant.

Tomlin J.'s parenthesis was picked up by the Court of Appeal in *Jones v. Bates* [1938] 2 All E.R. 237. The defendant asserting a right of footpath adduced overwhelming evidence of user for many years, including evidence of the plaintiff landowner's predecessors in title that they had never stopped people from using the path because they thought it was a public right of way. The judge in the Hastings County Court nevertheless rejected

this evidence as insufficient to satisfy section 1(1) of the Act of 1932. The Court of Appeal by a majority held that he must have misdirected himself on the law (there was then no right of appeal on fact from a county court) and ordered a new trial. But the case contains some observations on the law, including a valuable exposition by Scott L.J. of the background to the Act of 1932. The two majority judgments of Slesser and Scott L.JJ. both cite Tomlin J.'s parenthesis with approval. But the question of whether it is necessary to prove the subjective state of mind of users of the road in addition to the outward appearance of user did not arise and was not discussed.

Slesser L.J., at p. 241, after citing Tomlin J.'s parenthesis, went on to say that "as of right" in the Act of 1932 had the meaning which Cotton L.J. had given to those words in the Act of 1832 in *Earl De la Warr v. Miles*, 17 Ch.D. 535, 596: "not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done." This makes one doubt whether he was concerned with the subjective minds of the users.

Scott L.J., at p. 245, also quoted Tomlin J. with approval but went on to say:

> "It is doubtless correct to say that negatively [the words 'as of right'] import the absence of any of the three characteristics of compulsion, secrecy or licence - 'nec vi, nec clam, nec precario,' phraseology borrowed from the law of easements - but the statute does not put on the party asserting the public right the onus of proving those negatives ..."

Scott L.J. was concerned that the county court judge had placed too high a burden upon the person asserting the public right. If he proved that the right had been used so as to demonstrate belief in the existence of a public right of way, that was enough. The headnote to *Jones v. Bates* summarises the holding on this point in entirely orthodox terms:

> "(i) The words in the Rights of Way Act 1932, section 1(1), 'actually enjoyed by the public as of right and without interruption,' mean that the way has been used without compulsion, secrecy or licence, nec vi, nec clam, nec precario."

Finally in *Reg. v. Suffolk County Council, Ex parte Steed*, 75 P. & C.R. 102, 112 Pill L.J. referred to his own discussion of the subject at first instance in *O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42, 52. On the basis of passages from *Jones v. Bates* he had there expressed the view that "as of right" meant user "which was not only nec vi, nec clam, nec precario but was in the honest belief in a legal right to use." But he rejected the further submission that the users should know the procedures by which the right had come into existence.

My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J. in *Hue v. Whiteley* [1929] 1 Ch. 440 has led the courts into imposing upon the time-honoured expression "as of right" a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription. There is in my view an unbroken line of



descent from the common law concept of nec vi, nec clam, nec precario to the term "as of right" in the Acts of 1832, 1932 and 1965. It is perhaps worth observing that when the Act of 1832 was passed, the parties to an action were not even competent witnesses and I think that Parke B. would have been startled by the proposition that a plaintiff asserting a private right of way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as ev-

idence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like *Reg. v. Suffolk County Council, Ex parte Steed* when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr. J. G. Riddall's article "A False Trail" [1997] Conv. 199.

I therefore consider that *Steed's case* was wrongly decided and that the county council should not have refused to register the glebe as a village green merely because the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of the village. That was the only ground upon which Mr. Chapman advised the council to reject the application. But Miss Cameron, who appeared for the board, submitted that it should have been rejected for other reasons as well. Although these grounds did not form the basis of any cross-appeal, your Lordships considered that rather than put the parties to the expense of further consideration by the county council followed by further appeals, it would be convenient to consider their merits now.

The first point concerned the nature of the activities on the glebe. They showed that it had been used for solitary or family pastimes (walking, tobogganning, family games) but not for anything which could properly be called a sport. Miss Cameron said that this was insufficient for two reasons. First, because the definition spoke of "sports and pastimes" and therefore, as a matter of language, pastimes were not enough. There had to be at least one sport. Secondly, because the "sports and pastimes" in class *c* had to be the same sports and pastimes as those in respect of which there could have been customary rights under class b and this meant that there had to be some communal element about them, such as playing cricket, shooting at butts or dancing round the maypole. I do not accept either of these arguments. As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an



activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class. As for the historical argument, I think that one must distinguish between the concept of a sport or pastime and the particular kind of sports or pastimes which people have played or enjoyed at different times in history. Thus in *Fitch v. Rawling* (1795) 2 H.B1. 393, Buller J. recognised a custom to play cricket on a village green as having existed since the time of Richard I, although the game itself was unknown at the time and would have been unlawful for some centuries thereafter: see *Mercer v. Denne* [1904] 2 Ch. 534, 538-539, 553. In *Abercromby v. Town Commissioners of Fermoy* [1900] 1 I.R. 302 the Irish Court of Appeal upheld a custom for the inhabitants of Fermoy to use a strip of land along the river for their evening passeggiata. Holmes L.J. said, at p. 314, that popular amusement took many shapes: "legal principle does not require that rights of this nature should be limited to certain ancient pastimes." In any case, he said, the Irish had too much of a sense of humour to dance around a maypole. Class c is concerned with the creation of town and village greens after 1965 and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J. in *Reg. v. Suffolk County Council, Ex parte Steed* (1995) 70 P. & C.R. 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right. In the present case, however, Mr. Chapman found "abundant evidence of use of the glebe for informal recreation" which he held to be a pastime for the purposes of the Act.

This brings me conveniently to Miss Cameron's second point, which was that the evidence of user was too broad. She said that the evidence showed that the glebe was also used by people who were not inhabitants of the village. She relied upon *Hammerton v. Honey* (1876) 24 W.R. 603, 604, in which Sir George Jessel M.R. said:

> "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."

That was with reference to a claim to a customary right of recreation and amusement, that is to say, a class b green. Class c requires merely proof of user by "the inhabitants of any locality." It does not say user *only* by the inhabitants of the locality, but I am willing to assume, without deciding, that the user should be similar to that which would have established a custom.

In my opinion, however, the findings of fact are sufficient to satisfy this test. It is true that people from outside the village regularly used the footpath. It formed part of a network of Oxfordshire Circular Walks. But there was little evidence of anyone other than villagers using the glebe for games or pastimes. Mr. Chapman does record one witness as saying that he had seen strangers enjoying informal recreation there. He summed up the position as follows:



"The evidence of the [parish council's] witnesses and of the members of the public who gave evidence was that informal recreation on the glebe as a whole (as opposed to use of the public footpath) was predominantly, although not exclusively, by inhabitants of the village. This made sense because there is nothing about the glebe to attract people from outside the village. The [board] accepted that the village was capable of being a 'locality'..."

I think it is sufficient that the land is used predominantly by inhabitants of the village.

Miss Cameron's third and final point was that the use of the glebe was not as of right because it was attributable to neighbourly toleration by successive rectors and the board. She relied upon the following passage in Mr. Chapman's report:

> "It appears to me that recreational use of the glebe is based on three factors. First, the glebe is crossed by an unfenced footpath so that there is general public access to the land and nothing to prevent members of the public straying from the public footpath. Second, the glebe has been owned not by a private owner but by the rector and then the board, who have been tolerant of harmless public use of the land for informal recreation. Third, the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use and has been tolerated by the tenant or grazier."

I should say that I do not think that the reference to people "straying" from the footpath was intended to mean that recreational user was confined to people who set out to use the footpath but casually or accidentally strayed elsewhere. That would be quite inconsistent with the findings of user which must have involved a deliberate intention to go upon other parts of the land. I think Mr. Chapman meant only that the existence of the footpath made it easy for people to get there. But Miss Cameron's substantial point was based upon the finding of toleration. That, she said, was inconsistent with the user having been as of right. In my view, that proposition is fallacious. As one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right: see also *per* Dillon L.J. in *Mills v. Silver* [1991] Ch. 271, 281. When proof of a public right of way required a finding of actual dedication, the jury were entitled to find that such user was referable to toleration rather than dedication: *Folkestone Corporation v. Brockman* [1914] A.C. 338. But this

did not mean that the user had not been as of right. It was a finding that there had been no dedication despite the user having been as of right. The purpose of the Act of 1932 was to make it unnecessary to infer an actual dedication and, in the absence of specific rebutting evidence, to treat user as of right as sufficient to establish the public right. *Alfred F. Beckett Ltd. v. Lyons* [1967] Ch. 449, in which the court was invited to infer an ancient grant to the Prince Bishop of Durham, in trust for the inhabitants of the county, of the right to gather coal on the sea-shore, was another case in which the question was whether an actual grant could be inferred. One of the reasons given by the Court of



Appeal for rejecting the claim was that the coal gathering which had taken place could be referable to tolerance on the part of the Crown as owner of the sea-shore. But the establishment of a class c village green does not require the inference of any grant or dedication. As in the case of public rights of way or private easements, user as of right is sufficient. Mr. Chapman's remarks about toleration are therefore, as he himself recognised, not inconsistent with the quality of the user being such as to satisfy the class c definition.

Miss Cameron cautioned your Lordships against being too ready to allow tolerated trespasses to ripen into rights. As Bowen L.J. said in *Blount v. Layard* [1891] 2 Ch. 681n., 691:

> "nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

On the other hand, this consideration, if carried too far, would destroy the principle of prescription. A balance must be struck. In passing the Act of 1932, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use. As Scott L.J. pointed out in *Jones v. Bates* [1938] 2 All E.R. 237, 249, there was a strong public interest in facilitating the preservation of footpaths for access to the countryside. And in defining class c town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes. It may be that such user is attributable to the tolerance of past rectors of Sunningwell, but, as Evershed J. said of the origins of a public right of way in *Attorney-General v. Dyer* [1947] Ch. 67, 85-86:

> "It is no doubt true, particularly in a relatively small community... that, in the early stages at least, the toleration and neighbourliness of the early tenants contributed substantially to the extent and manner of the use of the lane. But many public footpaths must be no less indebted in their origin to similar circumstances, and if there is any truth in the view (as stated by Chief Justice Cardozo) that property like other social institutions has a social function to fulfil, it may be no bad thing that the good nature of earlier generations should have a permanent memorial."

I would allow the appeal and direct the Oxfordshire County Council to register the glebe as a village green.

LORD HOBHOUSE OF WOODBOROUGH. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons given by him I would also make the order he proposes.



LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons he gives I, too, would allow the appeal and make the order he proposes.

*Appeal allowed with costs. Declared, that Sunninghill Glebe village green within meaning of Commons Registration Act 1965 County council to be directed to amend commons register accordingly. Cause remitted to Queen's Bench Division.*

Solicitors: Pryce & Co., Abingdon; Winckworth Sherwood, Oxford.

M.G.

**[CHANCERY DIVISION]**

## WHITE AND OTHERS v. TAYLOR AND ANOTHER (No. 2) [1963 W. No. 92]

**1967 Nov. 27, 28, 29, 30; Dec. 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 18, 19, 20, 21; 1968 Feb. 12**

**BUCKLEY J.**

*Profit à Prendre - Common - Rights of - Depasturing sheep - Auction lots sold "together with" sheep rights - Sales recorded in common form memorandum of agreement - Common sold shortly after "subject to [sheep] rights" - Subsequent conveyances of auction lots - "Together with such right of common … as appertains or belongs" or "together with right of common … appertaining or belonging" - Only equitable right subsisting at date of conveyance - Whether right conveyed.*

*Common Rights - Pasture - Appurtenant to land conveyed - Auction particulars showing pasture down in common ownership with auction lots - No rights appurtenant or reputedly appurtenant - Not "enjoyed with" auction lots, or arising by estoppel - No sufficient user to establish prescriptive right - Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6 (1).*

*Vendor and Purchaser - Boundary - Hedge between close and waste land - Presumption of ownership of hedge - Ownership in owner of close.*

On June 17, 1920, the owner of Martin Down and a number of neighbouring properties offered them for sale by auction. The properties were divided into 38 lots, lot 38 being the down itself, and the other 37 lots being various farms, smallholdings, cottages and fields. In the printed particulars of sale the descriptions of the several lots was preceded by general remarks, inter alia:

> "All lots are sold subject to the right of purchasers of any other lot or lots to the use of the wells on such … lots as heretobefore accustomed. Practically all the land carries sheep rights on Martin Down, the numbers being shown against each lot, and Martin Down is sold subject to such rights and any other rights (if any) thereover as stated in the conditions for sale."

The description of most of the lots included a statement: "This lot carries X sheep rights on Martin Down." The description of the down itself stated:

"This lot is sold subject to all sheep rights as set forth in these particulars against each lot also to all other existing sheep rights appertaining to lands not included in this sale and to all other rights (if any) affecting the same and not vested in the vendor."

Where copyhold interests for lives or widowhoods still subsisted at the date of the sale in closes included in some of the lots, the description of the lot affected contained their particulars.

On the day of the auction sale, i.e., June 17, each of the sales was recorded in a memorandum of agreement in a common form.

*[1969] 1 Ch. 160 Page 161*

By a conveyance dated October 21, 1920, the down was conveyed to the defendants' predecessor in title, in fee simple

"subject to ... all rights easements and privileges in the nature of easements or quasi easements and privileges in over upon or affecting ... whether existing by grant prescription custom agreement or license or otherwise howsoever. ..."

Between October 21, 1920, and November 10, 1920, by various conveyances some of the lots were conveyed to the plaintiffs' predecessors in title, in fee simple

"together with such right of common pasture for sheep on Martin Down as appertains or belongs to the ... hereditaments hereby conveyed or any part or parts thereof" ("formula A").

By a conveyance dated November 15, 1920, one lot was conveyed:

"together with the right of common of pasture for sheep on Martin Down to the ... hereditaments or some part or parts thereof appertaining or belonging" ("formula B").

Other lots were conveyed without a reference to sheep rights.

All the six plaintiffs claimed rights arising out of those conveyances and four of them also claimed rights by virtue of their ownership of other land in the neighbourhood which was formerly partly glebe land and partly freehold land belonging to one Street ("Glebe and Street lands"). None of those lands had been included in the auction sale.

From September, 1939, until June, 1958, 45 acres of the down were in the occupation of the War Department, first under requisition and later under a lease. During that period it was used as a rifle range, and grazing was impracticable. Between 1941 and 1947 a further 182 acres were requisitioned at various dates by the Ministry of Agriculture and Fisheries. That land was in the occupation of a farmer until September, 1959. He ploughed and cultivated it. It was put back to grass when the farmer gave up possession. In 1954 the Ministry acquired the freehold estate in the land and in September, 1959, entered into an arrangement with a body called the Martin Down Grazing Rights Association by which the land, or possibly the right to graze it, was let at a rent to the association. The association, which was an unincorporated body consisting of persons claiming grazing rights on the down, let the right to graze the area to certain of its members for payment. That continued until May, 1962.

For nearly one hundred years a well had existed on the down. It had possibly been dug for use by persons needing water on the down primarily to facilitate watering livestock and was in use up to about 1920 when it fell out of use and was covered with planks and timbers. In about 1925, it was restored to use when a windlass was installed for drawing water, and was used for watering sheep from that time until some time during the second world war, when it again fell into disuse. No use had been made



of it since. While it was in use some, but not all, of the owners of sheep on the down used it as a source of water for their sheep, water being drawn from it to fill troughs placed nearby on the down. Other owners of sheep were accustomed to water their flocks with water carted from Martin village which was put into troughs on the down near the mouth of one or other of the public lanes leading from the village to the down. No water was naturally available on the down.

By a writ taken out on January 9, 1963, the plaintiffs claimed, inter alia, sheep rights over the down in respect of the land sold at the 1920 auction and Glebe and Street lands. As regards the land sold at the auction, they based their claim on the circumstances of the auction sale, and on the true construction of various conveyances; alternatively, on the operation of section 6 of the Conveyancing and Law of Property Act, 18811; and in the further alternative on prescription. As regards Glebe and Street lands their claims were based on prescription. The writ also claimed, as incidental to the sheep rights, rights to use the well on the down and to maintain and replenish troughs for watering sheep.

By their counterclaim the defendants alleged, inter alia, that in 1962 the fourth plaintiff wrongfully removed about ten yards of their boundary hedge and that he had erected a wooden gateway and a paling fence. The defendants, therefore, sought an order that the fourth plaintiff should remove the gateway and fence and should replace the hedge.

*Held*, (1) that at law no rights of common could exist by reason of the common ownership of the down and other lots at the date of the sale and thus the formulae A and B in the conveyances could not convey any such rights, but that the operation of the formulae was not confined to rights existing at law; and that if such rights appertained or belonged in equity to the lots conveyed they could fall within the language of the formulae (post, p. **179C, D, 180A**).

*Whalley v. Thompson* (1799) 1 Bos. & P. 371 followed.

*Per curiam*. A right to graze sheep on the down would not be properly called an easement: it would be a profit, a right over or upon or affecting the down (post, p. **177E**).

(2) That to discover whether, immediately before the conveyances, the rights appertained or belonged in equity to the properties conveyed and were capable of passing under the conveyances, the court was entitled to look at the contracts for sale

1 Conveyancing and Law of Property Act, 1881, s. 6: "(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

and to apply the language of the conveyances to the circumstances existing at the moment of their execution (post, p. **180E-G**).

*Doe d. Norton v. Webster* (1840) 12 A. & E. 442 and *Leggott v. Barrett* (1880) 15 Ch.D. 306, C.A. followed.

(3) That the particulars of sale showed that the vendor intended the purchasers of the several lots (other than the down), which were stated to carry sheep rights, to acquire with those lots the sheep rights as specified, and the purchaser of the down to acquire it subject to such rights; that each of the sales having been recorded in a memorandum of agreement on the same day in a common form, on entering into the contracts the purchasers became entitled in equity to the sheep rights as appurtenant to the several lots and the vendor became a trustee for them; and that the circumstances on which the language of the conveyances operated was governed by the contracts; that, accordingly, the conveyances employing formulae A and B were effective to grant sheep rights over the down consistent with the particulars of sale (post, pp. **181C, D, 183C**); and the language of the habendum of the conveyance of the down conveyed it subject to the sheep rights existing in equity (post, p. **184C, D**).

*Beddington v. Atlee* (1887) 35 Ch.D. 317 followed.

(4) That where a right of common pasture was appurtenant to a hereditament, the ownership of which was severed, the right was severable so as to appertain partly to one section and partly to the other of the severed hereditament (post, p. **189F**); and that in the absence of any special circumstances, the right should be apportioned rateably between the area of the part which was alienated and that which was retained (post, p. **190F**). Accordingly, the plaintiffs were entitled to sheep rights rateably apportioned to the area of their respective holdings.

*Wyat Wyld's Case* (1609) 8 Co.Rep. 78b; *Mors v. Webbe* (1609) 2 Br. & G. 297; *Sacheverell v. Porter* (1637) Cro.Car. 482 and *Smith v. Bensall* (1597) Gouldsb., 117 followed.

(5) That enjoyment of grazing facilities on the down by tenants of the lord of the manor holding under leases or tenancy agreements could not establish a reputation of rights appurtenant to the lands comprised in their holdings, and thus could not be said to be "appertaining or reputed to appertain to the land or any part thereof," within section 6 of the Act of 1881 (post, p. **185A-C**); that to prove that the relevant grazing rights were at the time of conveyance "enjoyed with" their lots, the plaintiffs had to show grants to them or to their predecessors in title of rights to graze that number of sheep or that in 1920 a particular number of sheep was being depastured on the down in respect of the lands now owned by them, but that the plaintiffs had failed to discharge that onus; that having regard to the circumstances surrounding the sales which were synchronal, the purchasers must have had notice that in law the rights could not be appurtenant to the lots; that the plaintiffs, therefore, could not successfully rely on the sale particulars as containing admissions or representations as to sheep rights which could be binding on the defendants either as admissions



made by a predecessor in title or by estoppel, and that, therefore, the rights could not be said to be "reputed or known as part or parcel of or appurtenant to the land or any part thereof," within section 6 (post, pp. **185D - 186A, D - 187A**).

*White v. Williams* [1922] 1 K.B. 727, C.A. considered.

(6) That to make good a prescriptive claim in the present case it was not necessary for a claimant to establish that he and his predecessors in title had exercised the right continuously, the right being a profit of a kind that, of its nature, would only be used intermittently, but the user must be shown to have been of such a character, degree and frequency as to indicate an assertion of a continuous right (post, p. **192E, F**); that the evidence did not support 30-year user so as to bring it within section 1 of the Prescription Act, 1832; that common law prescription could not be relied upon because of the united ownership before 1920; and that the doctrine of lost modern grant could not be prayed in aid because for the doctrine to apply the inference which would have to be made was that between June, 1920, and October, 1959, five separate grants were made, all of which had since been lost and nothing was known of them.

Observations of Lindley L.J. in *Hollins v. Verney* (1884) 13 Q.B.D. 304, 315, C.A. applied.

(7) That the plaintiffs had not established that the use of the well was necessary to the enjoyment of their rights to graze sheep on the down (since during a considerable period no use had been made of it), and that consequently they had not substantiated their claim to be entitled to use it; that in 1920 the watering of sheep which were grazing on Martin Down was regarded as being, and was in fact, necessary for the reasonable enjoyment of the right and the same remained so at the present time; and that, accordingly, the plaintiffs who had established sheep rights on the down were entitled, as an ancillary right under an implied grant, to water their sheep on the down by means of suitably located troughs supplied by carted water (post, pp. **197D, 198B, D-F**).

*Jones v. Pritchard* [1908] 1 Ch. 630; 24 T.L.R. 309 and *Pwllbach Colliery Co. Ltd. v. Woodman* [1915] A.C. 634, H.L.(E.) applied.

(8) That where there was a fenced close adjoining a piece of waste land, the fence, in the absence of evidence to the contrary, should be presumed to belong to the owner of the close; and that, accordingly, the hedge belonged to the fourth plaintiff, and the defendants were not entitled to the relief sought (post, p. **200E, F**).

**Action.**

On January 9, 1963, a writ was taken out by six plaintiffs, namely, Reginald Ernest White, of King's Farm, Martin, Fording bridge, Hants; John Ashley Densham, of Lower Allenford Farm. Damerham, Fording bridge, Hants; Mrs. Elizabeth Turner, of Drove End, Martin; Arthur Edward Singleton, of Drove End, Martin, Edward John Hart Baker, of Bustard Manor Farm, East



Martin; Harold Sidney Frampton, of Garretts Farm, Martin, against the defendants, Reginald Albert Taylor, of "Birch Coppice," Stour Way, Christchurch, Hants and Martin Down Ltd., of 20 Parkstone Road, Poole, Dorset.

The plaintiffs sought, inter alia, declarations: (1) that they were entitled to the rights of common of pasture of sheep appertaining to or conveyed with their respective lands situate at Martin, over part of Martin Down owned or occupied by the defendants;

(2) that they were entitled, as incidental to the rights of common of pasture to use the well on the defendants' land and to maintain and replenish from time to time troughs on the defendants' land for watering sheep grazed by the plaintiffs;

(3) that they had a right of way over the existing tracks on the defendants' lands for watering and obtaining access to sheep depastured there, and that there existed public rights of way on parts of the down.

In their counterclaim the defendants sought certain orders against the first plaintiff and a declaration about sheep rights. (Those points are not included in the report.)

By the counterclaim the defendants alleged that at some date in 1962 the fourth plaintiff wrongfully removed or caused to be removed some ten yards of the defendants' boundary hedge and that, in its place, he erected a substantial wooden gateway and a paling fence. The defendants therefore, sought an order that the fourth plaintiff should remove the wooden gateway and paling fence and should replace the hedge.

The second, third, fourth and fifth plaintiffs died after the writ was issued and orders to carry on had been made bringing in their respective personal representatives as plaintiffs.

The facts are fully stated in the judgment.

**Peter Oliver Q.C.** and **W. H. Goodhart** for the plaintiffs: Where there is in the conveyances, here, a grant of rights of common, it is in the form of a specific grant by way of rights appertaining and belonging. Before 1926 the rule was that a mere reference to appurtenances in a conveyance, where the conveyance was by the common owner, was not in general sufficient to operate as a grant by way of legal rights previously exercised as quasi easements by the common owner over the retained land. The mere use of the word "appurtenance" would not carry a quasi-easement with it unless there was some



other indication, e.g., a reference to rights "actually enjoyed", that a new grant was intended: *Whalley v. Thompson*2; *Bradshaw v. Eyre*3; *Worledg v. Kingswell*4; *Clements v. Lambert*.5 However, that general rule can be displaced. There was an inroad made into the general rule in *Doidge v. Carpenter*.6 In that case the general rule was not applied and it was explained in *Thomas v. Owen*,7 where it became clear that the word "appurtenance" is readily susceptible to secondary meaning. In *Baring v. Abingdon*8 the court said that there is no necessary inference that general words convey rights to the parties. But the parties' intentions can be found in other ways. For instance, they might have been landlord and tenant. Special circumstances from which the inference could be made were found in *Hansford v. Jago*.9 [Reference was made to *May v. Belleville*10] In the present case the intention is clear. There could be no "appurtenant" right over the down which was in the same ownership and therefore one is forced to look for a secondary meaning. This is to be found by reference to the particulars of sale which can be looked at to explain a latent ambiguity in the conveyance.

Alternatively, in so far as it is necessary to rely on section 6 of the Conveyancing Act, 1881, instead of relying on express grant it has been established that section 6 applied notwithstanding that the right was a profit à prendre in alieno solo; and that the particulars of sale are evidence of the rights and as such are admissible against a vendor: *White v. Williams*.11 [Reference was made to *Wright v. Macadam*.12] That the rights claimed were "reputed" to appertain is clear from the particulars themselves. The right alleged to pass need not be appurtenant or annexed to the land conveyed at the time of the conveyance in order to be enforceable. It need not be a right to which there is any permanent title; mere precarious enjoyment will suffice, so long as the right claimed as passing under section 6, is a right of a kind known to the law. Here, therefore, it

is clear that a right to pasture a number certain is a right which the law recognizes. So far as relates to whether they passed initially to the purchasers in 1920 the only question is whether they were actually enjoyed or were alternatively reputed or known as part and parcel of the land of Sir Eyre Coote at the date of the respective conveyances.

2 (1799) 1 Bos. & P. 371.

3 (1597) Cro.Eliz. 570.

4 (1600) Cro.Eliz. 794.

5 (1808) 1 Taunt. 205.

6 (1817) 6 M. & S. 47.

7 (1888) 20 Q.B.D. 225, C.A.

8 [1892] 2 Ch. 374, C.A.

9 [1921] 1 Ch. 322.

10 [1905] 2 Ch. 605.

11 [1922] 1 K.B. 727, C.A.

12 [1949] 2 K.B. 744; [1949] 2 All E.R. 565, C.A.



The best evidence is that of the common owner, which is to be found in the particulars of sale. But there is also the tithe apportionment which refers to the sheep rights attached to the copyhold lands over a very great number of years. It is unnecessary to trace the ownership back so long but it shows that the rights enjoyed a long-standing reputation.

Alternatively the particulars of sale operate as an estoppel which is binding on the vendor and on any successors in title of his estate: *E. R. Ives Investment Ltd. v. High.*13 [Reference was made to *Hollins v. Verney.*14]

The claim to prescription under the Prescription Act, 1832, is also not abandoned, but this depends for its establishment on the evidence as to the exercise of the rights during the required period. It is impossible to urge the claim to common law prescription. This right was previously annexed to the copyhold land, and

when the land vested in Sir Eyre Coote in 1920, with a consequent unity of possession, these copyhold interests must have ceased to exist. But user after 1920 can certainly give rise to a statutory prescription. If the plaintiffs are held to be entitled to the sheep rights claimed the question of apportionment would arise. Bearing in mind the respective holdings of the plaintiffs, a division pro rata according to acreage is the only appropriate method: *Wyat Wyld's case*15; *Mors v. Webbe*16; *Sacheverell v. Porter*17; *Smith v. Bensall.*18

The common for a number certain has no connection with the quality of the land to which it is attached as has a right for beasts levant and couchant: *Richards v. Squibb.*19 It may be aliened so as to become a right in gross, severed from the property of alienor: *Daniel v. Hanslip*20; *Leniel v. Harslop*21; *Drury v. Kent*22; *Bunn v. Channen*23; Cooke on Enclosures, 4th ed. (1864), p. 21. There is power of severance of the right of common on the disposition of freehold: *Lord Darcy v. Askwith*24 and *Smith v. Milward.*25 In the absence of agreement between the owners of different positions of acreage apportionment is the only logical basis. It may be questioned if the outstanding copyhold interest has any effect on rights created on the 1920 sale. If copyhold was surrendered to the lord of the manor that

13 [1967] 2 Q.B. 379; [1967] 2 W.L.R. 789; [1967] 1 All E.R. 504, C.A.

14 (1884) 13 Q.B.D. 304, C.A.

15 (1609) 8 Co. Rep. 78b.

16 (1609) Br. & Gold. 297.

17 (1637) Cro.Car. 482.

18 (1597) Goulds. 117.

19 (1968) 1 Ld.Raym. 726.

20 (1672) 2 Lev. 67.

21 (1672) 3 Keb. 66.

22 (1603) Cro.Jac. 14.

23 (1813) 5 Taunt. 244.

24 (1618) Hob. 234.

25 (1782) 3 Doug. K.B. 70.

extinguished any right of common which subsisted in the copyhold: Halsbury's Laws of England, 3rd ed, Vol. 8 (1954), pp. 334-335; but there is no authority for the proposition that where a copyhold is conveyed to a purchaser of freehold from the lord the same result follows. [Reference was made to *Phillips v. Ball*.26] The position is covered in any event by section 6 of the Conveyancing Act, 1881: see the definition of "land" in section 2.

Whether rights passed by express or by implied grant under the conveyances to the plaintiffs, ancillary rights of watering and way also passed by implied grants: *Pwllbach Colliery Co. Ltd. v. Woodman*.27 These rights are necessary for the enjoyment of the grant: and "necessary" in this context means "reasonably necessary." *Jones v. Pritchard*.28

**H. A. P. Fisher Q.C.** and **A. C. Sparrow Q.C.**, for the defendants. The first question which has to be considered is whether after the conveyance of the down Sir Eyre Coote had the power to grant sheep rights to purchasers by subsequent conveyances. The first document therefore to look at is the conveyance of the down. The reference to rights to depasture sheep found in the conditions of sale is omitted from the conveyance. The words of the habendum are not a warranty and they do not say that the rights in fact exist. A phrase introduced by the words "subject to all rights" is not a proper conveyancing form to create a reservation and exception in favour of the vendor and only refers to rights existing at the date of the conveyance: *May v. Belleville*.29 Even the words "subject to existing easements and quasi-easements" are not apt words to create new rights in favour of the vendor: *Russell v. Harford*.30 If a common owner wishes to reserve a right he must expressly say so: *Wheeldon v. Burrows*.31 Alternatively the words in the conveyances refer to rights easements or quasi-easements and privileges but the sheep rights are profits à prendre and not easements. They, therefore, are not sufficient to create sheep rights: Gale on Easements, (1959) pp. 4, 128 and 361; *Baring v. Abingdon*.32 Putting it at its highest against the defendants, these words could only relate to rights existing immediately prior to the conveyances and not to the rights which had existed but were no longer in existence. Secondly, they must have referred

26 (1859) 6 C.B.N.S. 811.

27 [1915] A.C. 634, 646, H.L.(E).

28 [1906] 1 Ch. 630.

29 [1905] 2 Ch. 605.

30 (1866) L.R. 2 Eq. 507.

31 (1879) 12 Ch.D. 31 C.A.

32 [1892] 2 Ch. 374, C.A.

to something which existed in law at the time of the conveyance, and could not have referred to rights in relation to parcels in common ownership. The word "rights" cannot be construed to include "quasi-rights" and if the lord of the manor had exercised sheep rights and allowed his tenants to exercise those rights that cannot be said to have created "quasi-rights". Further, such words are not apt to create rights which have merged by surrender of the estate created by the freeholder: *Sumner v. Brady*33; *Fort v. Ward*34; *Massam v. Hunter*35; *Hall v. Byron*.36

No extrinsic evidence is admissible to give to the words a meaning contrary to the conveyance. The documents in existence before the conveyances, e.g., contracts for sale, are only admissible if the rights in the conveyances are granted with express reference to them: *Shore v. Wilson*37; *Doe d. Norton v. Webster*38; *Leggott v. Barrett*39 [Reference was made to *Millbourn v. Lyons*.40] In *A. & J. Inglis v. John Buttery & Co.*41 it was held that the court is entitled to look at the surrounding circumstances to see what was meant by the words used in the conveyances; but there is a distinction between looking at the surrounding circumstances and admitting extrinsic evidence. There are exceptions to the rule that reservations and exceptions out of a conveyance must be expressly reserved. They are rights of necessity: *Aldridge v. Wright*42; *Liddiard v. Waldron*43; *In re Webb's Lease, Sandom v. Webb*.44 [Reference was made to *Derry v. Sanders*.45] If, however, the plaintiffs are found to be entitled to sheep rights, apportionment on an area basis is inappropriate because in the tithe apportionment agreement, sheep rights were attributed to particular groups of closes.

There is no evidence to show that any sheep rights were reputed to be attached to the freehold to satisfy section 6 of the Act of 1881. Enjoyment of grazing facilities on the down by tenants of the lord of the manor could not establish such a reputation: [Reference was made to *Birmingham, Dudley and District Banking Co. v. Ross*46; *Gregg v. Richards*47; *Coote v.*

33 (1791) 1 H.Bl. 647.

34 (1598) Moore, K.B. 667.

35 (1610) Yelv. 189.

36 (1877) 4 Ch.D. 667.

37 (1842) 9 Cl. & Fin. 355 H.L.

38 (1840) 12 A. & E. 442.

39 (1880) 15 Ch.D. 306, C.A.

40 [1914] 2 Ch. 231, C.A.

41 (1878) 3 App.Cas. 552, H.L. (Sc.).

42 [1929] 2 K.B. 117, C.A.

43 [1934] 1 K.B. 435, C.A.

44 [1951] Ch. 808; [1951] 2 All E.R. 131, C.A.

45 [1919] 1 K.B. 223, C.A.

46 (1888) 38 Ch.D. 295, C.A.

47 [1926] Ch. 521, C.A.



*Ford.*48] To establish a claim that the rights were "enjoyed with" the land each plaintiff has to establish a right to graze a specified number of sheep. However, in all cases the lots have been split up and the lots sold at the auction sale did not coincide with the pre-existing holdings. On the evidence the plaintiffs have not established that the rights were "enjoyed with" the land within the meaning of section 6 of the Act of 1881. The phrase used in the conditions of sale about the number of sheep rights on Martin Down was merely a description of what was offered for sale and as such was only a statement of intention. Therefore it was not within the words "reputed or known as part or parcel of or appurtenant to the land or any part thereof" of section 6 of the Act of 1881.

The particulars of sale do not contain such admissions or representations as can be binding on the defendants as admissions or representations of their predecessors in title. They do not give rise to any form of estoppel, none of the ingredients of a common law estoppel being present. They do not even give rise to promissory estoppel. Nor can they be within "proprietory estoppel" discussed in *E. R. Ives Investment Ltd. v. High*49: see also *General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society.*50

To establish prescriptive rights each plaintiff will have to show a continuous user for 30 years (*Lowe v. Carpenter*51 for each tenement and for a number certain of sheep. The evidence does not help any of the plaintiffs to prove continuous user.

**Sparrow Q.C.** following: As to the ancillary rights claimed by the plaintiffs, these are easements, if anything, and must therefore be (*a*) certain and capable of grant, as well as being (*b*) necessary for the enjoyment of the principal right. The rights said to have been enjoyed here have existed and varied according to weather, place of entry to the down and situation of the sheep owner's farm. There is uncertainty here. There can be no easement to deposit objects like troughs of water on a piece of land: *In re Ellenborough Park*52; *Copeland v. Greenhalf.*53 To decide on necessity one must analyse the principal right. It is to take herbage by the mouths of the sheep. It is not to maintain sheep on the down for any particular period of time. It is certainly not to take possession of the down by means of the

48 (1900) 17 T.L.R. 58.

49 [1967] 2 Q.B. 379, C.A.

50 (1878) 10 Ch.D. 15.

51 (1851) 6 Exch. 825.

52 [1956] Ch. 131; [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667, C.A.

53 [1952] Ch. 488; [1952] 1 All E.R. 809.



sheep. The plaintiffs' claim assumes a right to maintain sheep on the land for 6 to 8 hours. This is not justifiable. If they can stay this long, why not 24 or 48 hours, with appropriately enlarged ancillary rights? One could then claim to have huts for shepherds and hurdles. This is recognised not to be allowable. There is no true necessity for these rights. As regards the well on the down there is evidence that it was dug nearly a century ago but was not used from the early 20th century to about 1925. It was probably used in the 1930's but has not been used since. [Argument was also presented as to the alleged encroachments].

**Oliver** in reply. All the conveyances in this case stemmed from contemporaneous sales at one auction and nothing can turn on the order in which the conveyances were made. In *Beddington v. Atlee*54. it was decided that, where there were contemporaneous sales from a common owner, it is the order in which the contracts are made which is important and not the order of conveyances: see also *Allen v. Taylor*.55 So far as section 6 of the Act of 1881 is concerned it is immaterial that rights were being enjoyed precariously or by virtue of tenancies from the common owner. [Reference was made to *Cory v. Davies*.56]

**Sparrow** replying on the cases: The cases relied upon to justify ignoring the order of conveyances establish a very limited principle. It is an exception only. It is not a primary principle. The exception operates only where there are special physical circumstances amounting to a necessary dependence on the claimed right, as the cases clearly show. [Detailed reference was made to the cases.] This must be correct because, after all, one is considering a grant by implication. Plainly the exception to the general principle does not operate in the present case. [During the course of argument reference was made to *Carte v. Carte*57; *Elliot v. Crumpe*58; *Joyce v. Williamson*59; *Fitzmaurice v. Bayley*60; and *Ward v. Kirkland*.61]

Cur. adv. vult.

February 12, 1968. BUCKLEY J. read the following judgment: This action is about grazing and other rights over a down in Hampshire. It has been fought with a pertinacity and vigour which

54 (1887) 35 Ch.D. 317

55 (1880) 16 Ch.D. 355

56 [1923] 2 Ch. 95

57 (1744) Ridg.temp. H. 210.

58 (1672) 3 Keb. 8.

59 (1782) 3 Doug. 164.

60 (1860) 9 H.L.Cas. 78.

61 [1967] Ch. 194; [1966] 1 W.L.R. 601; [1966] 1 All E.R. 609.



says much for the powers of endurance of the breed of Hampshire sheep farmers to which the plaintiffs belong. The trial has lasted some 17 days, apart from four days spent on a preliminary point; and when I say that counsel, who have conducted the case with much skill and learning, have referred me to no less than 85 volumes of reports and text books, including a very large number of authorities, ranging in date from the last years of the 16th century to the present time, it will be appreciated that the parties have found advisers worthy of their own mettle. But I do not at all complain of the length of the trial, for there are in this case sufficient distinct causes of action, involving consideration of distinct issues of fact, to furnish at least half a dozen separate and respectable proceedings.

The down is called Martin Down. It lies in that corner of Hampshire where Dorset, Wiltshire and Hampshire adjoin. Its total area is just under 800 acres, of which 172 acres lie north of the road from Blandford to Salisbury and the remainder (with which I am more particularly concerned) lie south of that road. This down was formerly the waste, or part of the waste, of the manor of Martin. It seems that by the year 1920 most of the land which had formerly been copyhold of the manor had, by surrender or otherwise, become ordinary freehold in the hands of the lord of the manor, not subject to any subsisting copyhold tenure. In 1920 the down and most of the adjoining and neighbouring land lying in Hampshire, including most of the village of Martin, were comprised in a settled estate of which Sir Eyre Coote was tenant for life in possession. On June 17, 1920, the down and a number of neighbouring farms and other properties subject to the settlement were sold by auction. The defendants are together the owners in fee simple of so much of the down as lies south of the Blandford to Salisbury road. As such they are successors in title of the purchaser of the down at the auction sale.

Four of the original six plaintiffs, namely, Mr. Densham, Mrs. Turner, Mr. Singleton and Mr. Baker, have died since the writ was issued in January, 1963. Appropriate orders to carry on have been made, bringing in their

respective personal representatives as plaintiffs. For the sake of simplicity, I shall ignore the deaths of these four plaintiffs for the purposes of this judgment and speak of them as if they were still alive.

Each of the six plaintiffs is the owner in fee simple of farm land in the neighbourhood of the down and as such is the successor

*[1969] 1 Ch. 160 Page 173*

in title of a purchaser of such land at the auction sale. I will call these lands "Coote lands." In respect of these Coote lands the plaintiffs by their statement of claim in its final amended form claim the right to depasture on Martin Down - including that part of it which the defendants now own - the following numbers of sheep respectively:-

| | |
|---|---|
| Mr. White ..... | 648 |
| Mr. Densham ..... | 448 |
| Mrs. Turner ..... | 119 |
| Mr. Singleton ..... | 116 |
| Mr. Baker ..... | 265 |
| Mr. Frampton ..... | 141 |

Four of the plaintiffs, Mr. White, Mr. Densham, Mr. Singleton and Mr. Frampton, also owned other land in the neighbourhood of the down which were formerly either glebe land of the parish of Martin or land of ordinary freehold tenure which belonged to one Street. I will call these lands "Glebe and Street lands." None of these lands was included in the auction sale. In respect of these lands the four plaintiffs claim the right to depasture on the down the following numbers of sheep respectively:-

| | |
|---|---|
| Mr. White ..... | 46 |
| Mr. Densham ..... | 52 |
| Mr. Singleton ..... | 121 |
| Mr. Frampton ..... | 42 |

The plaintiffs' claims to sheep rights in respect of Coote lands are based, first, upon the circumstances of the auction sale and upon the true construction and effect of the various conveyances by which the several sales then effected were completed; alternatively, upon the operation of section 6 of the Conveyancing and Law of Property Act, 1881, in respect of those conveyances; and in the further alternative upon prescription. The claims to sheep rights in respect of Glebe and Street lands are based upon prescription alone.

The plaintiffs also claim certain rights upon the down connected with watering their sheep and obtaining access to their sheep there, which are claimed as part of or as incidental to their rights of pasture. It will be convenient to leave these for discussion after the major question of the rights of pasture has been dealt with.

The plaintiffs also claim that certain public rights of way exist across the defendants' land. These I will come to later.

The defendants counterclaim for relief in respect of various

*[1969] 1 Ch. 160 Page 174*

forms of trespass which they claim that some of the plaintiffs have committed on their land. In particular there is a dispute about whether Mr. White has or has not encroached upon the defendants' land by erecting a

fence along a line which he, Mr. White, alleges to be the boundary at that point between his land and the down.

The properties offered for sale at the auction on June 17, 1920, were divided into 38 lots. Lot 38 consisted of the down itself. The other 37 lots consisted of various farms, smallholdings, cottages, fields and so forth. The plaintiffs are now the owners of the whole or parts of the following lots:-

| | |
|---|---|
| Mr. White | All lot 6 and nearly all of lot 7; |
| Mr. Densham | Part of lot 8, all lot 9 and nearly all of lot 11; |
| Mrs Turner | Part of lot 32 and all of lots 33 and 34; |
| Mr. Singleton | Part of lot 31; |
| Mr. Baker | Part of lot 17, part of lot 25, all of lot 30 and the remainder of lot 32; |
| Mr. Frampton | Part of lot 17, part of lot 23, part of lot 28. |

The lots with which I am particularly concerned are consequently lots 6, 7, 8, 9, 11, 17, 23, 25, 28, 30, 31, 32, 33 and 34. Of these the only lots which remain entirely in the ownership of the plaintiffs are lot 6 (Mr. White), lot 9 (Mr. Densham), lot 30 (Mr. Baker), lots 33 and 34 (Mrs. Turner) and lot 32 (of which Mrs. Turner owns part and Mr. Baker the rest).

In the printed particulars of sale the descriptions of the several lots are preceded by general remarks which include this passage:

> "All lots are sold subject to the right of purchasers of any other lot or lots to the use of the wells on such first mentioned lots as heretofore accustomed. Practically all the land carries sheep rights on Martin Down, the numbers being shown against each lot, and Martin Down is sold subject to such rights and any other rights (if any) thereover as stated in the conditions of sale. ..."

The descriptions of most of the lots include a statement in these terms: "This lot carries X sheep rights on Martin Down," the number of sheep rights varying from lot to lot. Thus the lots with which I am particularly concerned are respectively stated to carry the following number of sheep rights:-

| | | |
|---|---|---|
| Lot 6 | ..... | 266 sheep rights |
| Lot 7 | ..... | 390 sheep rights |
| Lot 8 | ..... | 2 sheep rights |
| Lot 9 | ..... | 107 sheep rights |
| Lot 11 | ..... | 354 sheep rights |
| Lot 17 | ..... | 185 sheep rights |
| Lot 23 | ..... | 116 sheep rights |
| Lot 25 | ..... | 117 sheep rights |
| Lot 28 | ..... | 4 sheep rights |
| Lot 30 | ..... | 189 sheep rights |
| Lot 31 | ..... | 155 sheep rights |
| Lot 32 | ..... | 48 sheep rights |
| Lot 33 | ..... | 117 sheep rights |
| Lot 34 | ..... | 59 sheep rights |

The total number of sheep rights so listed in the particulars of sale in respect of all lots described as carrying sheep rights is 2,292. The description of lot 38, that is to say of Martin Down, states that:

> "This lot is sold subject to all sheep rights as set forth in these particulars against each lot, also to all other existing sheep rights appertaining to lands not included in this sale, and to all other rights (if any) affecting the same and not vested in the vendor."

Some copyhold interests for lives or widowhoods still subsisted at the date of the sale in certain closes included in some of these lots. Where this was the case the description of the lot affected contained particulars of the outstanding copyhold interests. Condition 3 of the special conditions applicable to the sale contains the following:

> "... In the case of every piece of demesne land which has been granted to be held by copy of court roll as aforesaid and is now comprised in any lot what is offered for sale is the right of the lord for the time being of the said manor to the freehold and inheritance of such demesne land and to all services and payments due under or by virtue of the grant by copy of court roll so long as the grant by copy of court roll in each case shall be subsisting but subject to all existing tenancies of such land and to all rights and privileges that can be exercised or claimed under or by virtue of the said grant by copy of court roll or the usage within the said manor in over or upon the land comprised within such grant or in over or upon any manorial commons or waste lands whether such rights and privileges shall be referred to in the particulars or in any general remarks or stipulations or revision notes issued by the vendor (which remarks or stipulations or revision notes are to be deemed as being part of these conditions) or in these conditions of sale or not so long as the said grant by copy of court roll shall be subsisting."

All these then subsisting copyhold interests have since



determined, either by surrender soon after the Coote sale or upon the falling of the relevant lives.

Special condition 4 was in these terms:

> "In the case of lot 38 ('Martin Down') what is offered for sale is the right of the vendor and his successors in title the lord or lords for the time being of the said manor to the soil of the said down and to all rents or moneys payable in respect of the use or enjoyment or occupation of the said soil or any part thereof but subject to such rights of depasturing sheep thereon or thereover as are included in the particulars of sale of ,the various lots or exist independently thereof and to all rights and easements and privileges in the nature of easements or quasi-easements (if any) in over upon or affecting the said down whether existing by grant prescription custom agreement or license or otherwise howsoever and the vendor shall not be required to furnish any information or evidence not in his possession as to the creation thereof or as to the persons entitled thereto."

It seems to me to be manifest from what I have referred to in the particulars of sale that the vendor intended that the purchasers of the several lots which were stated to carry sheep rights should acquire with those lots the right to run on Martin Down the numbers of sheep specified for those lots respectively for the purpose of allowing them to graze there, and that he intended that the purchaser of the down should acquire it subject to such grazing rights. The question is whether the sales were effected and eventually completed in such a way that that intention was carried out.

Each of the sales at the auction was recorded in a memorandum of agreement in a common form which recorded that a named purchaser was the highest bidder for a particular lot and was declared the purchaser thereof subject to the conditions of sale at a specified price. At this stage of the transaction the conclusion seems to me to be inescapable that the parties intended and agreed that the vendor should sell and that the several purchasers should buy the lots as described in the particulars of sale, that is to say, that the purchasers of lots stated to carry sheep rights should acquire those rights and that the purchaser of the down should acquire it subject to all those rights. It is said, however, that the conveyances by which the sales were completed were inappropriate to produce this result.

Before considering the individual conveyances it is convenient at this point to say that in 1953 Mr. White bought that part of the down containing approximately 172 acres which lies north of the



Blandford-Salisbury road. I have already held upon a preliminary point in this action that the consequence of this was that he lost all of whatever grazing rights he had over the down.1 It is, therefore, unnecessary for me in this judgment to consider the effect of the conveyances of lots 6 and 7.

The down was conveyed to its purchaser by a conveyance dated October 21, 1920. This contained no reference in express terms to sheep rights. It contains a recital that the vendor had agreed with the purchaser for the sale to him of the hereditaments therein described in fee simple in possession subject as thereinafter mentioned but otherwise free from incumbrances. In the operative part of the deed the down is conveyed to the purchaser in fee simple:

> "subject to the tenancies affecting the same or any part thereof and to all rights, easements and privileges in the nature of easements or quasi easements and privileges in over upon or affecting the said hereditaments hereby conveyed whether existing by grant prescription custom agreement or license or otherwise howsoever but discharged from all the limitations powers and provisions of the said will and codicil of the testator and from all estates interests and charges subsisting or to arise thereunder."

A right to graze sheep on the down would not be properly called an easement, nor a privilege in ,the nature of an easement, nor a quasi-easement: it would be a profit. As such it would, however, be appropriately described as a right over or upon or affecting the down. It is the plaintiffs' contention that the effect of the words I have read was to reserve out of the property conveyed by this conveyance the sheep rights mentioned in the particulars as being rights over, upon or affecting the down existing by grant, prescription, custom, agreement or otherwise or which as between the vendor and the purchaser must be treated as having then existed.

Two other conveyances with which I am concerned were made on the same date as the conveyance of the down, October 21, 1920. Lots 8, 20, 23 and 25 were all comprised in one conveyance of that date. By this conveyance these lots

> "together with such right of common of pasture for sheep on Martin Down as appertains or belongs to the said hereditaments hereby conveyed or any part or parts thereof."

were conveyed to the purchaser in fee simple. For ease of reference

1 Ante, p. 150; [1967] 3 W.L.R. 1246; [1967] 3 All ER. 349.

I will call the words which I have read from this conveyance "formula A".

Lot 11 was conveyed by a conveyance of the same date. The parcels in this conveyance also included formula A.

Lots 9 and 33 were together comprised in a conveyance dated October 26, 1920, the parcels in which also included formula A.

Lots 1 and 32 were together comprised in a conveyance also dated October 26, 1920. This conveyance did not contain formula A or any other reference to sheep rights.

Lot 17 was conveyed by a conveyance also dated October 26, 1920, the parcels in which included formula A.

Lot 28 was conveyed on the same date by a conveyance the parcels in which also included formula A.

Lot 34 was conveyed by a conveyance dated November 10, 1920, which did not contain formula A or any other reference to sheep rights.

Lot 30 was conveyed by a conveyance dated November 15, 1920, the parcels in which contained a slightly different formula (which I will call "formula B"), namely,

> "together with the right of common of pasture for sheep on Martin Down to the said hereditaments or some part or parts thereof appertaining or belonging."

Finally, lot 31 was conveyed by a conveyance dated November 22, 1920, which contained no reference to sheep rights.

The plaintiffs say that upon their true construction those conveyances which incorporate either formula A or formula B contain express grants of the grazing rights specified in the particulars of sale in respect of the various lots, whether those rights can with strict accuracy be said to have appertained or belonged to the lots at the dates of the conveyances or not. Moreover, they say that those rights did at the dates of the conveyances appertain or belong at least in equity to the several lots by reason of the terms of the contracts for sale to the predecessors in title of both the plaintiffs and the defendants and by reason of the terms of the conveyance of the down to the defendants' predecessor in title.

The defendants on the other hand say that she conveyance of the down contains no words sufficient to amount to a reservation by or regrant to the vendor of any sheep rights over the down, and that the words "subject to all rights, etc." in the conveyance of she down are only capable of referring to rights existing at the date of that conveyance. They say no sheep rights could then have existed



in relation to the freehold estate in any of the properties sold at the auction because at the time of the auction the freehold estate in all the properties sold was in common ownership and because the lord of the manor, in

whom the freehold was vested, could have no right of common over the waste of his own manor. They say that, consequently, the vendor conveyed the down to the purchaser without any reservation and, therefore, could not either contemporaneously, or a fortiori subsequently, grant sheep rights over the down to anyone else. Of the conveyances incorporating either formula A or formula B the defendants say that these formulae are not apt to create new rights and can only properly be read as relating to such rights, if any, as in fact appertained or belonged to the several lots at the dates of the conveyances, of which in consequence of the common ownership, if for no other reason, there were none.

The subject-matter of these sales consisted of either freeholds belonging to the lord of the manor in respect of which no copyhold interests existed or of freeholds belonging to the lord of the manor subject to existing copyhold interests. In neither case could any rights of common have existed at the date of sale appertaining to the property sold, for the lord of the manor could not have a right of common over the waste of the manor of which he himself was the owner. Consequently, if I am precluded from having regard to the circumstances of the auction sale, there seems to me to be difficulty in saying that the conveyances passed any grazing rights. In *Whalley v. Thompson*,2 where a common owner of two adjoining closes, in connection with one of which a way was used across the other, devised the former with its appurtenances, this was held not to give the devisee a right of way over the other close, since the testator could not at his death have had a right of way over his own property, so that there was then no right of way over the close which was not the subject of the specific devise capable of passing as an appurtenance of the close specifically devised. If in the present case there were sheep rights appertaining by custom to the copyhold interests which still subsisted, these would, it seems to me, be irrelevant to the sale, for such rights would not appertain to the property sold and would, as Mr. Oliver agrees, cease with the termination of the copyhold interests. If the vendor's leasehold tenants enjoyed grazing rights on the down, such rights would again be irrelevant to the sale: they would belong to the tenants under some express or inferred grant and would cease with the termination

2 (1799) 1 Bos. & P. 371.



of their tenancies. Consequently, in my judgment, the plaintiffs can only succeed on this part of the case if according to the proper construction of formulae A and B there were rights of grazing appertaining or belonging to the lots in relation to which those formulae were used at the dates of the several conveyances or if the circumstances were such as to admit of those formulae being construed in some secondary sense.

Mr. Fisher, for the defendants, contended that the words of formulae A and B are not ambiguous and that they must be construed according to their primary meaning. I am willing to accept this submission as regards formula A, from which it follows that I am not entitled to look at the contracts for sale for the purpose of ascertaining whether the parties intended to use that formula in some other sense. Reference to formula A requires the court to inquire whether in fact there was at the date of any conveyance the parcels in which included that formula any right of common of pasture for sheep on Martin Down which then appertained or belonged ,to any of the land comprised in the conveyance. As I have already indicated, the circumstances were such that at law no such right could exist by reason of the common ownership of the down and the land conveyed, but in my judgment the operation of the formula is not confined to rights existing at law. If any such right as is mentioned in the formula appertained or belonged to any part of the land conveyed in equity at the date of the conveyance, such right would, in my judgment, fall within the language of the formula. I conceive that I am perfectly entitled to look at the contracts for sale, not, of course, for the purpose of contradicting the conveyances (see *Doe d. Norton v. Webster*3, *Leggott v. Barrett*4 but for the purpose of discovering whether immediately before the several conveyances any such rights as are described in the conveyances appertained or belonged in equity to the properties conveyed and were capable of passing under the conveyances. This is not to use the contracts as aids to the construction of the conveyances, but merely to

apply the language of the conveyances, construed in accordance with its primary meaning and without any regard to the contracts, to the circumstances existing at the moment of the execution of the conveyances, which included the existence of the contracts. So also I must apply the language of the habendum in the conveyance of the down to the defendants' predecessor in title to the circumstances existing when that conveyance was executed, and ask myself what

3 (1840) 12 A. & E. 442.

4 (1880) 15 Ch.D. 306, C.A.



rights affecting the down then existed by reason of any agreement. If any such rights existed in consequence of the contracts for sale of the other lots it must, in my judgment, be wrong to ignore them. No question of this kind arose in any of the cases relied upon by Mr. Fisher in argument on this part of the case. These were all actions at common law except *Hall v. Byron*,5 but that case involved no question of equitable rights.

I have already stated my reasons for holding that upon the true construction of the contracts for sale of the lots described as carrying sheep rights, the purchasers became entitled to grants of those sheep rights. These contracts were of a kind which would have been specifically enforceable in equity, including that part relating to sheep rights. It follows, in my judgment, that, when they entered into these contracts, the purchasers thereupon became entitled in equity to the sheep rights in question as appurtenances to the land which they bought, of which the vendor in accordance with well-established principles then became a trustee for them subject only to certain limited rights which belong to a vendor in possession pending completion.

The order in which the conveyances were executed seems to me immaterial. The equities came into being when the contracts were made. All the relevant lots were sold at the auction sale: the contracts were all entered into on one day. Each purchaser must be taken to have known the vendor was at the same time selling the other lots to the other purchasers upon the terms of the conditions of sale.

In *Allen v. Taylor*6 Sir George Jessel M.R. had to deal with a case of contemporaneous sales by common owners of a dwelling-house and an adjoining piece of land. The question was whether the successor of the purchaser of the land could obstruct the lights of the house. If the vendor had sold the house but retained the land he could not have obstructed the lights because this would have been a derogation from his grant. If, on the other hand, he had sold the land but retained the house, the purchaser of the land could have obstructed the lights. The Master of the Rolls proceeds thus7:

> "Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights - the vendor being the same in

5 (1877) 4 Ch.D. 667.

6 (1880) 16 Ch.D. 355.

7 Ibid. 358.



> each case, and both purchasers being aware of the simultaneous conveyances? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights, and as part of one transaction he takes the land: he cannot take away the lights from the house. But, as I said before, it is a question of what is the settled law on the subject. I see the point is so stated in almost so many words by Tindal C.J. in *Swansborough v. Coventry*.8 He says, 'In the present case, the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law,' namely, that a grantor shall not derogate from his own grant."

He then refers to *Compton v. Richards*9 and *Wheeldon v. Burrows*10 and says11:

> "In the judgment in *Wheeldon v. Burrows*12 the case is treated as an exception to the general rule that if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. The late Thesiger L.J. says this13: 'It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough v. Coventry*14 and *Compton v. Richards*,15 namely, that, although the land and houses were not in fact conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction.' Then he says that that will not do. Then he goes on to say, 'In the cases which have been cited the conveyances were founded upon transactions which in equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time and as part and parcel of one transaction.' So that he evidently means to say that such a case as that is an exception to the general rule, and you cannot block up the lights."

The reason why the decision in *Wheeldon v. Burrows*16 was not governed by the two authorities mentioned by Thesiger L.J. was that in that case the two sales there under consideration were not contemporaneous.

In the present case, on the other hand, all the sales were contemporaneous, and they were all upon the terms of the conditions of sale of which every purchaser had notice.

In *Beddington v. Atlee*,17 an owner of a house and an adjoining

8 (1832) 9 Bing. 305, 309.

9 (1814) 1 Price 27.

10 (1879) 12 Ch.D. 31, C.A.

11 16 Ch.D. 355, 359.

12 (1879) 12 Ch.D. 31.

13 Ibid. 59.

14 9 Bing. 305.

15 1 Price 27.

16 12 Ch.D. 31, C.A.

17 (1887) 35 Ch.D. 317.



plot of land first contracted to sell the plot of land and subsequently contracted to sell the house. He next conveyed the house to the purchaser of it and later conveyed the plot of land to its purchaser. The question was whether the purchaser of the plot of land could obstruct the lights of the house. It was held that he could. Putting it shortly, the position was governed by the order of the contracts, not that of the conveyances. Likewise in the present case, in my judgment, the state of affairs upon which the language employed in the conveyances operated was governed in the relevant aspect by the contracts for sale. The order of the conveyances could not affect this.

For these reasons I am of opinion that those conveyances which employed either formula A or formula B were effective to grant sheep rights over the down consistent with the particulars of sale.

In the case of the conveyance which employed formula B I think that the case can also be put on another and distinct ground. This formula clearly implied that at the date of the conveyance in question there was some right of the kind the redescribed or intended to be described to which the parties were referring. There being no such right at law, then if, contrary to my view, the primary meaning of the language is confined to legal rights, extrinsic evidence would be admissible to resolve the resulting uncertainty as to what right the parties had in mind. Evidence of the circumstances of the sale would be admissible for this purpose, from which it would be apparent that the right intended to be described was the number of sheep rights mentioned in the description of the particular lot.

In *Thomas v. Owen*,18 Fry L.J. said:

> "No doubt the word 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as the fourth year of Philip and Mary *(Hill v. Grange*19 the word 'appurtenances' has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.'"

In *Pwllbach Colliery Co. Ltd. v. Woodman*,20 Lord Parker said:

18 (1888) 20 Q.B.D. 225, 321, C.A.

19 (1555) 1 Plowd. 164.

20 [1915] A.C. 634, 646, H.L.(E.).



"The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used."

The present case is not one of implied grant, but, in my judgment, the court should be no less ready to seek to give effect to the common intention of the parties in resolving a latent ambiguity in their language than in perfecting their transaction by implying what they have omitted to say.

Upon the view which I have expressed of the construction and effect of the conveyances the language of the habendum in the conveyance of the down is appropriate in reference to the sheep rights. The grantee of the down is to hold it subject to sheep rights already existing in equity in favour of purchasers of other lots. The reference to quasi-easements and to rights and so forth existing by agreement make it clear that this language is not intended to be confined to describing rights enforceable at law. It is unnecessary in these circumstances to pursue the question, discussed in argument, whether the qualifying words in this habendum are capable of being read as a reservation accompanied by an implied regrant.

In respect of the conveyances in which neither formula A nor formula B is used the plaintiffs rely upon section 6 of the Conveyancing and Law of Property Act, 1881, which, in the absence of an express contrary intention, imports general words into any conveyance of land. They also rely on this section as an alternative argument in formula A and formula B cases. They contend that the sheep rights were rights appertaining or reputed to appertain to the land conveyed or at the time of conveyance enjoyed with or reputed or known as part or parcel of or appurtenant to such land. That a common of pasture may pass under the general words in this section is established by *While v. Williams*.21

In the year 1846 a tithe apportionment agreement was confirmed for the parish of Martin. In this agreement rights of common of sheep on the down are mentioned and are so referred to as to indicate that rights to depasture specified numbers of

21 [1922] 1 K.B. 727 C.A.

sheep on the down attached to certain groups or collections of closes; but it is common ground that this referred to sheep rights attached to copyhold interests in the land. It cannot, therefore, afford any ground for discovering a reputation that any sheep rights attached to the freehold. Enjoyment of grazing facilities on the down by tenants of the lord of the manor holding under leases or tenancy agreements could not, in my judgment, establish a reputation of rights appurtenant to the lands comprised in their holdings. The implication would be that they so grazed the down by the consent of the lord or possibly under contractual rights or grants limited in their operation at the most to the periods of their tenancies. This could found no reputation of any kind of right capable of surviving those tenancies.

Consequently, I do not consider that the words "appertaining or reputed to appertain to the land or any part thereof" in section 6 avail the plaintiffs in this case. Can the plaintiffs successfully assert that relevant grazing rights were at the time of conveyance "enjoyed with" the lands conveyed? What are claimed are rights in respect of specified numbers of sheep. To make good such a claim the claimant must show a grant to him or his predecessors of a right to graze that number of sheep or possibly a greater number. To establish such a grant under this part of the general words in section 6 he must consequently show that at the date of the relevant conveyance the occupier of the land conveyed was in fact grazing that number of sheep or a greater number on the down and was doing so with - that is to say, in respect of - the land conveyed. In this connection the fact must be stated that the lotting of the various lots sold at the auction sale did not coincide with the pre-existing holdings; that is to say, the boundaries and consequently the areas and identities of the farms were changed to a significant extent.

Moreover, as is not surprising in view of the fact that none of the witnesses was farming any of this land in 1920, none of them is able to state with any accuracy what the sizes of the flocks of the various farmers were at that time. The figures which I was given amounted, at the best, to rough estimates and were sometimes, I think, little better than guesses. In my judgment the plaintiffs have not successfully discharged the onus of establishing that in 1920 any particular number of sheep was being depastured on the down in respect of the lands now owned by any of the plaintiffs or any part of them. Consequently, I am of



opinion that the words "enjoyed with" in section 6 do not avail the plaintiffs.

That leaves for consideration the words "reputed or known as part or parcel of or appurtenant to the land or any part thereof." Mr. Oliver, for the plaintiffs, relying on *White v. Williams*.22 has contended that in this respect the sale particulars constitute an admission against the vendor which is binding on the defendants as his successors, and that the sheep rights mentioned therein were part and parcel of the land sold. In paragraph 5B of their amended statement of claim the plaintiffs plead an estoppel resulting from the purchasers at the auction having bought on the faith of representations contained in the particulars. The validity of these arguments depends on the proper interpretation of the references to sheep rights in the particulars. Mr. Oliver says these are expressed as being, and were in truth, statements of fact: "This lot carries X sheep rights on Martin Down." Mr. Fisher, on the other hand, says that this phrase merely constituted part of the description of what was offered for sale, and so was in the nature of a promissory statement or a statement of intention. If the words are to be read as a statement of fact, they must relate to the legal position existing before the sale and must, I think, amount to representations of mixed fact and law, but they might nevertheless support a plea of estoppel. To construe the particulars I must read them in the light of the surrounding circumstances, or at any rate those surrounding circumstances which were known to the parties. These included the fact that the vendor was owner in fee simple not only of the lots described as carrying sheep rights on the down, but also of the down. It follows that the purchasers must have had notice that in law the rights could not be appurtenant to the lots described as carrying them. If they had not notice of this when they bought, as I think they had, they must certainly have had actual or constructive notice of it before their

purchases were completed by conveyance, in which case I cannot see how they can be heard to say that they were induced by the representation to complete the purchases. If upon their true interpretation the words amount to a representation that notwithstanding the common ownership the sheep rights were in some way appurtenant at law to the lands conveyed, this would, I am inclined to think, be a representation - and, indeed, a misrepresentation of pure law which could not found an estoppel. But the language of the particulars

22 [1922] 1 K.B. 727, C.A.



in this respect is, in my judgment, at least equally as appropriate to Mr. Fisher's reading as to Mr. Oliver's, and the surrounding circumstances, I think, make Mr. Fisher's sense more appropriate. At the least the phrase is ambiguous.

In *White v. Williams*23 a common predecessor in title of the parties owned a farm in Caernarvonshire called Rhwng-y-ddwy-afon (which I will call "R."), another farm in the same district called Tydden Mawr (which I will call "T.M.") and what was described in the particulars of sale as a mountain sheepwalk. These were all offered for sale by auction at one time. Lot 6 consisted of R., and the particulars of sale stated that the right of pasturage hitherto enjoyed by R. in common with others on the sheepwalk was included in lot 6. Lot 8 consisted of T.M. and the sheepwalk, which was offered for sale subject to and with the benefit of the right of pasturage thereon, hitherto attached to T.M. in common with other holdings. This, it will be observed, was not really appropriate language if lot 8 included the freehold of both T.M. and the sheepwalk. Lot 6 was, but lot 8 was not, sold at the auction. The purchaser of lot 6 was the predecessor in title of the defendant. The parcels in the conveyance of lot 6 incorporated a reference to the property conveyed having constituted lot 6 at the auction. Six years later the property comprised in lot 8 was sold to the predecessor in title of the plaintiffs. The plaintiffs disputed the right of the defendants to depasture sheep on the sheepwalk and sued in trespass alleging that they owned the sheepwalk in fee simple in possession. The county court judge held that the right to depasture sheep on the sheepwalk passed to the purchaser of lot 6 by virtue of section 6 of the Act of 1881, without being specifically mentioned, on the ground that it had always appertained to R. and had always been exercised and enjoyed with and reputed and known as appurtenant to R. He also expressed the view that there was no satisfactory proof that the common vendor owned the fee simple in the sheepwalk or that he owned more than a right of common or pasturage over it. A right of this kind would not have entitled the plaintiffs to sue in trespass, and was not pleaded. The plaintiffs appealed. The only question argued in the Court of Appeal was whether the right claimed could pass under section 6. The court held that it could and did. On the question as to the title Atkin L.J. went on to say24:

23 [1922] 1 K.B. 727, C.A.

24 Ibid, 738.



"But the learned county court judge, whose experience gives great weight to his opinion, came to the conclusion that the appellants had failed to prove that Mr. Huddart was in fact the unrestricted owner in fee simple of the land, inasmuch as his acts of ownership were consistent with

his merely having a right of common or pasturage over it. The particulars and conditions of sale, which are obviously admissions against him, and the evidence given in the county court confirming those admissions - namely, that tenants of other farms under different ownership had exercised rights of pasturage over this sheepwalk - constitute a considerable body of evidence in favour of the learned judge's conclusion."

Atkin L.J. was, I think, there stating an alternative ground of decision, but neither of the other members of the court decided the case on this ground. I am not altogether clear to what part of the particulars and conditions of sale Atkin L.J. was there referring as containing admissions relevant to the nature of the plaintiffs' title, unless it was to the circumstance that the sheepwalk was offered for sale subject to, and with the benefit of, the right of pasturage attached to T.M. He was not, I think, concerned with the question whether the particulars and conditions contained admissions that particular rights of pasturage appertained to or were enjoyed with R.

*White v. Williams*25 differed on its facts from the present case in two significant respects. First, the conveyance of R. referred in terms to the sale particulars. Secondly, the sales were at different dates. The particulars expressly included in lot 6 "the right of sheep pasturage hitherto enjoyed by this holding ... on the sheepwalk." The reference to the particulars in the parcels in the conveyance of R. had the effect of rendering the particulars admissible to show what property was intended to be conveyed. Once the particulars were looked at, the conclusion that the right of pasturage passed under the general words in section 6 easily followed, unless, as was contended, those words were inappropriate to pass a right of this nature, which the court held not to be the case. It does not seem to have been suggested that no right of pasturage on the sheepwalk had been in fact enjoyed in respect of R. The sales having been made at different dates, the sale and conveyance of T.M. could have no effect on the earlier sale and conveyance of R. The court had not to consider the interrelation of the two transactions, as I have to do in the present case, where the sales were synchronal and where,

25 [1922] 1 K.B. 727.



as I have pointed out, the parties had actual or, at the least, constructive notice that no grazing rights appertained at law to any of the properties sold, whatever the particulars of sale might say on the subject. Consequently in my opinion *White v. Williams*26 is not an authority governing the present case, as Mr. Oliver submitted.

For these reasons I do not think that the plaintiffs can successfully rely on the sale particulars as containing admissions or representations as to sheeprights which are binding on the defendants either as admissions made by a predecessor in title or by estoppel. Nor do I think that in the circumstances of this case the plaintiffs can successfully rely on what is called "proprietory estoppel" discussed in *E. R. Ives Investment Ltd. v. High*,27 even if this is open to them on their pleadings, which seems doubtful. There has, I think, been no such acquiescence on the part of the defendants or of any predecessor in title of theirs as to bring that principle into play.

As an alternative way of putting their case the plaintiffs claim prescriptive rights. They concede, however, that as regards the Coote lands they cannot make good a prescriptive title at common law because of the common ownership of the down and the other lots at the date of the auction sale. Their claim in respect of

Coote lands must consequently he brought within the doctrine of lost modern grant or within the Prescription Act, 1832.

Before I proceed to consider that part of the case I should say something about the effect of those conveyances which incorporated formula A and B in those cases where the lots sold at the auction are no longer intact, namely, lots 8, 11, 17, 23, 25 and 28.

I have been referred to authorities which in my judgment clearly establish that where a right of common of pasture is appurtenant to a hereditament the ownership of which is severed, the right of common is severable so that the right of common may appertain partly to one section of the severed hereditament and partly to another: see *Wyat Wyld's case*28; *Mors v. Webbe*29; *Sacheverell v. Porter*30; *Smith v. Bensall.*31

In the case of a common of pasture for beasts levant and couchant on the dominant tenement this is perhaps fairly evident.

26 [1922] 1 K.B. 727.

27 [1967] 2 Q.B. 379; [1967] 2 W.L.R. 789; [1967] 1 All E.R. 504, C.A.

28 (1609) 8 Co.Rep. 78b.

29 (1609) Br. & Gold. 297.

30 (1637) Cro.Car. 482.

31 (1597) Gouldsb. 117.



If A., owning Whiteacre, has such a right over Blackacre and aliens half of Whiteacre, he can no longer have beasts levant and couchant on the whole of Whiteacre but only on the half which he retains. His grantee may have beasts levant and couchant on the alienated half. Together they are entitled against the owner of Blackacre to depasture so many beasts as are levant and couchant on the whole of Whiteacre. The owner of Blackacre is unaffected. The relative right of A. and his grantee is determined by the capacity of their respective parts of Whiteacre to carry beasts levant and couchant. But a right to depasture a fixed number of beasts differs significantly from a right for beasts levant and couchant. It is not confined to enjoyment by beasts levant and couchant on the dominant land and may be enjoyed by beasts that do not come from the tenement to which the right is appurtenant: *Richards v. Squibb.*32 It may be alienedso as to become a right in gross, severed from the property of the alienor *(Daniel v. Hanslip*33; *Leniel v. Harslop*34; *Drury v. Kent*35; and see *Bunn v. Channen*,36 and Cooke on Enclosures, 4th ed. (1864), p. 21) because its enjoyment is not restricted to cattle on the land of the alienor and severance of the right from the land cannot increase the burden on the servient tenement.

It must follow that if A., the owner of Whiteacre, has a right to depasture 100 cows on Blackacre he can alien half of Whiteacre, retaining the whole of the pasture right for himself, or granting the whole of it to the alienee of the alienated part of Whiteacre, or making any apportionment between himself and the alienee that they may agree.

But what if nothing is specifically said about reserving, assigning or apportioning the right? The right so far as it was appurtenant to or enjoyed with the alienated half of Whiteacre would pass with it under the statutory general words. How, in these circumstances, should the right be apportioned? In the absence of any peculiar circumstances it should, in my judgment, be apportioned rateably to the area of the alienated part and the retained part of Whiteacre. Counsel have been unable to refer me to any authority directly bearing upon this point, but in my opinion apportionment rateably to area is, in the absence of special circumstances, both equitable and convenient.

Mr. Fisher contended that apportionment on an area basis was inappropriate in this case for reasons connected with the

32 (1698) 1 Ld.Raym. 726.

33 (1672) 2 Lev. 67.

34 (1672) 3 Keb. 66.

35 (1603) Cro.Jac. 14.

36 (1813) 5 Taunt. 244.



attribution of sheep rights to particular groups of closes in the tithe apportionment agreement; but as in my view the sheep rights which I am at present considering were granted de novo in 1920 the contents of that agreement appear to me to be irrelevant to any apportionment of them.

Apportionments on an area basis, the mathematical accuracy of which is admitted, have been calculated in respect of those lots which are no longer intact. On the basis of these apportionments Mr. Densham is entitled, in respect of lots 8, 9 and 11, to 448 sheep rights - i.e., the whole of the rights claimed by him in respect of Coote land; Mrs. Turner is entitled, in respect of lot 33, to 117 sheep rights; Mr. Baker is entitled, in respect of lots 17, 25 and 30, to 240 sheep rights; and Mr. Frampton is entitled, in respect of lots 17, 23 and 28, to 141 sheep rights. This leaves in issue the following number of sheep rights claimed in respect of Coote land:

Mrs. Turner, 82,
Mr. Singleton, 116 and
Mr. Baker, 25

If I am right in my view about section 6 of the Act of 1881, these claims must be made good, if at all, by prescription. If I am wrong in my view about the effect of formulae A and B but right in my view about section 6, the whole of the claims to sheep rights in respect of Coote lands must be made good, if at all, by prescription.

In addition to these claims in respect of Coote lands the claims in respect of Street and Glebe lands must be justified, if at all, by prescription.

Before I deal in any detail with the use which has been made of the down by the plaintiffs and their respective predecessors, certain other facts should be stated. As will appear in more detail when I come to deal with the claim to public rights of way, during the second world war the greater part of the down lying south of the Blandford-Salisbury road was requisitioned. Forty-five acres were in the occupation of the War Department, first under requisition and later under a lease, from September, 1939, until June, 1958, during which period it was used as a rifle range, and grazing there was impracticable. A further 182 acres were requisitioned at various dates in and between 1941 and 1947 by the Ministry of Agriculture and Fisheries. This land was in the occupation of a farmer named Tozer until September, 1959. He ploughed and cultivated it, but it was put back to grass when

*[1969] 1 Ch. 160 Page 192*

he gave up possession. In 1954 the Ministry acquired the freehold estate in this land and in September, 1959, entered into an arrangement with a body called the Martin Down Grazing Rights Association by which the land, or possibly the right to graze it, was let at a rent to the association. The association, which was an unincorporated body consisting of persons claiming grazing rights on the down, let the right to graze this area to certain of its members for payment. The members who grazed this part of the down under this arrangement included four of the plaintiffs, namely, Mr. Densham, Mr. Baker, Mrs. Turner and Mr. Singleton. This state of affairs continued until May, 1962, when the Ministry reconveyed this land to Mr. Golightly, its former owner, who thereupon sold it to the defendant company. While this land was occupied by Tozer there was no grazing there. Grazing by arrangement with the association would clearly not count as enjoyment as of right for the purposes of any prescriptive claim.

A further 146 acres was requisitioned by the Ministry of Agriculture and Fisheries in December, 1947, and remained under requisition till October, 1955. This land was let by the Ministry to the association under some form of licence. By arrangement with the association the plaintiffs Mr. White, Mr. Densham and Mr. Baker cultivated it. When the requisition came to an end, Mr. Golightly, the freeholder, continued to permit these three gentlemen to cultivate the land under licence, and they continued to cultivate the 146 acres until about 1959.

To make good a prescriptive claim in this case it is not necessary for the claimant to establish that he and his predecessors have exercised the right claimed continuously. This is a profit of a kind that, of its nature, would only be used intermittently. Flocks would not, for instance, be on the down at lambing time, or for 24 hours of the day, or very possibly on every day of the week or all round the year. But 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.

Each plaintiff's claim must be considered separately.

Mr. Densham acquired his farm at Martin, in respect of which his claim in this action is made, in August, 1948. He ran no sheep on the down until about the years 1954 and 1955, when about 170 sheep were run on the down from his land. There was then an interval of four or five years when again he ran no

*[1969] 1 Ch. 160 Page 193*

sheep there. From 1960 or thereabouts until after the issue of the writ on January 9, 1963, he kept a flock of about 200 to 260 sheep which used at times to run on the down. Between 1920 and August, 1948, the owners or owner for the time being of Mr. Densham's Coote land ran 250 to 300 sheep on the down, but from 1938 to 1948 Mr. Main, the then owner, also owned part of Mrs. Turner's Coote land, and from 1920 to 1938 Mr. Bailey, who then owned lot 9, also owned part of Mrs. Turner's Coote land.

The position before 1920 is obscure, for I cannot tell from the evidence how far these lands were from time to time held by copyhold; nor, having regard to the reorganisation of the farms at the time of the Coote sale, can I now discover precisely in respect of what land any sheep farmer who then ran sheep on the down purported to do so.

The position in respect of the Street land is this. William Street, who is the earliest owner or occupier of this land with whom I am concerned, held at the date of the tithe apportionment agreement altogether 204.66 acres, to which 380 sheep rights on the down were appropriated by that agreement. From before 1912 until 1925 or thereabouts successive members of the Street family grazed a flock of about 300 sheep on the down, but the evidence does not establish in respect of what land this was done. At times, at any rate, other land carrying, or alleged to carry, sheep rights was tenanted by the Street of the day and farmed by him in addition to the 204 acres. Mr. Densham's property includes 7.83 per cent. by area of the 204 acres, but in the absence of any reliable evidence as to the land occupied by the Streets from time to time the plaintiffs have not, in my judgment, established what number of sheep, if any, were run on the down between 1912 and 1925 in respect of Mr. Densham's Street land.

The Street family continued to own and occupy Mr. Densham's Street land until Mr. Densham bought it in 1948, but there is no evidence of any sheep rights having been exercised in respect of it between 1925 and 1948.

The Glebe land in the tithe apportionment agreement amounted to 29 acres, to which 60 sheep rights were appropriated. Mr. Densham's property includes 36 per cent. by area of this land. There is no evidence of any sheep having been run on the down in respect of this portion of Glebe land before 1946. From 1946 until 1948 it was owned by Mr. Main. who then owned lots 9 and 11, and as already stated ran 250 to 300 sheep on the down. From



1948 this portion of Glebe land was in the ownership of Mr. Densham, whose use of the down I have already described.

In these circumstances Mr. Densham cannot, in my judgment, make good any prescriptive claim. First, he cannot establish sufficiently continuous user. Between 1948 and the issue of the writ there were two periods, each of five or six years, during which he made no use of the down. From January 9, 1933, which was 30 years before the issue of the writ, to the date of Mr. Densham's purchase in 1948, no sheep rights were exercised in respect of the Street land, nor, it would seem, were any exercised in respect of the Glebe land. During the same period only 250 to 300 sheep were run on the down in respect of Mr. Densham's Coote land, and it cannot be said that these were on the down exclusively under rights attached to Mr. Densham's Coote land.

In these circumstances it is impossible to conclude that throughout the statutory period of 30 years under section 1 of the Prescription Act, 1832, any sheep rights have been enjoyed as of right and without interruption in respect of any of Mr. Densham's land. The periods of non-enjoyment during Mr. Densham's own ownership, in my judgment, make it impossible to hold that a right to enjoy any such rights has been continuously asserted in respect of his Coote land (as to which see *Hollins v. Verney*.37 A fortiori this is impossible in respect of either the Street land or the Glebe land.

The fact that the 182 acres mentioned earlier were under cultivation from various dates until 1959, and that the 146 acres were under cultivation from 1947 until, perhaps, 1959 cannot, in my judgment, assist Mr. Densham. On the contrary, these uses of the down, except in so far as section 16 of the Commons Registration Act, 1965, applied, amounted to interruptions of the enjoyment of the sheep rights in respect of those areas which were cultivated, at any rate whenever they were under crops. Section 16 of that Act did not apply to any part of the 182 acres after that land ceased in 1954 to be requisitioned, nor did it apply to any part of the 146 acres after 1955 when that land ceased to be requisitioned.

Secondly, as regards his Coote land Mr. Densham cannot rely on common law prescription because of the united ownership before 1920.

Thirdly, he cannot, in my judgment, make out a case as to

37 (1884) 13 Q.B.D. 304, 315, C.A.



his Coote land under the doctrine of lost modern grant. Any such grant would, as regards Coote land, have had to have been made since the Coote sale. Whether such a grant could reasonably be inferred must be considered in the light of all the surrounding circumstances, including the circumstance that a similar inference is, in this action, sought to be drawn in four other cases. My credulity would, I think, be stretched beyond all reasonable limits were I asked to infer that five separate grants of sheep rights were made by the defendants' predecessors in title between June, 1920, when the Coote sale took place, and October, 1959, when one of the defendants first bought part of Martin Down, all of which have since been lost and of which nothing is known. In any case, taking Mr. Densham's Coote land in isolation, the discontinuous nature of the enjoyment of sheep rights in respect of this land is, in my judgment, fatal to any claim under the doctrine of lost modern grant.

Fourthly, Mr. Densham cannot, in my judgment, successfully claim sheep rights in respect of his Street land or his Glebe land at common law or under lost modern grant (a) because of the discontinuous character of the enjoyment of any such rights in respect of these lands, (b) because no ancient enjoyment is proved in respect of the Glebe land, (c) because the evidence does not establish whether any enjoyment there was in respect of Street lands before 1925 was in respect of the freehold estate in the land or of a customary right annexed to periodic copyhold interests in the land, (d) because the evidence does not establish in respect of what land the Streets grazed the down or how many sheep, if any, they ran on the down in respect of Mr. Densham's Street land, and (e) because Mr. Densham's own grazing on the down has been quantitatively less than the rights he asserts and less than the rights he can establish in respect of his Coote land, and consequently no part of it is clearly referable to his Street land or his Glebe land.

Finally, the enjoyment proved in respect of Mr. Densham's Coote land did not at any time exceed 300, and could not, in any event, support a prescriptive claim to as many as 448 sheep rights appertaining to that land.

[His Lordship then considered the claims of the other plaintiffs and continued:]

I will recapitulate the effect of this part of my judgment. I hold that the plaintiffs, other than Mr. White and Mr. Singleton, are entitled to the following sheep rights on the down under

express grants contained in conveyances made to purchasers at the Coote sale:

| | |
|---|---|
| Mr. Densham ..... | 448 |
| Mrs. Turner ..... | 117 |
| Mr. Baker ..... | 240 |
| Mr. Frampton ..... | 141 |

I hold that Mr. White is entitled to no sheep rights for the reasons given in my judgment delivered on the preliminary point,38 and I hold that, save as aforesaid, the other plaintiffs' claims to sheep rights fail on the grounds, first, that such right passed in respect of any Coote land under section 6 of the Act of 1881, and, secondly, that the circumstances as established by the evidence do not support claims by any of the plaintiffs to sheep rights in respect of any Coote land, Street land or Glebe land under any form of prescription.

As an incident of their sheep rights the plaintiffs claim (1) a right to draw water from a well on the down, (2) a right to place troughs on the down for the purpose of watering their sheep there, (3) a right to cart water to those troughs, (4) a right to obtain access with vehicles or otherwise to their sheep on the down and to the well and the troughs, and (5) for all or any of these purposes to use the tracks coloured blue and green on the statement of claim plan.

The plaintiffs claim these incidental rights under the doctrine of implied grants discussed in *Pwllbach Colliery Co. Ltd. v. Woodman*,39 *per* Lord Parker. This is, that where the right claimed is necessary for the enjoyment of some other right expressly granted, a grant of the former right will be implied. Lord Parker gives as an example an express grant of a right to draw water from a spring which necessarily involves the right of going to the spring for the purpose. Necessity, for this purpose, means reasonable necessity (*Jones v. Pritchard*40. The test must be whether the alleged ancillary right is reasonably necessary for the reasonable enjoyment of the principal or primary right. Unless it is so, no basis for implying a grant of the ancillary right exists.

The facts relating to the well are these. It has existed for probably 100 years or thereabouts at least. It must, I think, have been dug for use by persons needing water on the down,

38 Ante, P. 150.

39 [1915] A.C. 634, 646, H.L.(E.).

40 [1908] 1 Ch. 630, 639.



that is to say, primarily, at any rate, to facilitate watering livestock on the down. It was in use during the first two decades of this century, but by the year 1920 had fallen out of use and was covered with planks or timbers. In about 1925 it was restored to use, when a windlass was installed for drawing water, and it was used for watering sheep from that time until some time during the second world war, when it again fell into disuse. No use has been made of it since then. When this well was in use some, but not all, owners of sheep on the down used it as a source of water for their sheep. They would draw water from the well to fill troughs placed on the down near to the well.

Other owners of sheep on the down have been accustomed to water their flocks, when on the down, with water carted from Martin village and put into troughs on the down near the mouth of one or other of the public lanes leading from the village to the down. All owners of sheep running on the down have been accustomed to water their sheep in one or other of these ways. No water is naturally available on the down.

None of the plaintiffs has attempted to establish a prescriptive right to take water from the well. No such right is pleaded.

Having regard to the considerable period during which the evidence establishes that no use was made of the well, notwithstanding that sheep were being run on the down, and to the fact that, when sheep were run on the down, not all the owners of sheep on the down used the well, I think it is clearly impossible to say that the use of the well is necessary for the enjoyment by the plaintiffs of their sheep rights. It would doubtless be convenient for some of them, but this is an insufficient ground for implying a grant.

I think, therefore, that the claim in respect of the well fails.

A well-known Dorset sheep breeder called by the defendants gave evidence to the effect that sheep can be grazed on a down where no water is available without being watered during the day. His custom is to put his sheep out on a Dorset down during the summer months at 5 o'clock in the morning, and he says that they get sufficient moisture from the dew on the grass. He expressed the opinion - although he could not say this from direct knowledge - that this was a common practice among Dorset breeders. On the other hand, I had evidence from an agricultural consultant, who is also a practical farmer with a large flock of ewes of his own, that sheep in normal circumstances will drink about three times a day and require six to seven litres of water



a day, and that without water they do not thrive. The evidence of the numerous witnesses who have been concerned with sheep on Martin Down has been unanimous that the sheep on the down have been watered and that this is necessary for the welfare of the sheep. I should hardly suppose that the farmers of Martin would have incurred the trouble and expense of drawing and carting water unless they thought this necessary.

I reach the conclusion that if, in 1920, anyone concerned with Martin Down had been asked whether sheep grazing there needed to be watered he would have said "Yes," and that the same would be so today. The object being to discover the presumed intention of the parties to the conveyances in 1920, the earlier date seems to me to be the relevant one. In these circumstances I find that the evidence establishes that in 1920 the watering of sheep grazing Martin Down was regarded as being. and was in fact, necessary for the reasonable enjoyment of the right to graze the down and, if this be of any significance, I find that the same remains so at the present time.

In my judgment, therefore, the plaintiffs who have established that they have sheep rights on the down are entitled, as an ancillary right under an implied grant, to water their sheep on the down by means of suitably located troughs supplied by carted water. I do not think that, as was suggested in argument, this would be a right of too indefinite a kind to be capable of being the subject of a valid grant. In practice these troughs have been situated on the down near to the well or within about 50 to 100 yards of the mouth of one or other of the lanes leading on to the down. The graziers' right must, I think, be to put troughs wherever it is reasonably necessary to do so for the purpose of properly watering the sheep without encroaching on the down further than is necessary for this purpose. The effect of this will be that the troughs must be located where they can be reached without an unreasonable departure from public or other rights of way or within a reasonable distance of the mouth of one or other of the lanes or of any other means of access to the down that any owner of the troughs may have.

Mr. Sparrow contended that it could not be necessary for those plaintiffs who are entitled to sheep rights and have land adjoining the down to have troughs on the down, because they could instal watering facilities on their own land which would be available to sheep on the down. I do not accept this argument. It seems to me to place an unreasonable fetter upon such plaintiffs' use of their



own land. For instance, land where sheep are watered could not be cultivated. Moreover, the right to graze on the down is a right exercisable anywhere on the down. Watering facilities at one point on the edge of the down would be unlikely to be of much, if any value, when sheep were grazing on a remote part of the down. Anyone having a right of watering sheep on the down must have the right of carting water to his trough, provided that in so doing he does not encroach on the down, or depart from any public or private rights of way available to him more than is necessary for this purpose.

Anyone having a right to depasture sheep on the down must also incidentally be entitled to go on to the down, either himself or by his servants or agents - for instance, by his shepherd - to do anything necessary for the proper care and management of his sheep; but this does not mean that an owner of sheep rights can drive anywhere on the down in a vehicle. There may be occasions when it will be necessary to take a vehicle on the down not on any right of way for the purpose of doing something necessary in connection with sheep on the down, but where the use of a vehicle would not be necessary for purposes connected with the welfare of the sheep but would be merely a convenience for someone in the vehicle, such use would not, in my judgment, be permissible. [His Lordship then considered the claim of public rights of way, analysed the evidence, and continued:]

To recapitulate my decision on this part of the case, I hold that: (1) Public rights of way with or without vehicles or beasts exist on the following tracks: (a) from the mouth of Sillens Lane to the Blagdon Gap; (b) from the mouth of Sillens Lane to point G on the Blandford - Salisbury road; (c) from the mouth of Sillens Lane to the Pentridge Gap; (2) A public right of way on foot only exists along the Postman's Walk; (3) A bridle way exists from the mouth of Small End Lane to point X, and from Thornhill Corner to point A; but that no other public rights of way exist over any of the tracks indicated on the statement of claim plan in blue, green or brown. I say nothing about private rights of way over any of these tracks. No such private rights are in issue in this action.

[His Lordship considered the first five claims in the counterclaim not material to this report, continued in relation to the sixth and last claim:]

Finally, the defendants complain that Mr. Singleton has made an opening in the hedge bordering the down at its north-east corner



between the points marked A and C on the statement of claim plan and has put a gate there. One issue is whether the hedge in question belongs to the defendants or to Mr. Singleton. I find as a fact that the gap in this hedge was not made by Mr. Singleton or by anyone acting for him, or by his authority: it already existed when he acquired his farm in 1959. After Mr. Singleton became the owner of the farm his son-in-law, Mr. Atter, who actually farmed and still farms this land, installed a gate in the gap. The level of the land on the farm side of the hedge is some three feet lower than the level of the down on the other side of this hedge. The level of the down at this point is slightly higher than the level of the ground where the hedge stands. Mr. Atter said that a ditch exists along the hedge on the down side, but this was denied by another witness. I find that there is no ditch or depression of any significance in this position. Mr. Roe, a director of the defendant company, asserted that at one time Mr. Atter asked his permission to trim this hedge. I think that Mr. Atter did mention his intention to trim the hedge to Mr. Roe in a neighbourly way, but he did not, I think, ask permission. The hedge has been fenced with wire on each side at some time or other. The gate is aligned with that side of the hedge which is remote from the down. No assistance is obtainable from any documents of title.

In my view the solution to the problem of the ownership of this hedge must be found in the presumption which, as I mentioned earlier, arises, in my judgment, where one finds a fenced close adjoining a piece of waste land. In such circumstances in the absence of evidence to the contrary, the fence should, I think, be presumed to belong to the owner of the close. On this ground I reach the conclusion that the hedge in question belongs to Mr. Singleton. From this, as well as from the fact that Mr. Singleton did not make the gap, it follows that this claim by the defendant fails.

*Order accordingly.*

*May 1, 1968. Judgment was given on costs and it was ordered that the defendants pay one half of the party and party costs of the action and counterclaim.*

Solicitors: *Stafford Clark & Co.; Shaen, Roscoe & Bracewell for R. S. Hawkins & Co., Poole, Dorset.*

A. R.