CO/5533/2002

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 10 November 2003

B E F O R E:

MR JUSTICE SULLIVAN

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THE QUEEN ON THE APPLICATION OF CHELTENHAM BUILDERS LIMITED
(CLAIMANT)

-v-

SOUTH GLOUCESTERSHIRE DISTRCICT COUNCIL
(DEFENDANT)

- - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

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MR G LAURENCE QC AND MISS R CRAIL (instructed by Burgess Salmon) appeared on behalf of the CLAIMANT
MR P PETCHEY AND MR A BOOTH (instructed by the solicitor to South Gloucestershire District Council) appeared on behalf of the DEFENDANT

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J U D G M E N T

1. MR JUSTICE SULLIVAN:

Introduction

2. There are two sets of proceedings before the court. The first is an application for judicial review in which the claimant seeks a quashing order in respect of a decision of the defendant's Public Rights of Way and Commons Registration Committee on 8 September 2002 to amend the Register of Town and Village Greens maintained by it

under the Commons Registration Act 1965 ("the Act") by adding land at Magpie Bottom, Tabernacle Road, Hanham, Bristol ("the site") as a village green; a declaration that the site is not a village green; and a mandatory order requiring the defendant to remove it from the register.

3. The second is a claim under CPR Part 8 for an order under section 14 of the Act that the register be amended by the removal of the site and for a declaration that the site is not a village green. Claims under section 14 are assigned to the Chancery Division.

4. On 1 August 2003, Master Bowles ordered, by consent, that there should be a trial of preliminary issues in the section 14 claim, and that the trial of those issues should be conducted together with the claim for judicial review. The agreed preliminary issues in the section 14 claim correspond with the issues now raised in the application for judicial review.

Factual Background and Statutory Framework

5. The claimant is a property development company. It acquired the land comprising the majority of the site from the defendant by transfer dated 23 February 2001 pursuant to an option agreement entered into in November 1996. The claimant exercised its option to purchase the land in November 1997. It was registered as the proprietor of the land with effect from 16 March 2001. On 6 March 2000 the claimant applied to the defendant for planning permission to erect eight houses and an access road on the land. The defendant failed to determine the application within the prescribed period, so the claimant appealed to the Secretary of State for the Environment. The Secretary of State's inspector, who described the land as "part of a former nursery . . . an unkempt and overgrown area of mature shrubs, self-seeded trees, brambles and tall grass, which is crossed by a network of informal paths", dismissed the appeal in a decision letter dated 6 December 2000.

6. Local residents, including Mr Bye of the Magpie Bottom Action Group, appeared at the hearing before the inspector in October 2000 and opposed the proposed development. On 5 July 2000, Mr Bye, together with three other local residents who appeared at the hearing before the inspector, had applied for registration of the land, together with some adjoining land, as a town or village green.

7. The Act provided for the registration of all existing town or village greens in England and Wales. Land capable of registration as such which was not registered by the end of a prescribed period (31 July 1970) was not deemed to be a green (Section 1(2)). After 31 July 1970 registration cannot be effected under section 1, but can be effected by the making of an amendment to the register under section 13 "where . . . any land becomes . . . a town or village green". The procedure is prescribed by the Commons Registration (New Land) Regulations 1969 ("the Regulations"). Application must be made to the registration authority (in this case the defendant) on the prescribed form. The registration authority must notify likely objectors, including owners, tenants and occupiers of the land in question, and publish and display notices of the application in

the area, inviting objections by a specified date. Having sent copies of any objections to the applicant and given him an opportunity to respond, the registration authority then decides whether to accept the application and make the necessary registration, or to reject it.

8. As enacted, section 22(1) of the Act contained a three-part definition of town or village green as follows. Land:

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

9. I have added letters [a]-[c] for convenience since the three classes are usually referred to as class [a], [b] or [c] village greens. The definition of a class (c) green was altered with effect from 30 January 2001 by sections 98 and 103(2) of the Countryside and Rights of Way Act 2000 ("the 2000 Act"). Class (c) greens are now defined as land:

> "Which falls within sub-section (1A) of this section.
>
> "(1A) Land falls within this sub-section if it is land on which for not less than 20 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."

No period has been prescribed for the purposes of paragraph (b) in sub-section (1A).

10. The application dated 5 July 2000 contended that the site had become a class (c) green in "1995 or before". The claimant's solicitors objected to the application in a letter dated 15 December 2000. The letter said, inter alia:

> "Our clients object to this application on the basis that the applicant has not established, on a balance of probabilities, that the claimed land has been used by local inhabitants for lawful sports and pastimes, as of right, for a continuous period of not less than 20 years for the following reasons:
>
> "1. The applicant has not established that there is a relevant 'locality' whose inhabitants have indulged in relevant activities on the application site. No specific neighbourhood, community or housing estate has been

defined . . .

"3. The applicant has claimed that various activities have been undertaken on the application site including walking, cycling, playing, exercising, socialising, picking blackberries, picnicking and drawing and painting. Given that the application site had been for some time unkempt and densely overgrown comprising an area of mature shrubs, self-seeded trees, brambles and tall grass, it is unlikely that all of the activities claimed could have been physically undertaken on the application site on a regular basis . . .

"7. The applicant has failed to establish that the claimed activities have been indulged in as of right. The majority of the evidence questionnaires make it clear that the local residents are aware that the local Council own the land. Any use of the application site by the public was with the implied permission of South Gloucestershire Council . . .

"In summary, the evidence presented in support of the application for registration as a village green does not define the relevant locality. Many of the questionnaires do not distinguish between recreational activities and sports undertaken on the land known as Magpie Bottom, which lies outside the application site and is designated a public open space maintained by the Council. Many of the evidence questionnaires referred to the application site as land that is crossed on foot in order to gain access to other recreation areas. The majority of the evidence questionnaires give an indication that local residents all knew that the land was in the ownership of the Council and therefore any such use of the land was with the Council's implied permission."

11. Correspondence between the claimant's solicitors and the defendant continued until April 2001, by which time the definition of class (c) green had been amended by the 2000 Act (see above) and the majority of the land within the site had been transferred by the defendant to the claimant. In a letter dated 18 April 2001, the claimant's solicitors reiterated their earlier objections, referred to correspondence from local residents seeking registration of the site and said, inter alia:

"The above correspondence and other material available to the Council regarding our client's planning application demonstrates that the Village Green application has been lodged by a small group of residents who are using the process to maintain their objection to planning permission being granted over the application site. Third party objections to the development of this brown field site were aired fairly, although unsuccessfully, in the planning enquiry process and an application under the Commons Registrations Act 1965 is not an appropriate mechanism to seek to further such objections once they have been dismissed by the

planning inspector."

12. The applicants for registration were supplied with copies of this correspondence by the defendant. On 8 June 2001 the defendant wrote to the claimant advising it that the applicants had withdrawn their application for registration. On 5 October 2001, Mr Bye and the other three previous applicants made a further application for registration. This time the application site was confined almost entirely to the claimant's land -- a small piece of adjoining land belonging to a third party was also included in the site. The application was made on the prescribed form. It claimed that the site had become a village green "by 2000 or before".

13. The applicants chose to describe the locality from which the inhabitants claiming to use the land came, in the following terms:

> "Map 'A'
>
> Claimed locality red . . .
>
> "Tabernacle Rd, Footshill Rd with adjoining roads of Harolds Way, Magpie Bottom, John Wesley High St. Edged in red on attached map A.
>
> "A long established local residential area with no parish boundaries."

The red edging on the plan enclosed what is perhaps best described as a kidney-shaped area broadly aligned from the north east to the south west with, to stretch the anatomical analogy somewhat, a "big toe" at its south western extremity. The toe projects into the St George's East Ward in Bristol City. The bulk of the claimed locality lies within the area of the defendant Council and is split between two Wards, the Woodstock Ward to the north and the Hanham Ward to the south. Bristol City and the defendant Council are both unitary authorities.

14. In some locations the red line follows a feature on the ground, for example, it runs along the boundary between the back gardens of the houses in Tabernacle Road and Lower Hanham Road, but for most of its length it appears to bear no relationship to any man made or natural topographical feature. For example, it bisects individual houses and gardens, and cuts across numerous streets and an adjoining area of open space. The application form was accompanied by 24 evidence questionnaires in the standard form published by the Open Spaces Society. Those completing the questionnaires all confirmed that they agreed with the locality as shown edged red on the plan. In answer to question 12, those completing the forms were able to say who they considered to be the local inhabitants in respect of the site, and in answer to question 14, they were able to identify the facilities available to the local inhabitants, for example, local school, church or doctor's surgery.

15. The claimant's solicitors objected to the application in a letter dated 2 May 2002. That letter said, in part:

"In summary it is clear that the applicant has not established on the balance of probabilities that the claimed land has been used by a significant number of the inhabitants of a locality for lawful sports and pastimes, as of right, for a continuous period of not less than 20 years . . .

"3. The applicant has claimed various activities have been undertaken on the claimed land, including walking, cycling, playing, exercising, socialising, picking blackberries, picnicking, drawing and bathing. Given that the claimed land has been for some time unkempt and densely overgrown comprising an area of mature shrubs, self-seeded trees, brambles and tall grass, it is unlikely that all of the activities claimed could have been physically undertaken on the claimed land on a regular basis. Indeed we are instructed that it has been physically impossible for the public to have used over 90 per cent of the claimed land for the purposes claimed due to the fact that it has become so heavily overgrown. If it were not for the two informal paths, much of the land would be impassible . . .

"4. The claimed land is crossed by informal paths and it is likely that only members of public accessing the application site on foot or bicycle were crossing the site to reach other recreational areas . . .

"5. The applicant has failed to provide any evidence that the claimed activities have been indulged in 'as of right'. Indeed many of the questions acknowledge that the Council was landowner and therefore any use of the claimed land by the public is likely to have been with the implied permission of South Gloucestershire Council . . .

"In any event, of particular importance is the additional statutory requirement that the use either continues or has ceased for not more than such period as may be prescribed or determined in accordance with prescribed provisions. No regulations prescribing such a period have been made and therefore one can only look to whether the use is continuing. It is our submission that any use of the land 'as of right' ceased when our client objected to the previous application to register the land as a village green. As you know, to qualify for use 'as of right' any 20 year use must be *nec vi nec clam nec precario* (without force, secrecy or permission). This means 'openly used . . . without protest or permission'. The act of lodging an objection to the application twelve months ago and actively fighting the village green claim is clearly sufficient enough 'protest' to prevent the land being used continuously as of right."

16. Around the end of May 2002 the claimant erected fencing to close off access to the site. Until that time, subject to the extent to which the site was overgrown, it was possible to gain access to it. The defendant's Head of Legal and Democratic Services

prepared a report for the meeting of the Committee on 5 September 2002. The report set out the factual and legal background and identified the issues, stating correctly, that "the onus is upon the applicant to prove on the balance of probabilities that the land has become a village green". The report identified the various elements contained in the definition of class (c) village greens. No complaint is made of this part of the report. The 24 evidence forms were analysed and appendices summarised the points made in the claimant's objection and the applicants' responses thereto.

17. Paragraph 26 of the report commented upon the points made in the claimant's solicitor's letter dated 2 May 2002. The responses to the points made in the first paragraph and paragraphs (3), (4) and (5) of the letter (see above) were as follows:

> "It is clear with regard to this application that the evidence forms themselves identify the locality. The crucial question on the evidence forms is number 3(b) which asks for confirmation that the person completing the form agrees 'with the boundaries of the locality on map A edged in red'. In each case this is confirmed by the map attached which identifies both the locality edged in red and the claimed land edged in blue . . .
>
> (3) The application site is largely overgrown with trees, bramble, nettles and other vegetation. There are some paths (non public rights of way) through this area and one or two small clearings in which bird tables have been erected. These informal paths have at some time been given what appears to have been a tarmaccadem surface. Part of the site was purchased in 1977 and included a house. The Council's records indicate that the house was demolished following a fire in 1978, ie before the twenty-year period commenced to run. It seems unlikely that some of the activities claimed have taken place on the open land because of the state of the vegetation. Nevertheless, it is quite possible for a number of the activities, for example walking, bird watching and black berrying, to have taken place on the application site.
>
> (4) There are some paths running through the area as stated above, but the questionnaires do not appear to be stating that users only pass through the area.
>
> (5) It appears that the adjoining public open space to the west and north of the application site was purchased by Kingswood Borough Council in 1985 and thrown open to the public after it had been cleared. It is not easy to distinguish between the open space which has been cleared in some parts but is overgrown in others, and the application site, which as stated previously is in the main overgrown. There is a stream in the adjoining public open space and in one place a bridge with a wooden surface and crude iron hand rail which joins up with the informal paths through the application site. It is however probably correct to say that the

use of the application site for certain recreation and activities over a considerable period is questionable, nevertheless, as already stated, it is quite possible for some of the activities claimed to have taken place on the application site."

18. The report concluded:

> "33. The effect of the recent changes in the law, ie the Sunningwell decision and the coming into force of section 98 of the 2000 Act -- has been to widen the circumstances in which an application to register land as town or village green is entitled to succeed.
>
> 34. It is felt that the criteria had been met by the application. Thus the specific area of land subject to the application is identified and has been used by a significant number of the inhabitants of the locality . . .
>
> 35. Furthermore, it is felt that the applicants have established that the application site has been used predominantly by people from the locality which has been specified precisely.
>
> 36. The objection by the solicitors acting for the land owners has not conclusively overturned any of the evidence provided with the application. The application has to be proved on a balance of probabilities that the land has become a village green and no compelling evidence to contradict this has been produced.
>
> 37. It is acknowledged that the site is/has been overgrown, however, this would not preclude a number of the claimed activities taking place."

The recommendation was that the register should be amended to include the site as a village green.

19. The claimant's solicitors had been sent a copy of the report in advance of the meeting. They protested saying that a public inquiry should be arranged to hear, to test and to consider the evidence which had been submitted, otherwise:

> "You will be depriving the objector of the beneficial enjoyment of its land on the basis of evidence which is taken at face value. Equally, you will be dismissing out of hand the Objector's evidence as to, for example, the overgrown nature of the land which would make the use of the land for many of the claimed activities extremely difficult, if not impossible."

20. They contended that it would be "unlawful and unreasonable" for the defendant to determine the application without holding an inquiry.

21. When introducing her report, the Head of Legal and Democratic Services responded:

> "The Council has followed the procedure required under the Commons Registration Act 1965 which does not require the Council to hold a non-statutory public inquiry to determine an application under that Act. However, under the public participation procedure approved by the Committee in 1999, the Committee may opt to proceed to a special meeting or an oral hearing should they wish . . ."

She referred to the Human Rights Convention which had been extensively relied upon by the claimant's solicitors, and continued:

> "The procedure adopted to deal with this application accords with the requirements of the 1965 Act and the relevant Regulations which allows any person an opportunity to submit an objection or representation to an application within the specified period and the applicant has been given an opportunity to respond."

22. The introduction stated that if members did not accept the officer recommendation, they could refer a decision and seek counsel's advice, or if there was "new evidence or a significant conflict", they could adjourn to a special meeting. Members resolved to accept the recommendation in the report. The minutes record:

> " . . . that the officer's recommendation be accepted as there was evidence of use of the site and the officer's report was not sufficiently challenged."

23. No other reasons are given in the minutes for the Committee's decision and there is no evidence from any of the members of the Committee. It was common ground therefore that the members had agreed with and adopted the approach set out in the officer's report. The claimant was informed by letter dated 10 September of the Committee's decision, and the site was added to the register as a village green on 7 October 2002.

Procedural History

24. The application for permission to apply for judicial review was filed on 4 December 2002. It raised four principal grounds of challenge to the defendant's decision to register the site as a village green. These grounds were, in summary:

> 1. That on the material before the Committee as to the physical condition of the site, it could not reasonably have concluded that the site had been used for lawful sports and pastimes throughout the relevant period (user).
>
> 2. That such use for lawful sports and pastimes 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 plan was neither a 'locality' nor a 'neighbourhood' for the purposes of the Act (locality).
>
> 3. That such user for lawful sports and pastimes as there had been had not continued as of right up to the date of the second application, having

become contentious once the applicants for registration were informed by the defendant of the claimant's objections to the first application to register the site (as of right).

4. That the defendant 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 at a non-statutory inquiry, or a hearing before the Committee itself (fairness).

25. The defendant's acknowledgment of service did not contend that the claim was not arguable; rather it contended that the claim should not have been made as an application for permission to apply for judicial review, but as an application to rectify the register under section 14 of the Act. Section 14 provides for the rectification of registers as follows:

> "The High Court may order a register maintained under this Act to be amended if --
>
> "(a) the registration under this Act of any land or rights of common has become final and the court is satisfied that any person was induced by fraud to withdraw an objection to the registration or to refrain from making such an objection; or
>
> "(b) the register has been amended in pursuance of sectioned 3 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;
>
> and, in either case, the court deems it just to rectify".

26. The claimant and the defendant were unable to agree as to the scope of section 14 and/or the appropriateness of judicial review. At a hearing on 6 May 2003 the claimant indicated that it would be making an application under section 14 without prejudice to its contention that judicial review was the appropriate remedy. I granted the claimant permission to apply for judicial review and ordered that, if possible, the application for judicial review and any application under section 14 should be heard together. In doing so I expressly made no finding as to the ambit of section 14, or as to its adequacy as a remedy.

27. The Part 8 claim form in the section 14 application was issued in the Chancery Division on 8 June, and in due course, Master Bowles made the order referred to in the introduction above. In addition to the four issues set out above (user, locality, as of right and fairness), there is, therefore, a fifth: appropriate remedy -- judicial review or section 14.

The Short Answer

28. This case was argued with great skill by Mr Laurence QC, on behalf of the claimant, and Mr Petchey, on behalf of the defendant, over three days. Numerous authorities were cited, particularly as to the meaning of "locality" in the Act. There is, however, a (relatively) short answer. The defendant's decision to register the site as a village green is manifestly flawed for the three reasons set out below. Whether the end result is to be achieved under section 14 or by way of judicial review, the court simply cannot allow the decision to stand.

Reasons

User

29. When dealing with "the issues" the report correctly stated that the onus was upon the applicants for registration to prove on the balance of probability that the site had become a village green. Thus the applicants had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years.

30. On the basis of the officer's findings in paragraph 26 of her report, it could not reasonably have been concluded that this test had been met. I recognise the need to read reports such as this as a whole and in a common sense way. Extracts should not be taken out of context. The relevant passages are set out above. In response to the claimant's contention that it had been "physically impossible for the public to have used over 90 per cent of the claimed land for the purposes claimed due to the fact that it has been so heavily overgrown", the report said that:

> (a) The land was "largely" or "in the main" overgrown with trees, brambles, nettles and other vegetation.
>
> (b) It seemed "unlikely" that some of the activities claimed had taken place on the open land because of the state of the vegetation; and that it was "probably correct" to say that the use of the site for certain recreation and activities over a considerable period was "questionable".
>
> (c) Nevertheless, it was "quite possible" for "a number" or "some" of the activities to have taken place on the site.

31. Mr Petchey submitted that the reference to a possibility rather than a probability of use was not an erroneous diminution of the burden of proof upon the applicants for registration. That issue was dealt with in the conclusions (see paragraph 36 of the report). Rather, this part of the report was stressing the officer's finding that, contrary to the claimant's contention that the use of the land was impossible, it was possible for some of the claimed activities to have taken place on the site. I accept that that is a fair

interpretation of this part of the report, but it raises two obvious and critical questions: which activities (since the probability was that the site was not used for certain of the claimed activities for the requisite period: see finding (b) above), and therefore, just how extensive was the use of the site; and over how much of the site did they take place (since it was in the main overgrown: see finding (a) above)? These questions remained unresolved to the end. The concluding paragraphs in the report left them unanswered.

> "It is acknowledged that the site is/has been overgrown, however this would not preclude a number of the claimed activities taking place."

32. The preceding paragraph in the report (paragraph 36) merely compounded the confusion. While it reiterated the need for the application to be proved on the balance of probabilities, this advice was sandwiched between two passages which appeared not merely to reverse the onus of proof, but also to impose an increased burden on the claimant. The report said that the claimant's objection had not "conclusively overturned any of the evidence provided with the application" and that "no compelling evidence" to contradict the application had been produced by the claimant. Even without this confusing advice as to the burden and standard of proof, there was no possible basis on which the Committee could reasonably have concluded that the whole of the application site had probably been used for lawful sports and pastimes for 20 years in the light of the views expressed in paragraph 26 of the report (and implicitly accepted by the Committee).

33. Mr Petchey made the point that the Committee had, in addition to the report, the completed questionnaires. That is true, but the views expressed in paragraph 26 of the report were based upon the totality of the available evidence. They should have led to only one conclusion: the application had to be refused.

Fairness

34. One of the many deficiencies in the Act and the regulations is that they do not prescribe any procedure (beyond publicising the application and sending copies of any objections to the applicant) for determining an application. In particular, no provision is made for an oral hearing. In practice, many registration authorities remedy this omission by making arrangements for an independent inspector (normally counsel experienced in this branch of the law) to hold a non-statutory inquiry. This practice was noted with approval by Carnwath J (as he then was) in R v Suffolk County Council ex.p Steed [1995] 70 P & CR 487 at pages 500 to 501.

> "It is accepted that, if the matter has to be reconsidered by the Council on its merits, then some form of oral hearing will in practice be necessary. Although there is no provision for such procedure in the regulations, I understand that authorities do sometimes organise non-statutory hearings where the written submissions disclose significant conflicts of evidence. This is appropriate. The authority has an implied duty to take reasonable steps to acquaint itself with the relevant information . . . (Secretary of

> State v Tameside Borough Council (1977) AC 1014, 1065). Some oral procedure seems essential if a fair view is to be reached where conflicting recollections need to be reconciled, even if the absence of statutory powers makes it a less than ideal procedure."

35. In other cases, hearings have been held before the decision making Committee itself, at which the applicants for registration and objectors had been given the opportunity to call and cross-examine witnesses and to make oral submissions. The defendant contends that neither a non-statutory inquiry nor a hearing before the Committee was necessary in the present case. Mr Petchey points to the fact that there was no conflict of evidence as such. The claimant had not placed any evidence before the Committee contradicting the completed questionnaires, it had merely relied on submissions in the letters of objection from its solicitors.

36. I accept that registration authorities have a discretion as to the procedure to be adopted (assuming that the limited requirements in the regulations have been complied with), but that discretion is not unfettered. It must be exercised in a manner which is fair to applicants and objectors. What fairness requires by way of procedure will depend upon the circumstances of the particular application. Coupled with the obligation to act fairly, the registration authority is also under an obligation not merely to ask the correct question under the Act, but to "take reasonable steps to acquaint [itself] with the relevant information" to enable it to correctly answer the question: see the Tameside case cited by Carnwath J above.

37. In the present case, the defendant does not appear to have given any, or any serious, consideration as to what fairness required. The approach adopted by the Head of Legal and Democratic Services when introducing her report appears to have been that it was sufficient for the defendant to comply with the requirements laid down in the Act and the regulations. Where there is a comprehensive statutory code governing the determination of appeals (for example the Town and Country Planning Inquiries Procedure Rules), it may well be difficult to persuade the courts that fairness requires anything more than compliance with the statutory code. But as noted above, the Act and the regulations do not provide a comprehensive code. In particular, they are silent as to how the registration authority is to set about resolving disputes of fact between applicants and objectors which have emerged as a result of the process of the applicant responding to the objector's response to the information contained in the application.

38. Given the report's findings as to user (see above), this was a case where the application could fairly have been rejected without an oral hearing because the burden of proof had not been discharged by the applicants (see above), but it could not fairly have been accepted without such a hearing, if only to resolve the two questions left unanswered on the written evidence and submissions: which activities, and therefore, what was the extent of the user; and over how much of the site did they take place for the requisite period?

39. In support of his submission that the defendant was not required to make

arrangements for some form of oral hearing, Mr Petchey relied upon the claimant's ability to make an application to the High Court under section 14 of the Act for the amendment of the register. On such an application the High Court would be able to hear oral evidence and submissions. I accept that the existence of the right to apply to the High Court is a factor to be taken into consideration when deciding what fairness requires in any particular case, but section 14 does not absolve the registration authority from the duty to adopt a fair procedure and to take reasonable steps to establish the facts to enable it to answer the statutory question.

40. It is important from the point of view of applicants for registration, as well as objectors, that the registration authority should do its best to resolve disputed questions of fact when deciding whether to accept or reject an application. The registration authority will be able to resolve factual disputes locally in a forum (inquiry or hearing) that will be more convenient for local residents who may support or oppose the application, and will not expose them to the additional expense and the risk of costs that are inherent in High Court proceedings.

Locality

41. The debate as to the meaning of "locality" in sub-section 22(1A) ranged far and wide. For the purposes of the short answer it is unnecessary to consider the meaning of "neighbourhood" since the defendant did not consider whether the area shown edged red on the plan could reasonably have been described as a neighbourhood. It is common ground between the parties that while the applicants did not have to define the locality in their application (see R(Laing Homes Limited) v Buckinghamshire County Council [2003] EWHC 1578 (Admin), at paragraphs 135-137), the defendant had to be satisfied that the claimed user had been by the inhabitants of an area that could properly be described as a "locality".

42. The applicants chose to describe the locality, the inhabitants of which they claimed had used the land for lawful sports and pastimes for 20 years. All the evidence before the defendant in the form of the completed questionnaires contended that the locality was that described in the plan accompanying the application. No other locality was ever suggested. The report accepted that the area put forward by the applicants was a locality for the purposes of section 22 because, and only because, the boundary of the area had been edged in red on a plan. In his submissions, Mr Petchey acknowledged that this had been the defendant's approach and submitted on its behalf that by drawing a line on a map, any area could be defined as a "locality" for the purposes of the Act. Certainty as to the extent of the locality was all that was required and that was provided if the area, any area, was delineated upon a plan.

43. Whatever may be meant by "locality" in sub-section 22(1A), I am entirely satisfied that it does not mean any area that just happens 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 in the sub-section since anywhere could be delineated on a

plan.

44. Parliament might have provided that land fell within sub-section (1A) if a significant number of "the local inhabitants" or "persons living in the vicinity" had used the land for lawful sports and pastimes, but it did not do so.

45. Setting the claimant's submissions as to the meaning of "locality" on one side (see post), it is plain that, 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". It may well be difficult to define the boundary of a "locality" on a plan because views may differ as to its precise extent, but there has to be, in my judgment, a sufficiently cohesive entity which is capable of definition. Merely drawing a line on a plan does not thereby create a "locality". In Steed (above), Carnwath J said, at page 501:

> "Whatever its precise limits, it 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."

Although these observations were obiter, since there was no dispute that Sudbury was a "locality" for the purposes of the Act, they capture the essential characteristics of a locality.

46. There is no suggestion in the report that the area delineated by a red line on the plan with the application was a distinct and identifiable community. The completed questionnaires mention local facilities such as local shops and a doctor's surgery, but there is no information as to their location or even as to whether they are within the area edged red. As mentioned above, the boundary of the area is, for the most part, arbitrary in topographical terms. It appears to have been defined solely upon the basis that it should be drawn so as to include the homes of the 24 people who had completed questionnaires.

47. Unless a "locality" in sub-section (1A) means any area that happens to have been delineated by a red line on a plan by an applicant, the defendant's decision is fatally flawed. For the reasons set out above, I am satisfied that, whatever else it may mean, "locality" does not have such a non-meaning in the Act.

48. In concluding that the defendant's decision must be quashed (whether under section 14 or in the judicial review proceedings: see below), on the grounds of user, fairness and locality, I do not intend to be unduly critical of the report. The Head of Legal and Democratic Services was doing her best to advise the Committee in a complex area of the law. The deficiencies of the Act and the regulations, and the uncertainties thereby created, have been apparent for very many years: see for example the observation of Lord Denning in New Windsor Corporation v Mellor (1975) 1 CH 380 at page 392. It has become well nigh impossible for registration authorities to discharge their duties under the Act without resorting to outside specialist advice. It is to be hoped that Parliament will take steps to simplify and clarify the statutory provisions at an early

stage.

Appropriate Remedy

49. When Parliament wishes to restrict the scope of a statutory appeal or application to the High Court, it does so in express terms: see for example, section 11(1) of the Tribunals and Inquiries Act 1992 and section 289(1) of the Town and Country Planning Act 1990, which make provision for appeals on a "point of law" from decisions of certain Tribunals and from the Secretary of State's decisions in enforcement notice appeals, respectively.

50. The High Court's powers under section 14 are not restricted to errors of law or procedure. If, for any reason, factual or legal, it appears to the court that no amendment to the register or a different amendment ought to have been made, then the court may order it to be amended. In Steed, Carnwath J said at page 496 that the court under section 14 "is not confined to remedying errors of law, but may consider the overall merits of the amendment".

51. In Secretary of State for Health v Birmingham City Council (unreported) 20 July 1995, Vinelott J said at page 10A of the transcript that "the court is given a wide discretion to rectify the register in the light of the circumstances when the application is made".

52. Thus, the starting point must be that the claimant could have raised the four issues: user, locality, as of right and fairness, in an application under section 14 rather than by way of a claim for judicial review. The claimant accepts that it could have (and subsequently has by way of agreed preliminary points) raised the first three issues, but expressed a concern that the court might not be able to deal with the fourth, fairness, without itself having to hear all of the evidence and reaching its own view on the totality of the evidence as to whether the site was or was not a town or village green. The question is free from authority, but I can see no reason why the court should not, under section 14, order an amendment to the register if it is satisfied that no amendment ought to have been made by the registration authority because it was procedurally unfair to have made the amendment.

53. The fact that the claimant could have raised all of its complaints under section 14 does not oust the court's power to grant judicial review. Where Parliament wishes to oust judicial review because of the availability of a statutory appeal, it has to do so in the clearest possible terms. There can be no ouster by implication: see the Court of Appeal's decision in R(Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 474, [2002] EWHC Civ 1738 at paragraph 44. Section 25 of the Acquisition of Land Act 1981 is an example of an express ouster; there is no comparable provision in the Act.

54. Although it will rarely be appropriate to grant permission for judicial review as an exercise of judicial discretion where Parliament has provided a statutory appeal

procedure, there will be exceptional cases: see paragraph 47 of Sivasubramaniam. In Sivasubramaniam, the Court of Appeal said that these principles applied with particular force in the context of a coherent statutory scheme such as that established under the Administration of Justice Act 1999 and the CPR. Claimants should not be allowed to use judicial review to bypass the need to obtain leave to appeal, the need to comply with time limits, or the need to comply with other procedural requirements (paragraph 48). In the present case the position is reversed. Unlike judicial review, there is no need to obtain the court's permission to make an application under section 14 and no need to make the application promptly or indeed within any time scale at all. In certain cases the court might take the view that the delay was such that it would be unjust to rectify the register, but there is no obligation to claim promptly.

55. Mr Petchey referred to section 10 of the Act which 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 rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration, except were the registration is provisional only."

56. He accepted that, absent section 14, the court would in judicial review proceedings have power to quash not merely the defendant's decision to accept the application, but also the registration itself. In R v Hillingdon London Borough Council ex.p Royco Homes Limited (1974) 1 QB 720, the Divisional Court granted an application for an order of certiorari to quash a grant of planning permission, notwithstanding the existence of a right of appeal to the Secretary of State. Decisions quashing orders, notices or other formal documents issued by local authorities are common place. For the reasons set out above, section 14 does not oust the court's power in judicial review proceedings to quash an unlawful registration. Mr Petchey submits that it would be "very odd if the court had concurrent powers" under section 14 to order that the register be amended, and to quash a registration in judicial review proceedings. If Parliament wishes to remove that "oddity" it has power to do so by enacting an ouster clause. Until judicial review is ousted, the court is able to exercise its discretionary power to refuse to grant judicial review in order to avoid any anomaly or injustice resulting from the existence of concurrent powers.

57. For completeness, I should mention the decision of Brooke J (as he then was) in R v Hereford and Worcestershire County Council ex.p Ind Coope (unreported) 26 October 1994. In that case, an application for judicial review of the County Council's decision to register land as a village green was unopposed. It was conceded that the County Council's decision should be quashed. When considering the question of remedy, Brooke J said:

> "I am satisfied that this is a case in which certiorari should go to quash the decision of the Commons Registration Panel. I am willing, in the exercise of my discretion, to make a declaration on the evidence before

> the court that the land is not a town or village green, but I am not willing to make an order of mandamus compelling the County Council to remove the land from the register.
>
> "No doubt they will remove the land from the register after the contents of this judgment have been drawn to their attention. If they fail to do so, the applicants always have their statutory remedy, under section 14 of the Act, of rectification of the register. But as the application has not been made under that section, I see no legal duty which I can order the County Council to follow to remove the land from the register. Accordingly mandamus is not appropriate."

58. The County Council was not represented at the hearing and Brooke J was not asked by the claimant to quash the registration itself. Accordingly, the point raised in the present proceedings was not considered.

59. For the reasons set out above, there can be no doubt that the registration of the site as a village green was unlawful. Is there any reason why the registration should not be quashed in the exercise of the court's discretion? Apart from stating, correctly, that the court has power under section 14 to order the amendment of the register, the defendant has put forward no reason as to why a quashing order would be inappropriate. The claimant is not seeking to obtain any unfair procedural advantage or to evade any procedural obstacle by making an application for judicial review. The claim raises discrete points of law which can be answered by reference to the report, and the other documents identified above, without the need for hearing oral evidence. In the circumstances, judicial review is at least as convenient as an application under section 14. Moreover, the defendant has not suggested that it has been prejudiced in any way by the fact that the claimant chose initially to proceed by way of judicial review.

60. The court's discretion must be exercised having regard to the overriding objective in CPR Part 1. Requiring a claimant who has commenced judicial review proceedings to re-commence them under section 14 by way of a Part 8 claim for no other reason than the existence of the right to make such a claim would not be consistent with the objectives of saving expense or ensuring that his case was dealt with expeditiously. In short, it would be a pointless waste of money and time for no practical advantage.

61. For these reasons I am satisfied that the court does have power to grant the claimant a quashing order in respect of, not merely the defendant's decision to register, but also the registration itself, in addition to its power to amend the register under section 14.

<u>As of Right</u>

62. In order to establish the existence of a class (c) village green it is not enough to demonstrate user for lawful sports and pastimes as of right for 20 years. The user as of right must "continue" up to the date of the application for registration (in this case 5 October 2001): see paragraph (a) in sub-section (1A). An alternative approach, which

would require the user to have continued as of right after the application was made until the date when the matter was being considered by the registration authority, or until the date of registration itself, would make a nonsense of sub-section (1A) because a landowner would only have to fence the land and put up notices on receipt of an application in order to defeat it, however long the user might have been.

63. For the user to have been "as of right" it must have been *nec vi, nec clam, nec precario*, not by force, not by stealth nor by the licence of the owner: see the speech of Lord Hoffmann in R v Oxfordshire County Council ex.p Sunningwell Parish Council [2000] 1 AC 335 at page 350H. Lord Hoffmann explained that:

> "the unifying element in these three vitiating circumstances was that each constituted a reason why it would not be 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" (see page 351A).

64. The landowner does not have to meet force with force. He can achieve the same effect by making non-forcible objection or protests directed towards the users of his land. In Newnham v Willison [1988] 56 P & CR page 8, there was a dispute as to the existence of a right of way. Kerr LJ referred to Mcgarry and Wade's*, The Law of Real Property* (5th edition):

> "Then the authors deal with forcible user, saying that it extends not only to user by violence, as where a claimant to a right of way breaks open a locked gate, but also to user which is contentious or allowed only under protest."

Kerr LJ continued:

> "And there are references to Eaton v Swansea Waterworks and Dalton v Angus.
>
> "The text goes on:
>
> "If there is a state of 'perpetual warfare' between the parties, there can obviously be no user as of right; and if the servient owner chooses to resist not by physical but by legal force . . . the claimant's user will not help a claim by prescription.
>
> "This, it seems to me, is clearly the position of the present case. Before June 27 1983 the user of the swept curve was contentious. There is a similar passage in *Gale* and also in *Halsbury*".

Having analysed the Authorities, he said this at page 19:

> "In my view what these authorities show is that there may be 'vi' -- a forceful exercise of the user -- in contrast to a user as of right once there

> is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious."

65. In that case the defendants had done more than engage in correspondence, they had erected a post obstructing the plaintiff's use of the track. In Dalton v Angus (1887) AC 740, the House of Lords was concerned with a right of support. At page 786, Bowen J said this:

> "It might, perhaps, be added with some show of reason that the user ought, if the analogy of lights and other easements were to be followed, to be neither violent nor contentious. The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: Eaton v Swansea Water Works Company."

He continued:

> "I am aware that this view is not one which has been laid down in any decided case."

66. Mr Laurence submitted that the claimant's solicitor's objection to the first application for registration which led to that application being withdrawn made it clear that the applicant's use of the land was contentious, so that all subsequent user was "vi". This point was made in the claimant's solicitor's letter of objection dated 2 May 2002: see above. While it was noted in one of the appendices to the report, it was not answered in the report.

67. Mr Petchey submits that there is now a difficulty in Newnham v Willison in that it articulates a subjective approach:

> "Knowledge on the part of the person seeking to establish prescription that his user is being objected to."

Such an approach was rejected in Sunningwell: see Lord Hoffmann at page 356C. If user which is apparently as of right cannot be discounted merely because many of the users were indifferent as to whether a right existed, or even had private knowledge that it did not (ibid), why should it matter that some users may know that their use is contentious?

68. He further submits that, whatever the position may now be post Sunningwell, Newnham v Willison and the cases referred to therein, were all examples of "perpetual warfare" between the landowner and users of his land. The claimant's objection to the first application did not establish a state of perpetual warfare. He pointed to the terms of the letters dated 15 December 2000 and 21 April 2001 which, while they objected to the application for registration, did not make it clear that local residents had no right to

go on the land. Rather, they argued that any use of the site by the public was with the implied permission of the defendant, which was the landowner, until the claimant became the registered proprietor on 16 March 2001.

69. In my judgment, the question following their Lordships' decision in Sunningwell must be not whether those using the land knew that their user was being objected to or had become contentious, but how the matter would have appeared to the owner of the land, since in cases of prescription the presumption arises from the latter's acquiescence: see pages 352H to 353A of Sunningwell.

70. In this context, the reaction of the applicants for registration to the landowner's objection must be relevant. If they had refuted the objection and persisted with their application, then it might well have been reasonable to have expected the landowner to do more to resist the exercise of the claimed right, for example, by erecting fencing or putting up notices. However, the reaction of the applicants after initially disputing the points made in the claimant's solicitor's letters of objection, was to withdraw their application to register the land as a village green. From the claimant's perspective, therefore, it had "seen off" the applicants' contention that its land was a village green. Why did it need to do any more to make it plain that it was not acquiescing in the acquisition of village green rights over its land?

71. I accept Mr Petchey's submission that there was not a state of perpetual warfare, but there did not need to be given the apparent success (from the landowner's point of view) of its opening shots in the war. The letter dated 15 December 2000 objected to the application for registration on a number of grounds, but it did say in terms that "the applicants had failed to establish that the claimed activities had been indulged in as of right". Read fairly and as a whole, the letters dated 15 December 2000 and 18 April 2001 made it sufficiently clear that the claimant was not acquiescing in the applicants' user of its land. It follows that the applicants' user of the site did not continue to be "as of right" after the withdrawal of their first application on 8 June 2001.

The Claimant's Case on Locality

72. The claimant's principal submission was that locality in section 22 means "a division of the county defined and known to law": see per Kekewich J at page 313 of Edwards v Jenkins (1896) 1 CH 308. The Defendant's submission is set out above. It contended that all that Parliament required was certainty and that the area delineated on plan A by the applicants was certain and it was therefore a locality for the purposes of the Act. Alternatively it was submitted (even though the issue had not been considered in the report) that the area delineated in the plan was certain and could therefore be described as a "neighbourhood".

73. The parties' submissions on the meaning of "locality" and "neighbourhood" ranged far and wide. Their original skeleton arguments were augmented by a supplementary skeleton argument and a further note from the claimant, and a supplementary note and two further notes from the defendant. There is no doubt that the issues raised in these

submissions are of great importance to all those concerned with village greens -- applicants, landowners and registration authorities alike. I was asked to provide answers to a number of unresolved questions. Since, in my view, the case for registration of this site does not even get off the starting blocks on the issues of user and locality (whether or not it means an area known to the law), I do not intend to deal with this final issue at any great length. Given their wider importance, the unresolved questions should be determined in a case where the inhabitants do come from an area that is sufficiently cohesive to be described in ordinary language as a locality, but which is not a division of the county known to law.

74. In Edwards v Jenkins, Kekewich J decided that a custom claimed by the inhabitants of three parishes to play on a field in one of the parishes was bad. This decision was doubted by Lord Denning MR in the New Windsor case at page 387 "so long as the locality is certain, that is enough". Brown LJ agreed with Lord Denning. Brightman J expressly left the question open: see page 396.

75. Lord Denning's doubts were not echoed in subsequent cases. In Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931, where a class (c) village green was claimed, Harman J, having concluded that there could be no possible claim of right, said this:

> "Other points were argued. In particular, Mr Drabble QC argued that it was impossible for a village green to be created by the exercise of rights save on behalf of some recognisable unit of this country -- and when I say recognisable I mean recognisable 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. The idea that one can have the creation of a village green for the benefit of an unknown area -- and when I say unknown I mean unknown to the law, not undefined by a boundary upon a plan, but unknown in the sense of unrecognised by the law -- then one has, says Mr Drabble, no precedent for any such claim and no proper basis in theory for making any such assertion. In my belief, that also is a correct analysis. I shall not go through the detail of it, but as a secondary reason for my judgment I would assert that it is impossible for the residents of Cadnam Crescent, alternatively of Cadnam Crescent and Milton Road, to be the persons in whose favour there could be created a right for the inhabitants of those two roads in perpetuity, and it seems to me that it would be a total departure from any of the authorities that have been cited."

76. In Steed, Carnwath J adopted a similar approach. Having referred to the need for there to be a "distinct and identifiable community such as might reasonably lay claim to a town or village as of right", and to the fact that Sudbury was being relied on as the

locality, he continued on pages 501 to 502:

> "In argument, there was some suggestion that a smaller unit could be taken, perhaps the streets adjoining the land. In support of this, I was referred to the conclusions of Gerald Ryan QC. In a non-statutory report prepared in 1979 for the Sussex County Council, Mr Ryan cited Pain v Patrick as showing that a custom might be claimed for the benefit of the inhabitants of only some of the houses in a particular settlement. In the particular case, he advised the Council that the houses in the immediately surrounding streets could qualify as a 'locality' under the Act. With respect to his acknowledged expertise in this field, I find this difficult to accept. Pain v Patrick was concerned with rights to a ferry, not to a village green. In the present statutory context I do not think that a piece of land used only by the inhabitants of two or three streets would naturally be regarded as 'a town or village green'. The word 'locality' in the definition of village green should be interpreted with regard to its context. Such an approach is also consistent with that of Kekewich J in Edwards v Jenkins:
>
> > "'I take it that the judges have used the word 'district' as meaning some division of the county defined and known to the law, as a parish is . . .'
>
> "Although the actual decision has been doubted (see New Windsor case), the words underlined fairly reflect the earlier cases there cited, and indeed the concept of a local law as explained in Hammerton v Honey. The word 'locality' in the Act seems intended to bear the same connotation as the word "district" as used in such cases."

77. Mr Petchey accepted that the houses in Pain v Patrick might well have comprised the ancient vill of Littleport, and would thus have been an area known to the law. In support of his submission that what was required was certainty as to the locality, rather than an administrative area known to the law, he referred to the exposition of Custom in 12(1) Halsbury's Laws (1998) 4th edition, reissue. The author, Professor JH Baker QC, refers to the need for certainty both as to the nature of the custom alleged and the locality where it is alleged to exist: see paragraph 615.

78. Under the heading, "Certainty as to locality", paragraph 616 says, in part:

> "A custom must be certain in respect of the locality where it is alleged to exist; for every custom must be local and cannot be alleged as existing throughout the whole realm. Some definite limit must therefore be assigned to the area in which the custom is said to obtain. This area must be defined by reference to the limits of some legally recognised administrative division, as for instance, a county, a hundred, a forest, a region of, marshland, a city, a town or borough, a parish, township within

> a parish, a vill, a hamlet, a liberty, a barony, an honour, or a manor. It is disputed whether a single custom may be claimed as operating in a number of such units, even though identical customs may in fact obtain in adjacent districts."

79. The references in that passage to a forest and a region of marshland are references to legally recognised entities, such as the New Forest or Romney Marsh. Paragraph 616 continues:

> "It has been said that it is not sufficient that the area where a custom is alleged to obtain is a mere geographical district, however clearly defined, for there would be no apparent reason for the existence of a separate custom affecting a district of a kind unknown to the law; but authorities on this point do not appear to be unanimous."

80. There is a reference to the authorities listed in footnote 27. The only lack of unanimity in the authorities cited in footnote 27, which include Edwards v Jenkins, is to be found in Harrop v Hurst, where a custom for the inhabitants of a named district, Tamewater, in the parish of Saddleworth, to take water from a spout in the highway was accepted. The weight to be given to this discordant note must be limited, since no objection was taken on the basis that Tamewater was not an area known to the law.

81. It is common ground that the word "locality" in sub-section (1A) must be construed in the context of the definition of class (a) and (b) greens in sub-section (1); that locality has the same meaning in classes (a), (b) and (c); and that it has the same meaning throughout sub-section (1A). For class (a) village greens the locality will have been defined in an Act of Parliament, or in a formal allotment made thereunder. It will therefore be an area known to the law. For class (b) village greens, apart from the doubt expressed by Lord Denning in the New Windsor case (above), the authorities in which the issue has been considered are unanimously to the effect that at common law a customary right to indulge in lawful sports and pastimes could exist only for the benefit of some legally recognised administrative division of the county. In my judgment, that would have been the sense in which Parliament used the word "locality" when defining class (b) and (c) village greens in 1965.

82. It will be remembered that the Act pre-dated the substantial re-organisation of local government that was effected by the Local Government Act 1972. In 1965 local government areas were much smaller and more local with numerous boroughs, urban district councils, rural district councils and a number of relatively compact county boroughs.

83. There is a further difficulty in accepting Mr Petchey's submission as to the meaning of "locality". On the defendant's approach there is no practical distinction between a "locality" and a "neighbourhood". Provided it is sufficiently certain (because it has been delineated on a plan), any neighbourhood can be a locality and vice versa. Indeed Mr Petchey submitted that "locality" and "neighbourhood" were essentially

synonymous. He fairly acknowledged that to succeed in this submission he had to persuade the court that when Parliament in the 2000 Act amended the definition of class (c) village greens by inserting a reference to "neighbourhood" in sub-section (1A), it did so unnecessarily, and upon the basis of a misapprehension as to the meaning of "locality" in section 22(1) as enacted in 1965.

84. I accept that the belief of Parliament in 2000 as to what was meant by "locality" in the 1965 Act is not determinative: see the speech of Lord Scott in Bettison v Langton [2002] 1 AC 27; [2001] UK HL 24 at paragraph 62. In that case parliament's erroneous belief was contrary to "a deluge of judicial and academic opinion" (paragraph 45). In the present case, Parliament's belief that the burden placed upon applicants for village green registration to demonstrate that the users were the inhabitants of any locality was unduly onerous and should be lightened by the introduction of the neighbourhood concept, was entirely in accordance with the (almost) unanimous view expressed in the authorities cited above. Accordingly, I am not persuaded that Parliament in 2000 misunderstood the meaning of "locality" in the 1965 Act.

85. It is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under "locality", I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so.

86. The parties are agreed that Parliament, in enacting the 2000 Act, was attempting (unnecessarily the defendant would say) to make it less not more difficult to establish class (c) village green rights. Parliament might have provided that land would fall within sub-section (1A) if it had been used for not less than 20 years by a significant number of the inhabitants "of any locality or of any neighbourhood", but for whatever reason, it did not do so. If a "neighbourhood" is to be relied upon, it must be a neighbourhood within a "locality". Thus, the need to identify a locality has not been removed. In most cases this should not create a difficulty, but it does for the applicants in the present case. The area shown edged red on the plan is contained within two unitary local authority areas: Bristol City and South Gloucestershire. There is no County Council, Avon County Council having been abolished on 1 April 1996.

87. Mr Petchey referred to the joint arrangements made between the two unitary authorities to deal with such matters as strategic planning. The need for such arrangements merely emphasises the fact that there are indeed two separate authorities. He sought to rely on section 6(c) of the Interpretation Act 1978 and invited me to read section 22(1A) as though "neighbourhood within a locality" meant "neighbourhood

within a locality or localities".

88. In my judgment, a contrary intention appears in section 22. For the reasons set out above, locality in the case of class (a) and (b) village greens means an administrative unit, not one or more administrative units. That "locality" has the same meaning in sub-section (1A) is reinforced by the use of the word "within", signifying that a "neighbourhood" must be wholly inside a single locality. In effect, the defendant's case requires sub-section (1A) to be read as though it referred to a "neighbourhood within, or partly within one and partly within another, locality".

89. When enacting the 2000 Act, Parliament did not intend to create this additional obstacle for applicants such as those in the present case, but it managed to do so. This is a further example of the urgent need for Parliament to revisit this area of the law.

Conclusion

90. The claimant succeeds. The parties agreed that I should reserve consideration of what relief would be appropriate and hear further submissions in the light of this judgment. Before doing so, I would like to express my thanks for their most helpful submissions.

91. Right, that is the end, my voice has just about lasted out. Miss Crail, Mr Petchey cannot be here. I got the message he could not be here. Mr Booth is here in his stead, but obviously has played no part in the proceedings. I would prefer, subject to any submissions you may have, if there are vexed questions about what relief should be appropriate, in particular declaratory relief, to leave that to be discussed perhaps between you and Mr Laurence and Mr Petchey. If you are unable to agree a form of order then I would arrange a time to suit us all to enable further submissions to be made. Does that seem sensible?

92. MS CRAIL: My Lord, we are entirely content with that course, which is eminently sensible.

93. MR JUSTICE SULLIVAN: And I would have thought that so far as costs and so forth are concerned, again that can be the subject of discussion. I would be very surprised if there was a disagreement about it. Broadly speaking I am likely to be prepared to approve any order that the parties are agreed to as to the sensible way of resolving this matter. Mr Booth, does that seem sensible to you?

94. MR BOOTH: Certainly, my Lord. I am not going to object to any of that. It seems eminently sensible.

95. MR JUSTICE SULLIVAN: If you would convey my apologies to Mr Petchey. We did try to arrange a time that was convenient for everyone, but the only time that Mr Laurence could do Mr Petchey could not do. The only time Mr Petchey could do, Mr Laurence could not do, and the only time they could both do it, I could not do, so I am afraid he had to lose out.

96. MR BOOTH: Mr Petchey sends his sincere apologies for not being able to attend.

97. MR JUSTICE SULLIVAN: Accepted. Right, we will leave questions of the formal order over for -- Mr Booth, Miss Crail, written form will be perfectly acceptable if the parties are agreed, and we only need to have an oral hearing if the parties cannot agree on the order. So there is no need for people to come back unless it is absolutely essential. Thank you very much.

The Queen on the Application of Tadworth and Walton Residents' Association Mr Clive Elcome v Secretary of State for Environment, Foods and Rural Affairs v Walton Heath Golf Club Limited, Reigate and Banstead Borough Council

CO/4492/2014

High Court of Justice Queen's Bench Division the Administrative Court

4 March 2015

[2015] EWHC 972 (Admin)

2015 WL 1472559

Before: Mr Justice Holgate

Wednesday, 4 March 2015

Representation

Dr Ashley Bowes (instructed by KSM Solicitors) appeared on behalf of the Claimants.

Ms Sarah Ford (instructed by Treasury Solicitors) appeared on behalf of the Defendant.

Mr Neil King QC (instructed by Aldridge Lester) appeared on behalf of the Interested Parties.

Judgment

Mr Justice Holgate:

1 The Claimants challenge by way of judicial review the Decision of an Inspector given on behalf of the defendant, the Secretary of State for Environment, Food and Rural Affairs by a letter dated 14 July 2014 to make an order under sections 16 and 17 of the Commons Act 2006 requiring Surrey County Council, as commons registration authority, to exclude from the register of common land an area of 8 hectares on Walton Heath Common, forming part of Beecham's Field (“release land”) and to register as replacement common land an area of about 9.8 hectares located 1.3km to the south and running along the edge of the Surrey Hills escarpment (“replacement land”).

2 The first Claimant, the Tadworth and Walton Residents' Association, is an association representing the interests of those who live in those communities.

3 Permission to apply for judicial review was granted on 10 November 2014 by Mrs Justice Lang who indicated that as the first claimant is an unincorporated association lacking legal personality one of its officers should be added as a claimant. That was done by a consent order, adding Mr Clive Elcome, the chairman, as a second Claimant.

Background

4 The application under Section 16 was made by the first interested party, The Walton Heath Golf Club (“the Club”). The club owns the release land and the replacement land. On 25 May 2012 it obtained planning permission to change the use of the release land from non-agricultural land to golf practice facility, together with associated works.

5 The release land is described in paragraph 5 of the decision letter as an area of 8 hectares, lying to the south-east of the B2032 Dorking Road and forming part of an area known as Beecham's Field. The majority of the area is flat amenity grassland. The remainder comprises

mainly woodland and an access track.

6 The Inspector described the replacement land in paragraph 7:

> "It is an area of [9.8 hectares running] along the edge of the escarpment, roughly 1.3 km to the south of the release land and on the opposite side of the M25 road. Just over half the land is occupied by woodland … The remainder of the land is improved grassland. Much of the land slopes quite steeply towards the south. The replacement land not currently accessible to the public."

7 The proposal attracted substantial opposition. There were more than 160 representations objecting to the application, but I also note some 60 in support.

8 The position of the second interested party, the Reigate and Banstead Borough Council ("the Council") was neutral, as is recorded by the Inspector in paragraph 13 of the decision letter.

9 A statutory public inquiry had to be held. That took place between 20 and 23 May. The Inspector carried out an unaccompanied site inspection on 19 May and then a formal site inspection on 23 May.

10 The Claimants had the benefit of being represented by Dr Bowes, who also appeared on their behalf in these proceedings. He called a number of witnesses, including a botanist, Mrs Ann Sankey.

11 The club was represented by Mr Neil King QC, who also appears in these proceedings. Amongst the witnesses called on behalf of the club was an ecologist, Dr Anne-Marie Brennan.

Statutory Framework

12 Section 16(1) of the Commons Act 2006 enables the owner of any land registered as common land or as a town or village green to apply to the appropriate national authority for the land to cease to be registered. In this case the appropriate authority is the Secretary of State.

13 By subsection (2) :

> "If the release land is more than 200 square metres in area then the application must also include a proposal for replacement land under subsection (3)."

14 The key provisions in this case are section 16(6) and (8) . Subsection (6) provides that:

> "In determining the application the Secretary of State must have regard to:
>
> (a) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);
>
> (b) the interests of the neighbourhood;
>
> (c) the public interest;
>
> (d) any other matter considered to be relevant."

15 Subsection 16(8) provides that the reference in subsection (6)(c) to the public interest includes the public interest in four matters, the first two of which are (a) nature conservation and (b) the conservation of the landscape.

16 Regulation 17(1) of the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, 2007 SI, No. 2589 imposes a duty on the Inspector to express his or her decision on a section 16 application in writing and to give reasons therefor.

17 Lastly, section 40(1) of the Natural Environment and Rural Communities Act 2006 imposes a duty on every public authority when exercising its functions to have regard:

> "So far as is consistent with the proper exercise of those functions to the purpose of conserving biodiversity."

18 Subsection (3) provides that:

> "The conservation of biodiversity includes in relation to a living organism or type of habitat restoring or enhancing a population or habitat."

A Summary of the Inspector's Decision

19 I will adopt the convention of referring to paragraphs in the inspector's decision by the letters DL followed by the paragraph number.

20 In DL9 the inspector set out the statutory provisions of section 16(6) , noting in footnote (1) the elaboration of "the public interest" by reference to section 16(8) .

21 In DL10 he also had regard to the published guidance relating to the determination of applications under section 16 to be found in:

> "Common land consents policy guidance, July 2009 DEFRA."

22 In DL11 to DL15 the Inspector dealt with the application of section 16(6)(a) . He reached the conclusion in DL14 that the proposed deregistration and exchange will have no adverse effect on the interests of persons occupying or having rights in relation to the release land.

23 In DL16 to DL30 the Inspector dealt with section 16(6)(b) , that is to say the interests of the "neighbourhood". In DL16 he explained the definition of neighbourhood which he would apply in this case.

> "The 2006 Act does not define the term 'neighbourhood'. However, published guidance makes it clear that the term should be taken to refer to the local inhabitants. I further take the term to refer to the local inhabitants to the common as a whole although clearly the impact of the proposed exchange is likely to be greatest on those living closest to the release and/or replacement land."

24 In DL17 he applied that definition in the following terms:

> "There are a number of settlements that could be said to form part of the neighbourhood of Walton Heath Common including Walton-on-the-Hill and Tadworth to the west and north, Lower Kingswood and Mogador to the east and some to the south such as Buckland. It could also be argued that inhabitants of larger settlements slightly further afield such as Reigate might regard themselves as local to the common. Nevertheless, it seems likely that the majority of local residents that will feel the greatest impact of the proposed exchange are those living closest to the release and replacement land such as the residents of Walton-on-the-Hill and Tadworth. Accordingly, whilst I have taken account of the interests of all local inhabitants, I have given most weight to the interests of people living in these areas."

25 In DL18 to 27 the Inspector assessed the implication of the proposed order for the neighbourhood. In DL18 to 20 he described the use made of the release land. In DL21 to 22 he dealt with the 3 hectares of grassland forming part of Beecham's Field which will remain as common land and other available areas of open space suitable for informal recreational use. In DL23 he discussed the accessibility of the release land.

26 In DL24 the Inspector described the very different character of the replacement land, namely

a rough sloping grassland and areas of ancient woodland. He said that it is accessible from various directions from footpath and bridleways but some are steeply sloping and muddy in wet weather. He said that others passed close to the M25 and suffer from traffic noise. He also pointed out there was no vehicular access or car park close to the replacement land. He said that in particular the replacement land is 1.3 kilometres from the release land and therefore further away from houses in Walton on Hill and Tadworth than the release land.

27 In DL25 the Inspector, whilst accepting that the replacement land was not as accessible as the release land, said that it nevertheless had other attractions for local inhabitants, notably extensive views to the south and additional interest.

28 In DL26 to 27 the Inspector explained why concerns as to accessibility to the replacement land by, horse-riders were unfounded. In DL28 to 30 he expressed his overall conclusions on this topic.

29 In DL28 the Inspector said that people who used the release land to practice golf but who are not members of the club along with other users of the land for informal recreation would be unable to continue those practices in the future. But he considered that that concern was attenuated by two factors. First, the use of the release land for informal purposes was already limited to some extent by its use for golf practice. Second, a reasonable area of Beecham's Field together with other areas would remain available for recreation and enjoyment.

30 In DL29 the Inspector said the replacement land offers a different sort of experience compared to that available on Walton Heath Common. He recognised that that area would be considerably less accessible to residents of Walton on Hill and Tadworth but, on the other hand, he said it would be more accessible to residents to the south of the M25. Reading DL29 together with DL17, it is plain that the Inspector had in mind residents in Buckland and the north western areas of Reigate.

31 In DL30 the Inspector expressed his overall conclusions as to the effect on the "interests of the neighbourhood" in these terms:

> "Overall therefore it would appear that the proposed exchange would result in some adverse effects for some local inhabitants but these would be limited to some extent and at least partially offset by benefit to others."

32 There is no dispute in this court that the effect of that conclusion was that under section 16(6)(b) the Inspector found that the effect of the proposal would be, to some extent, adverse.

33 The Inspector dealt with the application of section 16(6)(c) , the public interest considerations, at DL31 to 44.

34 He dealt with nature conservation between DL31 and 37. He stated in DL31 that the release land has "moderate ecological value and some potential for improvement by an appropriate management programme". As to the replacement land, he said in DL32, that that area has considerable potential ecological value. His overall conclusion on nature conservation was set out in DL37 in the following terms:

> "Overall, it is my view that the proposed exchange would have a positive effect on nature conservation if Beecham's Field, including the release land and the replacement land is managed sensitively in the future. The undertaking made by WHGC would appear to ensure that this will be the case as the proposed management plans are to be based on appropriately qualified advice and it is likely that Reigate and Banstead Borough Council will also obtain appropriate advice before approving the plans."

35 The Inspector dealt with landscape issues at DL38 to 41. He attached significant weight to the potential for the public to enjoy the landscape features of the replacement land which he described as being much more varied along with an elevated position on the escarpment. At DL42 the Inspector dealt with public access and concluded that there will be no significant adverse effect on public rights of access other than to the release land itself. At DL43 the Inspector concluded that there will be no detrimental effect on archaeological remains or features

of historic interest.

36 He expressed his overall conclusions on public interest topics issues in DL44 in the following terms:

> "On balance, it is my view that the overall effect of the proposed exchange on the public interest would be positive. In particular, the management plans for Beecham's Field and the replacement land to which WHGC has committed should ensure that more of the nature conservation potential of both sites is realised and the public will also benefit from being able to gain access to an interesting and attractive are which offers a different experience from other parts of the common."

37 Lastly the Inspector dealt with section 16(6)(d) under the heading of "other matters" between DL45 and DL50. This section focussed on the club's case as to why it needs to use the release land as a golf practice area:

> "45. Walton Heath Golf Club is well known and highly regarded amongst golfers. The old course is ranked within the top 100 courses in the world and both the old and new courses are listed in the top 100 courses in the UK. The club acts as host to a number of important tournaments and attracts around 8,000 visitors per year. The club believes that it is an asset for the village of Walton-on-the-Heath bringing it recognition and direct and indirect employment and economic benefits. The club itself employs 42 staff.
>
> 46. Unusually for such a club it provides very limited practice facilities for golfers. Such facilities that are available involve balls being hit across parts of the course, are not large enough to permit full shots to be made with all clubs and can only be used under supervision of professional staff. Alternatively, golfers can practice on Beecham's Field but this potentially conflicts with members of the public using the same area for air and exercise as is their right.
>
> 47. WHGC already has permission to close Beecham's Field to the public for one week every year which allows it to be used for golf practice or car parking during major tournaments but does not address the need for improved practice facilities for club members and visitors.
>
> 48. It is argued by the club that the provision of improved practice facilities is imperative if it is to retain its status. The requirements for a satisfactory practice area are a large area of flat land close to the clubhouse, professionals' shop and first tees. The only area that meets these requirements is the release land."

38 At DL49 the inspector rejected a suggested alternative location for the practice area.

39 Ultimately the inspector brought all his conclusions together in DL51 and DL52 which read as follows:

> "51. This is an unusual case in that the proposed replacement land is so far removed and so different in character from the release land. In consequence, the proposed exchange is likely to affect different groups of people, both some local inhabitants and some members of the wider public, in different ways. This makes it more difficult to determine where the balance of advantage or disadvantage lies.
>
> "52. However, taking all factors into account it is my view that the disadvantages of the deregistration of the release land which will be felt by some local inhabitants are outweighed by the advantages to others and the general public of both the deregistration of the release land and the registration of the replacement land. I therefore conclude that the application should be granted subject to the substitution of the revised fencing plan referred to earlier."

Legal Principles for Judicial Review of an Inspector's Decision

40 The relevant principles are agreed. They are in essence the same as those long established for the statutory review of an Inspector's decision on a planning appeal. They were conveniently summarised in paragraph 19 of the judgment of Lindblom J in Bloor Phones East Midlands V Secretary of State for Communities and Local Government at 2014 EWHC 754 (Admin) which I gratefully adopt.

41 An important aspect of the challenge in this case relates to the adequacy or otherwise of the reasons given by the Inspector for his decision.

42 In that context the leading authority is the decision of the House of Lords in *South Bucks District Council v Porter (No. 2) [2004] 1 WLR, 1953* .

43 The relevant principles were conveniently drawn together in paragraph 36 of the speech of Lord Brown of Eaton-under-Heywood. But it is to be noted that in paragraph 35 he expressed the hope that his summary would focus the attention of litigants on the main considerations to be borne in mind when contemplating a reasons challenge so as to discourage some challenges of this nature.

44 Lord Brown's summary was drawn from case law set out at paragraphs 24 to 34. For the purposes of this challenge I emphasise the following principles:

> (i) The decision letter is addressed to parties well aware of the issues involved and *arguments deployed* at the inquiry and so it is not necessary to rehearse every argument in the decision letter (see paragraph 26);
>
> (ii) It would be an unjustifiable burden to require the decision-maker to deal with every material consideration and there is no obligation to do so. The duty to give reasons only applies to the main issues in dispute or the principal important controversial issues (see paragraphs 24, 27, and 34);
>
> (iii) Reasons can be briefly stated. To be challenged, there must be something 'substantially wrong or inadequate' in the reasons given (see paragraph 25);
>
> (iv) The burden lies on the claimant to show that there is a lacuna in the reasons given 'such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process public law which would afford a ground for quashing the decision' (paragraph 31). But such adverse inferences will not readily be drawn" (see paragraph 36)."

Ground 1

45 In their statement of case prior to the inquiry the Claimants had objected to the lack of a mechanism by which the management plan suggested by the club for enhancing the biodiversity of the release land and managing the ecological interests of the replacement land would be secured. The 2012 planning permission had not imposed any such requirement.

46 Consequently on 6 May 2014 the club entered into a section 106 obligation under the Town and Country Planning Act 1990 with the council which was conditional upon the making of the order on the application under section 16 of the 2006 Act (see clause 3.2).

47 By clause 4, the club undertook to perform the obligations in schedule 1 . Those obligations read as follows:

> "1.1 Not to implement the Beechams Field Consent prior to the submission of the Ecological Management Plans to the Council.
>
> 1.2 To pay the reasonable costs incurred by the Council in approving and monitoring the implementation of the Ecological Management Plans.

> 1.3 Not to Occupy or permit Occupation of Beechams Field prior to the approval of the Ecological Management Plans by the Council.
>
> 1.4 Following approval of the Ecological Management Plans by the Council, to implement and thereafter comply with the Ecological Management Plans."

48 The "Beechams Fields Consent" referred to the 2012 planning permission. The section 106 obligation also contained precise definitions as to what the management plans for the release land and replacement land should contain.

49 It is plain that nature conservation was a substantial issue for the Inspector to consider, not least because of Section 16(6)(c) and (8) of the 2006 Act. It was a subject to which he had to have regard. Plainly the Inspector relied upon the section 106 obligation when reaching his conclusions in DL37, 44 and 52.

50 The Association's criticism before the Inspector of the section 106 obligation was encapsulated in paragraph 25(a) of its closing submissions. The Association pointed out to the Inspector in the clearest possible terms that the obligation to submit, obtain approval of and then implement the management plan would not be triggered by the Inspector's decision to make the order for deregistration, but would depend upon the club's decision to implement the 2012 planning consent. It was suggested that the club could circumvent the obligation by obtaining a fresh planning permission without any requirements for a management plan.

51 Under ground 1 the Claimant submitted that the Inspector misunderstood the effect of the section 106 obligation because he proceeded on the basis that the club's obligations would arise upon the deregistration of the release land in any event and irrespective of whether the 2012 planning permission was implemented.

52 In order for this contention to be accepted the Court would have to be persuaded that the Inspector misunderstood and went against, not only the plain wording of the section 106 obligation, but also the pellucid submissions of Dr Bowes and the response of the club. Paragraphs 10 and 11 of the club's submissions clearly acknowledged that the obligations would not be triggered simply by the making of the order for deregistration. This was a matter of common ground at the inquiry which was explained to the Inspector by both parties without any ambiguity whatsoever.

53 The part of decision letter challenged is DL35 which reads:

> "WHGC made a Unilateral Undertaking under section 106 of the Town and Country Planning Act 1990 in May 2014 in which it has agreed to submit Ecological Management Plans for both the whole of Beecham's Field and the replacement land to Reigate and Banstead Borough Council and not to implement the planning consent for the change of use to a golf practice facility on Beecham's Field prior to the submission of the plans. It has further agreed to pay the reasonable costs of the council in approving and monitoring the implementation of the plans, not to occupy or permit the occupation of Beecham's Field before the approval of the management plans and, following approval, to implement and thereafter comply with the plans. Details of the matters that are to be included in the plans are also set out in the undertaking."

54 Dr Bowes accepts that the passage starting with: "Not to implement … " and continuing to the end of the paragraph accurately sets out the effect of the four limbs of the obligation in schedule 1 of the section 106 agreement. The criticism is that the preceding text reveals the alleged error.

55 I cannot accept that submission for a number of reasons. First, the text criticised does not even purport to describe a freestanding obligation to carry out a management scheme in the event of deregistration. It merely refers to the club having agreed to submit management plans for Beecham's Field and the replacement land. It did not refer to an obligation to do so in the event of deregistration. The natural meaning of this passage therefore is that it simply described in broad terms the scope of the club's commitment in respect of management plans. The use of word "and" immediately in front of "not to implement" emphasised by the Claimants is insufficient to modify the meaning of the text criticised so as to describe a free-standing obligation.

56 Second, it would make little or no sense for a section 106 obligation to require the club to comply with the four steps set out in schedule 1 to the deed and summarised in DL35, both in the event of the subsequent implementation of the 2012 consent and also in the event of the prior deregistration of the release land. It would be wrong of the Court to impute to the Inspector such a bizarre construction of the section 106 obligation in the absence of any wording language in the decision letter to that effect.

57 Third, the conditional language used in DL36, 37 and 44 (for example, "should ensure its proper care" and "would appear to ensure") shows that the Inspector understood that the obligation was conditional rather than absolute, in the sense that it would not become effective simply upon deregistration. I do not think that the other phrases relied upon by Dr Bowes in DL36 and 44, such as "The fact that the current replacement land is to be subject to management … " and "the management plans … to which WHGC has committed" when read in context alter the proper understanding of the decision letter.

58 Fourth, I do attach substantial weight to the clear terms of the section 106 obligation and the submissions of the association and the club thereon. The Court should not draw the conclusion that the Inspector misunderstood all of that material or indeed any additional oral submissions simply on the basis of the text criticised in the decision letter which the Association criticises.

59 In my judgment, DL35 shows that the Inspector correctly understood the section 106 obligation.

60 I note that in reply Dr Bowes accepted that even on his case DL35 could be read in the way I have set out above, but submitted that it could in the alternative be read in the way he suggested. That line of argument, in my view, simply points to a reasons challenge rather than an argument supporting ground 1.

61 For these reasons I reject ground 1.

Ground 2

62 Ground 2 is a reasons challenge. It falls into two parts:

(a) The Inspector's handling of paragraph 25(a) of the Claimants' closing submissions and;

(b) The Inspector's handling of the ecological evidence, in particular paragraph 3.3 of the proof of Mrs Sankey.

63 In opening the case Dr Bowes said that ground 2(a) only arises if the Court should find that the Inspector had correctly understood the operation of the section 106 obligation. In view of the additional submission made in reply to which I have just referred, I should make it plain that I see no ambiguity whatsoever in the Inspector's decision letter in that respect. The Claimants have not persuaded me that there is any substantial doubt as to whether the Inspector misconstrued the section 106 obligation.

64 The original complaint under ground 2(a) was that the Inspector failed to deal with the Claimants' objection that the club could circumvent the section 106 obligation by obtaining a fresh grant of planning permission for the golf practice facility. It is important in this, as in any other reasons challenge, to see the criticism being made in the context of the material put before the inspector.

65 In his submissions to the Court Dr Bowes made it plain that whereas in some section 16 cases objectors contend that the orders should not be made unless there is an *absolute* obligation to implement a proposed management scheme (i.e. contingent only upon the making of the order) that was not the position adopted by the Claimants in the present case. They did not object to the section 106 obligation as such. Instead they submitted that less *weight* should be given to it because of the contention that the club could, I emphasise the word could, not would, seek to circumvent the obligation in order to save the costs of compliance therewith.

66 Paragraph 11 of the club's closing submissions responded directly to that contention in the

following terms:

> "11: TWRA say that the Club could avoid these obligations by not implementing the planning permission. However, taking a fair and realistic view of the evidence, this is fanciful and is highly unlikely to occur. Mr Newlands' clear evidence is that the Club needs to implement the permission, and that (as it has done before) it would in any event ask Dr Brennan to formulate a detailed management plan and implement it."

67 Correctly, in my view, the club responded in terms of whether the association's fear was *likely to arise* . They submitted that on a fair and realistic view of the evidence the suggestion was "fanciful" and "highly unlikely to occur".

68 It is relevant to note that in paragraph 25(a) of their closing submissions the Claimants submitted:

> "If the release land was deregistered the club could perfectly lawfully decline to implement that planning permission (or obtain and implement a different one) and avoid the obligations under that unilateral undertaking altogether."

69 Thus, two points were being made by the Association. The first one was couched in somewhat hypothetical or theoretical language. The Club's evidence was that it needed to implement the 2012 planning permission. If the club did not implement their scheme under that permission, then it would not obtain the benefits which were said to be necessary and the rationale for seeking deregistration.

70 The second point is the one now being focused upon and was only mentioned, as Mr King observed, parenthetically. The Court has been told and there has been no dispute that none of the club's witnesses, in particular Mr Newlands, was cross-examined on the point. In the circumstances I am doubtful as to whether this was a substantial point on which the inspector was legally obliged to give reasons. But even assuming that point in the Claimants' favour, I have concluded that ground 2(a) is not made out.

71 Here it is important to judge the reasons given by the inspector by applying the principle that they are addressed to parties who are familiar with the material before the inquiry. Here the club's material does not appear to have been the subject of any challenge on the issue of likelihood. Given the way the issue was handled at the inquiry, in my judgment there was no obligation in this case to refer to that material in the decision letter. Instead it should have been treated as material about which the parties were already well aware and of which they did not need to be reminded. That material included paragraph 5.1 to 5.6, 6.3 to 6.4, 6.11 to 6.12 and 7.10.1 to 7.10.6 of Mr. Newlands proof. I will not lengthen this judgment by setting that evidence out but in summary it covered such matters as the deficiencies in the existing practice facilities, the importance of providing the new facilities in order to maintain the competitive status of the club, and the lack of alternative locations.

72 On the basis of such material the club advanced paragraph 11 of its closing submissions and the Inspector reached the conclusions set out in DL45 to 49. Thus, it is plain that the Inspector concluded that the club needed to carry out the scheme for which it had obtained planning permission in 2012.

73 The Claimants' alternative suggestion that the club could seek to circumvent the 106 obligation by obtaining another permission was not pursued with any of the club's witnesses. In these circumstances the Inspector expressed his judgment that the section 106 obligation "should ensure" that more of the natural conservation potential of both sites should be realised (DL44) and that the club's undertaking "would appear to ensure that" the proposed exchange would have a positive effect on nature conservation (DL37).

74 Dr Bowes accepted that if the Inspector had said that it was unlikely that a second planning permission would be sought, that would not have been open to challenge. In my judgment, if the Inspector's decision is read in a fair way, and as a response to the manner in which the respective cases were put to him, no criticism can be made as to the adequacy of the reasoning he gave on this point. He accepted, in effect, the club's case that it was likely that the 2012

permission and the section 106 obligation would be implemented and the management plans put into effect.

75 Ground 2(b) related to paragraph 3.3 of Mrs Sankey's evidence on the likelihood of the management plan achieving biodiversity benefits on the release land. Paragraph 3.3 of that evidence reads as follows:

> *"Potential impact of the proposed development*
>
> I agree that the management suggestions to improve the ecological value of the grassland by removal of arisings, would further reduce the soil fertility could promote species diversity. These could be initiated immediately. However, the expected increase in use of the grassland as a formal practice area could work the other way. Increased soil compaction and closer, more regular mowing would decrease species diversity. The proposed formal route to this practice area has not been indicated. There are two possible routes, either through the band of trees and shrubs north west of the Recreation Ground or through the woodland to the east of Beecham's Field. Both of these routes would have a negative impact on the biodiversity of these wooded areas and cause further fragmentation."

76 As against that, Dr Brennan, for the club, said as follows:

> "3.1.2: In its present condition the release land has limited ecological value but possesses potential value which is currently unrealised. This is presented in my report *Walton Heath Golf Club: Ecological Appraisal & Management Recommendations — Site of Proposed Practice Area* (July 2012).
>
> "3.1.5: The proposed formalisation of its use as a practice ground provides an opportunity to realise its conservation potential. Central to this is the removal of arisings following mowing of the practice area. This will promote biodiversity by reversing the eutrophication process whereby arising add to the nutrient burden of the soil.
>
> "3.1.6: Proposed mitigation seeks to extend the above management regime across the remaining 3.2 hectares of Beecham's Field to the southwest — thereby enhancing the acid grassland characteristic of Walton Heath. This will have a number of benefits viz,

a. *Benefit to biodiversity* by providing better quality wildlife habitat.

The management of the area will also enable woodland/scrub management to remove non-native invasive species.

b. *Benefit to the landscape and amenity value* by providing an improved experience for those accessing this part of the Heath as the proposed management regime will seek to diversify the award as the nutrient-poor soils here favour the re-establishment of grassland characteristic of Walton Heath."

77 It is submitted that the inspector failed to comply with his obligation to give reasons because he did not resolve an apparent difference of view between these two experts by reference to the material set out above. But in my judgment the position with which the Inspector was faced was as follows:—

> (i) Dr Brennan's opinion was unequivocal and it was supported by a more detailed report referenced in her proof at paragraph 3.1.2.
>
> (ii) It is accepted by the Claimant that there was no cross-examination of Dr Brennan on these matters.

(iii) Mrs Sankey's evidence did not go all one way. She accepted that the management proposals "could promote species diversity" and then raised the possibility that the anticipated use as a practice area "could work the other way. That was a tentative suggestion at best and, furthermore, the witness did not go on to express any opinion at all as to what the outcome would be taking those two matters together.

(iv) The matter raised in this Court was not relied upon in the Claimant's closing submissions.

78 In the circumstances I do not accept that this difference between the two experts can be elevated into a principal important controversial issue so as to give rise to a duty to give reasons on that point. In my any event, taking DL31, DL34 and DL37 together it is apparent that the Inspector accepted Dr Brennan's evidence and thus adequate reasons were given.

79 Dr Bowes did point to a further aspect covered in paragraph 25(b) of the Claimants' closing submissions.

80 It appears that in re-examination Mrs Sankey said that there was "no guarantee" that the management plans put forward by Dr Brennan and in the section 106 obligation would be approved by the local planning authority because of the possibility of detrimental impacts on European protected species. This point had not been raised in her proof or put in cross-examination to Dr Brennan. The Court was told that it was simply raised in re-examination as a question from the witness. There is no suggestion that any substantive reasoning or evidence was given at that stage. Indeed, that is highly unlikely given that the introduction of such late material at that point in the inquiry would have attracted a strong procedural objection. The point was merely "trailed". On the basis of the exiguous material put before the court, I am firmly of the view that this was not a substantial issue engaging the obligation to give reasons. With the benefit of oral submissions on this point, in my judgment it turns out not to have been arguable and, should not have been raised in the claim.

Ground 3

81 It is submitted that the Inspector acted irrationally by treating areas to the south of the M25, notably Buckland and parts of Reigate as falling within the neighbourhood for the purposes of section 16(6)(b) .

82 I have already referred to DL16 in which the Inspector set out the basis upon which he understood the term neighbourhood should be applied. In so doing, he relied upon "published guidance". That was a reference to the explanatory memorandum laid before Parliament along with SI 2007, No. 2589. It is to be noted that at the inquiry the Claimants expressly agreed with that approach to the identification of the neighbourhood, as can be seen from paragraphs 11 and 12 of their closing submissions.

83 Self-evidently the application of that agreed approach to the identification of the neighbourhood was quintessentially a matter for the judgment of the inspector.

84 I have previously referred to DL17 in which the inspector set out the conclusions he reached on the extent of the neighbourhood, applying the test contained in DL16.

85 Although the common extends to the south of the M25 and indeed the release land is contiguous with that area and, although that southern part of the common may be reached by bridges over the motorway, three things are plain from DL17:

(i) The Inspector did define a neighbourhood, applying the agreed test, and it cannot be said that he did so in any way that can be criticised as arbitrary, for example, simply drawing a line on a plan. Indeed, that suggestion is not made by the Claimants in this case (contrast *R(Cheltenham Builders Ltd) v South Gloucestershire D.C. [2003] EWHC 2803 (Admin)*).

(ii) The Inspector gave most weight to the effect of the proposals upon residents of

Tadworth and Walton-on-the-Hill.

(iii) He gave much less weight to the effects of the proposals on those living further away at, for example, Buckland and Reigate.

86 No challenge was made as such to that approach, based upon the criteria set out in DL16. The criticism instead is that it was irrational for the inspector to include Buckland or parts of Reigate within the neighbourhood at all.

87 Miss Sarah Ford, for the Secretary of State, correctly submitted that the test for establishing irrationality in this area is particularly high. She drew the Court's attention to three authorities. First, in *The Queen v The Home Secretary (ex parte Hindley) 1998 QB 751* , page 777A, Lord Bingham, Chief Justice, said:

> "The threshold for irrationality for the purposes of judicial review is a high one. This is because the responsibility for making the relevant decision rests with another party and not with the court. It is not enough that we might, if the responsibility for making the relevant decision rested with us, make a decision different from that of the appointed decision-maker..To justify intervention by the court the decision under challenge must fall outside the bounds of any decision open to a reasonable decision-maker."

88 Second, she *referred to The Queen (Cherkley Campaign Ltd) v Mole Valley District Council) [2014] EWCA Civ, 567* , at paragraph 48 of which held that the Court would be particularly slow to make a finding of irrationality in relation to a planning judgment, especially when the decision-maker had the benefit of a site visit whereas the court has to work upon written material alone.

89 Third, she *referred to the decision of Sullivan J (as he then was) in The Queen (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions) [2001] EWHC, Admin 74* at paragraphs 7 and 8, where the judge pointed out that the Inspector is to be treated as an expert tribunal and consequently the threshold of irrationality is a difficult obstacle for an applicant to surmount. That difficulty, he added, is greatly increased in planning and analogous cases because the Inspector is not simply deciding questions of fact but is reaching a series of judgments. As a result, he said that an applicant alleging that an Inspector has reached an irrational conclusion on matters of judgment faces a "particularly daunting task".

90 In this challenge the basis upon which irrationality is alleged is neatly set out in paragraph 68 of the Claimants' skeleton which reads:

> "In the alternative it is submitted that it was irrational to include Buckland within the neighbourhood because it is south of the M25 and some way to the bottom of the very steep Mole Valley escarpment SSSI. Similarly, it was irrational to include Reigate within the analysis of neighbourhood as it geographically distant from the common."

91 That really was as far as the argument went. I need only say that the court is simply not in a position to disagree (let alone quash for irrationality) on matters of judgment of this kind reached by the Inspector in response to submissions which, with all due respect, are no more than bare assertion. In truth, they represent a difference of opinion, one which of course is genuinely held and understandable but nonetheless, at the end of the day, a difference of opinion. No material has been provided to the court which could even begin to support an attack on the rationality of the decision. This type of challenge, particularly in the light of Newsmith , ought firmly to be discouraged.

92 In any event, even if the Inspector was not entitled in law to treat the benefits of the replacement land for inhabitants of Buckland and Reigate as falling within section 16(6)(b) , Dr Bowes accepted that these matters would still have had to be taken into account by the Inspector under the public interest limb in section 16(6)(c) and that under that provision there is no reason to think that that factor would have been given any different weight by the Inspector. True

enough, with that factor removed from section 16(6)(b) , the conclusion in DL30 would to that extent have been more adverse to the proposal. But, on the other hand, when added under section 16(6)(c) it would have increased the benefits found by the Inspector to have been established in DL44. Ultimately, all these matters found their way into the overall balancing exercise performed by the inspector in DL51 and 52.

93 When the Inspector's reasoning process is correctly understood, I find it impossible to see how the outcome of that final balancing exercise could have been any different. Dr Bowes did not advance any persuasive reason as to why a different view should be taken. Accordingly, even if a legal challenge under ground 3 had been made out, contrary to the firm conclusion I have already reached, I would have refused to grant any relief because I am satisfied that in this respect the decision would necessarily have been the same, applying the well-known principles in *Simplex GE (Holdings) Ltd v Secretary of State [1989] 57 P&CR 306* .

94 Perhaps in recognition of these difficulties, Dr Bowes sought to raise an alternative argument under ground 3, namely that the Inspector had erred in law in DL16 and DL17 by applying the wrong legal test for the identification of a neighbourhood. He sought to rely upon the statements by Sullivan J in *The Queen (Cheltenham Builders Ltd) v South Gloucestershire District Council [2003] EWHC 2803 (Admin)* as to the meaning of neighbourhood in what is now section 15 of the 2006 Act. He submitted that the Inspector should have identified communities with a sufficient degree of cohesiveness. In this instance cohesiveness related to the common. However, he accepted very fairly that this test could not have been applied without additional fact-finding on the part of the Inspector. Indeed, all parties at the inquiry would have needed an opportunity to consider the evidential position in relation to any such test.

95 Referring to three authorities, namely *South Oxfordshire District Council v Secretary of State for Environment, Transport and the Regions [2000] 2 All ER 667* , paragraphs 13 to 15 of *Newsmith and HJ Banks Ltd v Secretary of State [1997] 2 PLR 50* , it is well-established that there is no absolute bar on raising a new point of law in a challenge made in the High Court. But a factor weighing strongly against allowing such a point to be raised arises where it is dependent upon fact-finding which has not taken place because the point was not mentioned at the public inquiry. That is the position here.

96 In addition, the question of whether case law on the meaning of neighbourhood in Section 15 can or should be read across to section 16 raises, in my view, some difficult issues. I would not have been prepared to decide that question on the materials provided in this hearing. More substantial research and argument would have been necessary.

97 For those reasons ground 3 fails and, for all of those reasons, this application is dismissed.

98 It only remains for me to thank all counsel for the concise and helpful submissions which they have made. I would say in particular that so far as the Claimants are concerned I do not think that their interests could have been better advanced than by the untiring efforts of Dr Bowes.

DR BOWES: Thank you, my Lord.

MR JUSTICE HOLGATE: Now are there any other matters, please?

MS FORD: Yes, costs.

MR JUSTICE HOLGATE: Yes. There is a PCO in place. I saw a consent order I think a day ago and signed that. I think it is agreed that your costs be limited to £5,000.

MS FORD: Yes.

MR JUSTICE HOLGATE: So you are asking for …

MS FORD: I am seeking £5,000, although it appears—

MR JUSTICE HOLGATE: I do not think I have seen the schedule.

MS FORD: The schedule is not complete because it does not include the skeleton for this hearing. But the point I would make—

NEW SPEAKER: Has Dr Bowes seen anything?

MS FORD: No. The point I make is that even (Handed) without my fees or the skeleton for the hearing we are already on £6,252.

MR JUSTICE HOLGATE: I had better have a look. How many hours have you spent, would you say, on the case, without embarrassing you, broadly speaking?

MS FORD: My Lord, I have not actually reviewed it recently.

MR JUSTICE HOLGATE: Can you give me an “at least figure”?

MS FORD: I would say in preparation for the skeleton and general preparation for the hearing, I would say about 10 hours—

MR JUSTICE HOLGATE: That gives me a rough feel. Thank you. So you are asking for £5,000; is that right?

MS FORD: My Lord, yes.

MR JUSTICE HOLGATE: What would you say, please?

DR BOWES: My Lord, I have taken instructions. They are seeking a potential order and I take no issue with that.

MR JUSTICE HOLGATE: Yes, liability must follow. The only issue could be quantum and I would not have thought that £5,000, given the information we have got and the nature of the case is unreasonable.

DR BOWES: I accept that.

MR JUSTICE HOLGATE: So, in that case the order I make is that the claim is dismissed and there will be an order that the Claimants pay the defendant's costs in the sum of £5,000.

DR BOWES: Sorry to trouble you on one matter. Two final issues, one is just a slight correction to my Lord's judgment. It is a matter of fact.

MR JUSTICE HOLGATE: I am relieved to hear there is only one.

DR BOWES: I beg your pardon?

MR JUSTICE HOLGATE: I am relieved to hear there is only one.

DR BOWES: Indeed, yes. One brief point. I think my Lord put it that the replacement land is on the Surrey Hills escarpment. The decision letter, at paragraph 32. I think the accurate term is “within the Surrey Hills Area of Outstanding Natural Beauty” and on “the Mole Gap to Reigate Escarpment Site of Special Scientific Interest. I just flag that up for my for my Lord's accuracy. Of course nothing turns on it, my Lord.

MR JUSTICE HOLGATE: No. I do not think that I made that up, but I will look to see where I got it from. But thank you for that.

DR BOWES: The only other point, my Lord, is I seek no application for permission to appeal because I have no instructions to do so, although I would crave your Lordship's indulgence to allow 1 month, i.e. 28 days, instead of the usual 21 days, purely because those who instruct me, i.e. the Treasurer of the Residents Association instructs me, is not available, and I simply make that application on that basis and put it in your Lordship's hands.

MR JUSTICE HOLGATE: So you are not asking for an order which allows a period of time from the transcript becoming available, presumably because you may be kind enough to think that what has been said today is sufficiently clear for you to be able to advise without having to wait for the transcript.

DR BOWES: Yes, my Lord. Alternatively, I am happy to take it from the point of the transcript, if that is easier. I am not asking—

MR JUSTICE HOLGATE: Yes, but sometimes people ask for that if they feel they really do need the transcript before they can advise. I do not think you are putting it that way. You are just simply saying: “I would like 28 days” for the sole reason you give. So the question is whether that

is opposed by the defendant or the interested party.

MR KING: On our part, the 21 days is sufficient. People are often away. With respect, that is not a good enough reason. Obviously my clients want to see closure of this matter as soon as possible and I would respectfully say that should be good enough.

MR JUSTICE HOLGATE: Anything more you want to say?

DR BOWES: It is in your Lordship's discretion.

MR JUSTICE HOLGATE: That is undoubtedly true.

DR BOWES: I have put the point, my Lord, and—

MR JUSTICE HOLGATE: Yes. Attractively though the point is put, as always, I am not going to extend time because bearing in mind this is analogous to a planning matter and there is a great deal of emphasis upon expedition in cases of this kind. Even allowing for the one week when the Treasurer is not available, it seems to me that the 14 days which would remain would still provide adequate time with which to take instructions and to take any necessary steps.

DR BOWES: I am grateful.

MR JUSTICE HOLGATE: So, I am sorry, I am not going to extend time. So we should add to the order, that the application to extend time is refused. Thank you. Sorry.

MR KING: I was only going to say that I had understood my Lord, when your Lordship described the land, to take it from paragraph 7.

MR JUSTICE HOLGATE: I knew I took it from somewhere. Not having been there I could not possibly have imagined it.

MR KING: It is on page 27.

MR JUSTICE HOLGATE: Yes. That is where I was taking it from.

MR KING: I did not think that my Lord had said what Dr Bowes said you had said, but you can check.

MR JUSTICE HOLGATE: I can check it against DL7. That was definitely the intention.

2002 Scot (D) 2/12

Sainsbury's Supermarkets Ltd v The National Appeal Panel For Entry to the Pharmaceutical Lists

Outer House, Court of Session

Lord Carloway

29 November 2002

Judicial review – National Health Service – Pharmaceutical services – 'Neighbourhood' – Application for inclusion of premises in pharmaceutical list – Practice committee and appeal panel disagreeing with applicant's definition of 'neighbourhood' of premises – Application refused on grounds of adequacy of existing pharmaceutical services – Whether committee and panel erring in approach – National Health Service (Scotland) Act 1978, s 27(1) – National Health Service (Pharmaceutical Services) (Scotland) Regulations 1995, SI 1995/414, reg 5(10).

The petitioners applied for inclusion of their supermarket store in the pharmaceutical list of Greater Glasgow Primary Care National Health Service Trust. In terms of s 27(1) of the National Health Service (Scotland) Act 1978, every health board was under a duty to make arrangements as respects its area for the supply to persons in that area of 'proper and sufficient drugs and medicines'. In terms of reg 5(10) of the National Health Service (Pharmaceutical Services) (Scotland) Regulations 1995 an application for inclusion in a pharmaceutical list was to be granted by a health board only if it was satisfied that it was 'necessary or desirable to secure adequate provision of pharmaceutical services in the neighbourhood' in which the premises were situated. In a letter attached to their application the petitioners defined the neighbourhood of their premises, in terms of which a motorway was regarded as providing a boundary. The application was refused by the trust's pharmacy practice committee upon the ground that the application was not necessary or desirable to secure adequate provision of pharmaceutical services in the neighbourhood of the petitioner's premises. In reaching this decision the committee disagreed with the petitioners as to how the 'neighbourhood' was to be defined. The committee took the view that an area beyond the motorway, which included two pharmacies, was part of the neighbourhood. The petitioners appealed and the matter came before the national appeal panel (the respondents). The panel refused the appeal. The panel also adopted a definition of neighbourhood which included areas beyond the boundary, including one of the two pharmacies ('the Arden pharmacy'). The panel stated that this area 'formed a natural neighbourhood within reasonable walking distance of the proposed premises' and that within this area there was adequate provision of pharmaceutical services by existing pharmacies. In this petition for judicial review of that decision the petitioners claimed that both the committee and panel had misdirected themselves as to the definition and application of 'neighbourhood' in reg 5(10) of the 1995 regulations. The petitioners submitted that what should be looked at was the area of the local community and not walking distance and that socio-economic factors required to be taken into account. Secondly the petitioners submitted

that the panel had erred in taking into account the adverse economic consequences of their application upon a competitor, namely the Arden pharmacy. Thirdly, the petitioner submitted that they had provided a positive reason why consumers would benefit, namely extended opening hours, which the panel had not mentioned. In reply the respondents focused on the terms of reg 5(10) and submitted that if adequacy was already there in the neighbourhood, the committee or panel did not require to look further. The respondents further submitted that they had not erred in their approach.

The petition would be refused.

The panel had not erred in reaching its decision. The ascertainment of the neighbourhood was primarily a matter of facts and circumstances more suited to resolution by a committee or panel than through rigorous and detailed legal or linguistic analyses and might depend on a great number of factors. In this case the panel had carefully defined the boundaries of the neighbourhood as a matter of fact, giving reasons for the area selected. While it would not have been appropriate for the panel to adopt 'reasonable walking distance' as a formal definition, distance could be a useful guide to the extent of a neighbourhood. That appeared to be how the panel had regarded it. Similarly the adequacy of services within an area was primarily a question of fact to be resolved by the committee or panel. In this case the panel had adopted the correct overall approach to the question of adequacy. The detrimental effect the new pharmacy could have on local contractors, particularly those such as the Arden pharmacy serving deprived communities, was a relevant consideration. The panel's regard had not been directed towards the protection of the Arden pharmacy's viability in economic terms but to its retention as an important element in maintaining the adequacy of services in the defined neighbourhood. Moreover it was not to be supposed that the panel was not aware of the petitioner's extended opening hours, merely that it did not much attach significant weight to them. Having regard to all the facts and circumstances, the decision reached by the panel was one which was reasonably open to it. Accordingly the petition would be refused.

Davidson, QC (instructed by Maclay, Murray & Spens) for the petitioners

Brailsford, QC (instructed by R F Macdonald) for the respondents

Caroline Dale-Risk, LLB, Dip LP, MPhil

GADSDEN & COUSINS
ON
COMMONS AND GREENS

THIRD EDITION

BY

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SWEET & MAXWELL

THOMSON REUTERS

"loo hole" which "allows greens t? be destroyed".199 TheG area asa ktroducing an amendment ':'"hich became s.98 of the overn111e respon edodby ed the words "or of any ne1ghbourhood withina lac li OA cta, dich mtr uc b a ty" ·' ""lu Wd e fi ·u· n of a green, which words have een retained in s lS of th in tth, ru n 1· d ·r t be a · hb . e? 006 ·, If a nei hbourhood is to be re ,e upon mus ne1 ourhood Withm Atl . gl al'ties see below) so that the need to 1dent1fy a localityh aJ0ca1. i ty (or oc 1 , as notb een removed.

Meaning of neighbourhood

15-44 A neighbourhood is not a sub-division of a locality, 200 and need not be recognised admirustrauv umt.[201] . a

What constitutes a ne1ghbourh od has be ons der;d under other statutocy regimes. The cases on w aton s t ltte s a, e1ft .ourtbod nd r other leig l atio have asked whether pamcu1ar areas are su c1en y 1stmctive to cnos t t neighbourhood of its own"[202] and heth r they have feeling of a commuru te; neighbourhood.203 In one case the evidential fact rs which _were noted as being he! ful to identifying whether or not an area compnsed a neighbou rhood inclu ed! whether it had natural boundaries or distinct boundaries fonned by a large roadsueb as a motorway; the presence or otherwise of facilities which might be expect to exist in a given neighbourhood, including shops, primary schools and a posot f. fice; differences in housing types and standards; and differences in socio-economic circumstances. The court stressed that these were only relevant indicators and the absence of or difference between certain factors did not prevent an area being a neighbourhood. In *Northampton BC v Lovatt,*[205] a housing case, Chadwick LJ relied on a dictionary definition which said that neighbourhood meant:

> "The people living near to a certain place or within a certain range... a community, a c ertain number of people who Iive close together. A district or portion of a town... especially considered in reference to the character or circumstances of its inhabitants; a small but relatively self contained sector of a larger urban area"

In the context of greens, the issue crone before Sullivan Jin *Cheltenham Builders.* He said:

> "I do not accept the defendant's submission that a neighbourhood is any area ofland at an applicant for registration chooses to delineate upon a plan. The registration autb001 has to_be satisfied that the area alleged to be a neighbourhood has a sufficient degree; cohe iveness, therwise the word "neighbourhood " would be stripped ofa n a mearung. If Parliament had wished to enable the inhabitants of any area (as defi:1wo 1 tld phlan ac ompanying the application) to apply to register land as a village gre, en 11 ave said so."206

15-45 What can· pn nc ip1e quali·fy as a neighbourhood is now, under 8· 15 of the 2()(), m

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191 *Hansard* HL 617 c ol.865 (16 October 2000)

200 *Le e d• G' roup* Vo l at (56)

201 *Ch l' e tenham Builders* at (85)

202 *Re Li*

203 *ReDrg s pp bca ti o n* (1957) 7 p & CR 233 at 235

204 *av1es's Appli* (1973 3 P. & C.R. 115 at 131-132. *(ca l i s:l (2 'ffJ, Sainsbury'sSupe;auo,i* S.L.T. 688. *narketsLt d v National Appeal Panel for Entry to the Pharmacue* 1

205 0998) 30 H.L.R.8 75

206 (2003] EWHc 2803 (Adrni.n) at [85].

Neutral Citation Number: [2010] EWHC 530 (Admin)

Claim No: CO/6298/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Date: 23 March 2010

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

R (OXFORDSHIRE & BUCKINGHAMSHIRE MENTAL HEALTH NHS FOUNDATION TRUST and OXFORD RADCLIFFE HOSPITALS NHS TRUST)

Claimants

and

OXFORDSHIRE COUNTY COUNCIL

Defendant

and

(1) PAUL DELUCE
(2) CHRISTOPHER WHITMEY
(3) ROSIE BOOTH

Interested Parties

Charles George QC and Philip Petchey (instructed by Clarkslegal LLP Solicitors) for the Claimants
Charles Mynors (instructed by the County Solicitor, Oxfordshire County Council) for the Defendant
Ross Crail (instructed by Public Law Solicitors) for the First Interested Party
The Second and Third Interested Parties appeared in person

Hearing dates: 25 and 26 February and 17 March 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This is an application for judicial review of a decision of the Defendant, Oxfordshire County Council ("the Council") made on 6 April 2009, by which it resolved to register an area of land known as Warneford Meadow ("the Meadow") as a new town or village green ("TVG") under the Commons Registration Act 1965 ("the 1965 Act") as amended. Registration itself has not yet been effected due to these proceedings.

2. The resolution was passed following the submission of a report by the County Solicitor and Head of Legal Services in January 2009, recommending registration. That recommendation was itself the result of advice contained in the report of Vivian Chapman QC dated 18 October 2008 ("the Report"), supplemented by his Further Report dated 28 January 2009.

3. The application to register the Meadow as a new TVG was made by Mr Paul Deluce, the First Interested Party in this case, on 19 December 2006. There is no specific procedure under the 1965 Act to hold a public inquiry but the Council decided to hold one under its general powers pursuant to s111 of the Local Government Act 1972. To that end it appointed Mr Chapman as the Inspector. He has very extensive knowledge and experience of this area of the law and has often acted as Inspector in relation to TVG applications.

4. The objectors to the application were the Secretary of State for Health ("SOSH"), the owner of the Meadow, the South Central Strategic Health Authority and the Second and Third Interested Parties in this case, Mr Whitmey and Mrs Booth. In this judgment I shall use the expression "the Authority" to refer to the Claimants, the predecessor authority ie the Oxford Regional Health Authority (responsible for the 1989 signs referred to below) or the South Central Strategic Health Authority, as the context requires. Registration of the Meadow as a TVG has, among other things, the effect of preventing development on the land, or its sale for development which is what the SOSH and the Authority wish to do, in order to generate funds for the provision of new health facilities.

5. The Inquiry took place over 15 days in October 2007, January and May 2008. Following the hearing of much evidence and the receipt of detailed oral and written submissions, the Inspector produced his Report running to some 79 pages. He then received further submissions which commented on the Report and this led to the Further Report in which he confirmed his original recommendation. Accordingly although the decision in question is that of the Council, the focus of this case is upon the Report and Further Report. The Authority contends that they contain errors of law such that his recommendation, and in turn the decision of the Council, should be quashed. Mr Whitmey and Mrs Booth support that claim. It is resisted by the Council and also by Mr Deluce. I heard from Mr George QC for the Authority and Mr Whitmey in person for himself and Mrs Booth. I heard from Mr Mynors for the Council and Ms Crail for Mr Deluce. I am grateful to them all for their assistance and submissions.

STATUTORY BACKGROUND

6. At this stage it is necessary only to set out the definition of the relevant class of TVG with which the Inspector was concerned. It is to be found in s22 (1A) of the 1965 Act as amended by s98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act") which states that 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 ...(a) continue to do so..."

OVERVIEW OF THE MEADOW AND ITS ENVIRONS

7. The location and layout of the Meadow is shown most clearly on the large map at p276HH of the hearing bundle ("the Map"). It is about 20 acres in size. Its northern boundary is constituted by Roosevelt Drive beyond which is a housing estate called Little Oxford built in 1991. To the north-west is the Warneford Hospital. To its east lies Boundary Brook beyond which is the large complex of the Churchill Hospital. To the west there is an area of long-established housing stretching down from Hill Top Road to the Cowley Road.

8. At the Inquiry Mr Deluce contended that in this case the user was by a significant number of the inhabitants of a neighbourhood referred to as the Divinity Road Neighbourhood ("DRN"). This was said to consist of an area of housing as follows: the northern boundary was the rear of the houses on the north side of Divinity Road, the eastern boundary was the rear of the houses on the east side of Hill Top Road, the southern boundary was Bartlemas Close and the Southfield Park Flats and the western boundary was the Cowley Road. It included the hamlet of Bartlemas, Warneford Road, Minster Road and the Southfield Park Flats. The total number of dwellings in this neighbourhood was 890. The definition of DRN was later amended to include the Meadow itself.

THE INSPECTOR'S CONCLUSIONS

9. Broken down into its constituent parts, the key express requirements of s22 (1A) in this context may be described thus: there must be

    (1) Land on which
    (2) for not less than 20 years
    (3) a significant number of the inhabitants of any..... neighbourhood within a locality
    (4) have indulged in lawful sports and pastimes,
    (5) as of right, and ...
    (6) continue to do so.

10. The Inspector found that Mr Deluce had established each of these elements. However, it is important at this stage to note that the Inspector did not find the relevant neighbourhood to be DRN. Instead, he found it to be a much smaller area within DRN consisting of the houses on Hill Top Road. I shall refer to this neighbourhood as "HTRN". See paragraphs 375 and 380 of the Report. It is not suggested that it was not open to the Inspector to find a different qualifying neighbourhood. Hence the Authority does not challenge that finding. Equally, there is no challenge by Mr Deluce to this finding and given that his application in fact succeeded, it is perhaps difficult to see how he could.

11. It should also be noted that it was and is common ground that of the total estimated number of witnesses who submitted evidence of use of the Meadow, about a third came from HTRN, another third from the residential area to the west of the Meadow excluding HTRN (ie more or less, the balance of DRN) and the final third from the area to the north of the Meadow.

THE ISSUES

12. There is no challenge to the findings that the Meadow constituted land on which the inhabitants of HTRN (being the qualifying neighbourhood) had indulged in lawful sports or pastimes for 20 years and continued to do so. It is common ground that the relevant 20 year period ended on the date of the application ie 19 December 2006, so that it started on 19 December 1986.

13. However, it is (and was before the Inspector) contended by the Authority and Mr Whitmey that such 20 year usage was not enjoyed "as of right". This is because of the erection of certain signs on the Meadow by the Authority between January and March 1989 which read "No Public Right of Way". It was said that these notices rendered the use of the Meadow for lawful sports or pastimes contentious so that an uninterrupted 20 year period of such use could not be shown as at the date of the application. On the application before me it is said that in rejecting that argument and in finding that these notices did not make the user contentious the Inspector made two errors of law:

    (1) First, in deciding what the nature and effect of the notices was, he wrongly took into account the subjective intention of the Authority in relation to the notices, and

    (2) Second, he also took into account on this question certain documents which post-dated the period when the notices were there namely January – March 1989.

14. These alleged errors form ground 1 of the application for judicial review to which I shall refer as "the Notices Issue".

15. In addition it is contended before me (and was contended in the Authority's Further Representations dated 10 December 2008) that the Inspector erred in law in finding that there was sufficient usage of the Meadow by a significant number of the inhabitants of HTRN. This argument is founded upon the contention that although s22 (1A) of the 1965 Act does not expressly say so, it was an implied requirement of the section that not only must the use of the Meadow have been by a significant number of the inhabitants of HTRN, but also that the Meadow was used predominantly by such inhabitants ("the Predominance Test"). If the Predominance Test were to apply to this case, it could not be satisfied because on the evidence only about one-third of the users came from HTRN, the only qualifying neighbourhood found by the Inspector. It is implicit in the Report and made explicit in the Further Report that the Inspector rejected the notion that the Predominance Test applied. No more was required than that the users of the Meadow included a significant number of the inhabitants of HTRN. The fact that they constituted only about a third of the total users was irrelevant. This gives rise to the second ground for judicial review and is a pure question of law ie does the Predominance Test apply to s22 (1A) or not? I refer to it as "the Neighbourhood Issue".

16. Thirdly, the Authority contends before me that the Inspector made a further error of law when he described the consequences of registration of the Meadow as a TVG for users who did not come from HTRN. It is common ground that he did make an error of law here and the sole question is whether this error can be said to have had any material impact on his conclusion that the Meadow be registered. I shall refer to this as "the Subsequent Rights Issue". I deal with each issue in turn.

THE NOTICES ISSUE

The Law

17. It is common ground that the expression "as of right" means not "by right" but "as if by right". In order to be as of right a user must be *nec vi nec clam nec precario* – not by force, stealth or licence from the owner. User by force is not confined to physical force. It includes use which is "contentious". A landowner may render use contentious by, among other things, erecting prohibitory signs or notices in relation to the use in question.

18. In this case the Notices Issue raises the question of the proper approach to deciding whether a particular notice has indeed rendered the use contentious. In this regard I refer first to the judgment of Pumfrey J in *Smith v Brudenell-Bruce* [2002] 2 P & CR 4. After reviewing the relevant authorities, he stated at paragraph 12 that:

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

19. In *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWHC 1813 (Admin) Sullivan J had to consider the adequacy or otherwise of a sign erected on the owner's land in relation to its user for recreational purposes as part of a claim that it be registered as a TVG. The notice said this:

> *"Cleveland Golf Club*
> *Warning*
> *It is dangerous*
> *to trespass on*
> *the golf course"*

20. Sullivan J found that the local people using the land were aware of the notice. He then said this:

> "21. I accept that the wording of the notices should not be considered in the abstract. The surrounding context, including any evidence as to their effect upon those to whom they were directed, should also be considered. The response to a notice may well be an indication as to how it was understood by the recipient. Moreover, the notices should be construed in a common sense rather than a legalistic way because they were addressed not to lawyers but to local users of the land.
>
> 22. If the defendant was not acquiescing in the continued use of its land by local people for recreational purposes, it would have been very easy to erect notices saying, for example, "Cleveland Golf Club. Private property. Keep out" or "Do not trespass", followed by a warning "It is dangerous to trespass on the golf course". The fact that local users took umbrage at being described in the notices erected in 1998 as trespassers does not mean that those notices told them to stop trespassing, as opposed to warning them that if they continued to trespass it would be dangerous....
>
> 23. In the present case there was no evidence before Mr Chapman that the erection of the notices in 1998 had any practical effect whatsoever, much less that it had, even temporarily, 'seen off' the use of the land by local people for recreational purposes. The witness who gave evidence about the notices, Mr Fletcher, said that they had been painted out on the night that they were erected. They were re−painted and re−erected three times and then the club gave up. In these circumstances, given the ambiguity and the wording of the notices (to put their possible meaning at its highest from the point of

view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting those notices in 1998 it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users..."

21. By way of contrast in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43, the relevant sign read:

Oxford City Council.
Trap Grounds and Reed Beds.
Private Property.
Access prohibited
Except with the express consent
Of Oxford City Council

22. From those cases I derive the following principles:

(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;

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

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

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

(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in *Brudenell-Bruce* (supra) to "consistent with his means". That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more.[1] As it happens, in this case, no point on means was taken by the Authority in any event so it does not arise on the facts here.

In my judgment the following principles also apply:

[1] The reference to means by Pumfrey J seems to have its source in the quotation in the judgment from *Dalton v Angus* (1881) LR AppCas 740 at p773 where Fry J quotes Willes J's reference to the need of a party claiming a right by acquiescence to show that the servient owner could have done some act to put a stop to the claim "without an unreasonable waste of labour and expense". That suggests that reasonableness comes into any means-related argument. So a simple consideration of means does not seem to be enough. Hence my reservation about Pumfrey J's formulation.

(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean – that is simply another way of asking the question as to what the reasonable user would have made of it;

(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;

(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users.

The Inspector's findings on the Notices

Evidence before the Inspector

23. It is common ground, as the Inspector found, that there were three particular paths on the Meadow as at 1989. One of them, FP80, was already designated as a public footpath. Its route can be seen on the Map. There was another path running on the other side of the Meadow. On the Map it is shown as Right of Way 111. It was not however designated as a public footpath then. That only came in 2002. But it is convenient for present purposes to refer to it as FP 111. Third there was a diagonal path running from one end of the Meadow, where FP 80 and FP 111 meet, to its northern boundary at Roosevelt Drive. It is not marked on the Map but is clearly visible in the photographs at pp276AD and AE of the bundle ("the Diagonal Path"). It is also common ground that two of the signs were placed at points B and C on the Meadow as shown in the plan at p340 and that point C is a place from which the three paths referred to above diverged and is an entrance to the Meadow from Hill Top Road.

24. At paragraphs 360-363 of the Report the Inspector found that over the 20-year period, members of the public used the Meadow for recreational purposes including walking with or without dogs, and children playing. This is not challenged.

25. But the objectors argued that the true effect of the notices erected here ("No Public Right of Way") was to render contentious such recreational use at least over the period January-March 1989. In response, Mr Deluce argued that at best, the notices rendered contentious the use of FP 111 and the Diagonal Path as rights of way and had no impact upon recreational user of the Meadow generally.

26. Before turning to the Inspector's findings it is necessary to summarise the evidence before him on the question of contentiousness.

27. First, and as noted in paragraph 70 of the Report, on 21 November 1988 Mr Pomfret of the Campaign for the Protection of Rural England ("CPRE") applied under s53(2) of the Wildlife and Countryside Act 1981 for a modification order to add further public footpaths on the Meadow to the definitive map. At about the same time, the Authority had noted certain unofficial footpaths on the Meadow and was considering putting up notices. The Inspector noted at paragraph 72 that the Authority wrote to its solicitors, Clarks, about this saying that it intended to erect signs at the points marked X on a plan. The location of the signs was probably as set out in the plan at p340. At paragraph 73 he noted that Clarks sent to the Authority a letter of advice dated 28 December 1988 saying that a modification application had been made by CPRE and that the appropriate wording for the signs was "No Public Right of Way". The application for a modification order was supported by a number of evidence forms from a variety of witnesses as described in paragraph 74. On 27 January 1989 CPRE supplied to the Authority copies of the evidence it relied upon.

28. A newsletter from the local Social and Liberal Democrats called "Focus" probably published in January or February 1989 said this:

> "RHA fails to close footpaths [heading]. Congratulations to walkers on the Hospital Fields who have been cheerfully ignoring the rash of "No Public Right of Way" notices which have sprung up all over our footpaths..The [CPRE] submitted a claim to have these added to the county map last November...why does the RHA want to reduce access to the land behind that, which at present is scheduled as open space? Margaret Godden, your County Councillor has written to ask that very question "

29. Although not referred to expressly by the Inspector in the Report there was before him this further material:

(1) A letter from Ms Godden to the Authority complaining about the notices referring to the CPRE application, stating that the paths have been walked on for generations and asking what they were to understand from the notices to the south of Roosevelt Drive (there called the hospital access road) and whether the Authority hoped to convert the open space to buildings;

(2) The Authority replied by a letter dated 27 February 1989 stating that:

> "The position is that we do not at the moment accept the CPRE claims that additional footpaths have been established across the Churchill/Warneford site and the matter is in the hands of our solicitors. It is being dealt with as a general matter of estate management and no more than that should be read into the erection of the notices to which you refer."

(3) Ms Godden responded by a further letter, dated 7 March saying that she was at a loss to understand why a public authority should think it proper to "restrict access to open land in its ownership". She also said that she had no doubt that the CPRE would succeed in establishing the new footpaths;

(4) An article in the *Oxford Times* from 24 March 1989 referring to the issue over the paths and referring to the Meadow as a "green lung" area of open space, and a statement from Mr Pomfret who said that the "lung" was very popular and their evidence of usage was excellent. Reference was also made in the article to what was said in the correspondence referred to above.

30. In paragraph 77 the Inspector noted that it was accepted that in 1989 a sign saying "No Public Right of Way" was erected on the Diagonal Path at the Hill Top Road end. Paragraph 79 refers to a letter from the Oxford City Council to the Authority dated 31 March 1989, complaining about the erection of the signs in the Lye Valley area which is where Boundary Brook runs at the eastern edge of the Meadow (ie not the location of the particular paths referred to above). But a response came from Mr Banbury then an employee of the Authority who said that the signs had been put up by the City Council Engineer's Department at the request of the Authority to try and stop the establishment of rights of way not on the definitive map.

31. There were then further applications for modification orders in June and July 1989.

32. Paragraph 81 refers to a draft letter of objection to the Council dated 30 May 1990 in respect of the claimed footpaths. The Inspector said that it was unclear whether such a letter was ever sent, but it was clear from the draft that the stance taken by the Authority was that the public had general recreational access to the whole of the Meadow rather than using specific routes in the nature of rights of way. He then quoted from it as follows:

> "The Health Authority has never had a policy to discourage the use of the site as open space by members of the public, but it has never intended to dedicate any particular route through or around the perimeter of the site as a public footpath ... many ... use the site as a recreational area for walking of dogs, or simply to enjoy the more peaceful atmosphere of the site. Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as open space ... the Authority has not objected in the past [to the use] of the site as open space by the public, but it did in 1985 take steps to prevent people walking animals across the land by the erection of signs at various points, including at the point where the hospital service road intercepts the claimed footpaths."

And he added that he was entitled to infer that the letter was drafted by Clarks on the instructions of the Authority.

33. Paragraph 82 refers to a meeting on 5 October 1990 attended by Mr Banbury and Mr Pomfret and the minutes appeared to suggest that the Authority was taking the stance that it was prepared to allow people to wander the Meadow so long as new rights of way were not created. Paragraph 83 refers to the fact that Clarks wrote to the Authority on 7 November 1990 saying that modification orders should be opposed on the basis that public use was not for passage on defined routes but general use for recreation. So the Authority's own case appeared to rely positively on the fact of use and continuing use of the area generally as opposed to the use of paths for rights of way.

34. Ultimately a modification order was made in 1997 to add the paths 111, 112, 113 and 130 as shown on the Map but the Authority objected again, as it was entitled to do. A letter of objection sent on 3 March 1998 stated that the footpaths were used for general recreational purposes. Paragraph 89 refers to a letter from Clarks to the Council objecting to the 1997 modification order. It referred to the "No Public Right of Way" signs and then stated as follows:

> "Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as open space ... our client objects to proposed footpaths on the grounds that no single right of way for the public has been established in the defined positions shown on the plan attached to the proposed order."

35. After a public inquiry, a revised modification order was made in 2002 including the footpaths shown on the Map.

36. The Inspector heard from numerous witnesses called by Mr Deluce. But many of them did not recall, or recall in any detail, the signs erected in early 1989. The Inspector found this odd but it did not alter his finding that they were indeed there and visible. At paragraphs 150-158 he noted the evidence of a Mr Dunabin on which the Authority placed considerable reliance in the hearing before me. Mr Dunabin lived in Southfield Road from 1986 to 1996 and thereafter at Hill Top Road. At paragraph 153 the Inspector said that Mr Dunabin could remember that in 1989 a sign was erected on the Meadow close to the Hill Top Road end of FP80 saying "No Public Right of Way". He thought that it was intended to deter people from leaving FP80. In paragraph 154 the Inspector said however, that the main purpose of Mr Dunabin's evidence was not to deal with his own use of the Meadow but to give evidence about the neighbourhood from which the users of the Meadow came.

37. The Inspector also referred to the evidence of a Dr Graeme Salmon, also called by Mr Deluce. He had lived in Hill Top Road since 1972. At paragraph 279 the Inspector said Dr Salmon had seen the sign once in 1989. He assumed that its purpose was to prevent the Diagonal Path from being recognised as a public right of way. He said that it was "not inconceivable" that the NHS did not object to the general use of the Meadow. It did not say that no-one could come on it at all.

38. A number of live witnesses were also called by the Authority. They included Mr Banbury who worked as a grounds maintenance manager for various NHS bodies and was responsible for the Meadow from 1980 to 1994. Paragraph 311 refers to the fact that in evidence Mr Banbury produced the plan at p340 showing where the signs were and in his written statement he said that the purpose of the signs was "to prevent access and vandalism on the hospital land and to protect the legal rights of the hospital authority." However, the Inspector went on to say that "the contemporaneous documents suggest that the specific purpose was to prevent the creation of new public rights of way across hospital land. Mr Banbury agreed that none of these signs lasted very long. Many of the signs were torn down very quickly." Save for what he said about the purpose of the signs, the Inspector accepted Mr Banbury's evidence.

39. At paragraph 324 the Inspector referred to the evidence of another witness for the Authority, a Mr Caldwell. He had been employed as the Estates Manager since 1990 and had responsibility for the Meadow between 1990 and 1994. Paragraph 324 notes that when cross-examined about "the case put forward by the Secretary of State in relation to the footpath inquiry ie that there was general public access to the Meadow rather than use of defined paths, Mr Caldwell was unable to offer any explanation for the inconsistency between the Secretary of State's respective cases to the footpath inquiry and to the town green inquiry other than that NHS estates staff were not alerted to the risk of registration of NHS land as a new green until guidance was issued in 2001/2002."

The Inspector's Findings of Fact

40. Section 8 of the Report deals with findings of fact. Under the heading "Recreational Use" the Inspector said at paragraph 363 that he also took into account that "in relation to the footpath modification application it was the landowner's own case that use of the Meadow

by the public was general recreational use of the Meadow not confined to passage on specific paths. This case must have been put forward on the instructions of the landowner and must have reflected the landowner's perception at the time."

41. Then, under "Contentiousness" at paragraph 369, the Inspector said this:

> "I find that in January 1989, the landowner erected a number of signs stating "No public right of way". Two of these signs were on Warneford Meadow (as subject to the present application). These were at points B and C on Mr Banbury's plan JNB1. Point B was where FP 111 left Roosevelt Drive in a southerly direction. That sign was referential to FP 111. Point C was near the Hill Top Road entrance to the Meadow. I find that the sign at point C was referential to FP 111 and the diagonal path. Although Mr Banbury claimed that the purpose of the signs was to restrict general access to the Meadow, I find that the purpose of the signs was to prevent FP 111 and the diagonal path from acquiring the status of public rights of way. First, the case of the landowner in relation to the modification order was that it had no objection to general public recreational access to the Meadow, but only to the creation of public rights of way. Second, if the signs had been intended to forbid general access to the Meadow, I do not understand why they did not say so. With hindsight, it seems odd to challenge the creation of public footpaths but not the creation of a new green, but this is explained by the fact that the landowner was unaware of the law relating to new greens."

The Inspector's recommendation

42. Section 9 of the Report is headed "Applying the law to the facts" and under the heading "...as of right..." at paragraph 384 the Inspector said this:

> "In my judgement, recreational use of the application land by the inhabitants of Hill Top Road ... was not...contentious. Access was predominantly by way of the Hill Top Road entrance to FP 80 which was at all times an open and unobstructed lawful entrance. For the reasons explained above, I do not consider that the landowner took any steps which made informal recreational use of the application land by local people contentious...
>
> - The 1989 "no public right of way" signs were erected in an attempt to prevent FP 111 and the diagonal path from becoming public rights of way and did not purport to, were not intended to, and did not in fact restrict general use of the Meadow for recreation by local people ...
>
> If one asked whether the landowner was doing everything, consistent with his means and proportionately to the user, to contest and to continue and to endeavour to interrupt recreational use of the Meadow as a whole, one could only answer in the negative. The cases explain that the thinking behind the *nec vi* requirement is that if use is *vi* (being forcible or contentious) such use negatives the inference that the landowner is acquiescing in the recreational use of his land. It appears to me in this case that the evidence strongly shows that the landowner did acquiesce in general recreational use of his land. He said as much in his case to the footpath inquiry."

The Further Report

43. Following the making of the Report on 15 October 2008 and on about 10 December 2008 the Authority produced detailed Further Representations. Paragraphs 42-58 thereof took issue with the Inspector's finding that the notices were not effective to render the user contentious. Paragraph 49 quoted from paragraph 369 of the Report and then paragraph 50 stated that the Authority did not accept that the landowner's case was that it had no objection to general public recreational access but only to the creation of public rights of way. Rather "it was its position that [it] *..never had a policy to discourage the use of the site as open space by members of the public and. [it] has not objected in the past to the site as open space by the public.*.There **is** a difference." On any view the Authority here was stating what its position was at the time.

44. Paragraph 51 then said that the intention of the landowner was however irrelevant. "A notice must be interpreted objectively and in relation to its effect on users of the land, not by reference to what the landowner was trying to achieve by erecting it." In paragraph 52 it was said that there could be an exception to this; if for example the landowner had told people that it had no objection to their use of the land for recreational purposes this would evidently give the notice a "special meaning which it would not generally bear." Paragraph 53 said that the above addressed what the notices were intended to do. The key question was what the notices in fact did and reference was then made to the judgment of Sullivan J in *Lewis* (supra) at paragraph 21. In that regard further submissions were made at paragraphs 54-58 including a reference to the article in the *Oxford Times*.

45. Then, on 23 January 2009 Mr Deluce submitted a Response to, among other things, the Authority's Further Representations. Paragraphs 7 to 20 contain detailed points in answer on the question of the notices. Paragraph 8 referred to paragraph 81 of the Report and said that the draft letter from May 1990 showed that the objectors were now trying to attribute to the notices a meaning not even perceived by the landowner at the time. Paragraph 12 said that the notices would have indicated to a reasonable person that the landowner's thinking was to try and prevent the establishment of rights of way, and that the contemporaneous evidence (referred to in paragraphs 70-73 and 79 of the Report) showed what that thinking was. Paragraph 13 stated that the notices were subjectively and objectively intended to negative an intention to dedicate rights of way.

46. On 28 January 2009 the Inspector produced his Further Report. On the question of the Notices he simply said this in paragraph 14:

> "I have reviewed again the advice in my Report ..in the light of the objectors' comments. I adhere to the view that these signs did not render contentious general recreational use of the Meadow and I re-affirm the findings and comments at paragraphs 369 and 384 of my Report. I find the arguments in paragraphs 7-20 inclusive of the applicant's response to be convincing."

47. The Recommendation of the County Solicitor of January 2009 was stated to be for the reasons given in the Report and Further Report, and the Resolution of 6 April was in the same terms.

The Authority's points on the Notices Issue

48. Although Mr George QC made it very clear that the Authority's challenge here was based on two alleged errors of law (set out in paragraph 13 above) and that there was no challenge to the Inspector's findings based on irrationality, he nonetheless addressed the Court in some detail on the efficacy of the notices generally, as did Mr Mynors and Ms Crail. Although I am not sitting in general review of the Inspector's advice here it is necessary for me to address the more general arguments both because they set the context for the specific challenges and because Mr Mynors and Ms Crail argue that if and to the extent that there were errors of law, the Inspector would still have reached the same conclusion - see *Simplex GE (Holdings) and Another v Secretary of State for the Environment and the City and District of St. Albans District Council* (1989) 57 P. & C.R. 306 per Cumming-Bruce LJ at p327 – and thus the decision of the Council to register should not be quashed.

49. In my judgment the facts overwhelmingly pointed to the conclusion that under the principles referred to in paragraph 22 above and in particular looking at the notices objectively in context, they did not render the recreational user contentious. This is for the following brief reasons:

(1) The notices were clearly directed to the paths nearby. The Inspector found that the notice at point B was referential to FP 111 and that at point C referred to FP111 and the Diagonal Path. They could not have referred to FP 80 as this was already a public right of way. Given those facts the obvious meaning to be ascribed to them was that those paths were not to, and did not, give rise to a public right of way;

(2) There was no reason why they should be taken objectively to refer to recreational use of the Meadow as a whole. Mr George QC said that a sign referring to there being no right of way is not necessarily limited in its scope to a particular path and he gave the example of an open field with no paths on it at all. That may be so in that context but that is not this case. Here the notices were by paths and have been found as a fact to refer to them and there is a quite separate and distinct use of the Meadow which has nothing to do with the paths, or is only incidentally related to them, namely the general recreational user; here the notices only make sense if they relate to the paths and rights of way in relation to those paths. They are in fact silent as to any other use of the paths for example crossing them while walking the dog or "milling around" in their vicinity;

(3) If the Authority had wanted to render user of the land as a whole contentious, it could and should have said so by using an appropriately worded notice; see the examples referred to by Sullivan J in paragraph 22 of *Lewis* (supra) or that used in the *Oxfordshire* case (supra), as referred to in paragraphs 20 and 21 above. The Inspector made this obvious point in paragraphs 369 and 384 of the Report. See also paragraphs 11 and 14 of Mr Deluce's Response. And there would also have been many more signs, given the number of different access points, as can be seen from the photograph at p276AD; the fact that the users from HTRN may have concentrated on the entrance at point C is no answer to this argument;

(4) There is in fact no body of evidence from users to challenge this interpretation of the notices. Mr George QC placed emphasis on the evidence of Mr Dunabin referred to at paragraph 36 above because he was from HTRN. But in fact he did not live there at the material time in 1989. On the other hand, Dr Salmon, whose evidence is referred to at paragraph 37 above, did. And if anything, his evidence supported Mr Deluce's case not that of the Authority; moreover the Inspector was entitled to reject Mr Dunabin's view of the sign in his determination of what he thought, objectively, it meant to the users in general. There is no challenge to any such rejection;

(5) The form of notice here is a classic response to an application for the establishment of further public footpaths, bringing into play the evincing of a contrary intention for the purposes of s31 (1) and (3) of the Highways Act 1980; and see paragraphs 10 and 13 of Mr Deluce's Response.

50. Against that background I deal with the alleged errors of law. First it is necessary to consider what the Inspector meant when he referred to "contemporaneous" documents or evidence in paragraphs 311 and 314. The context of this was Mr Banbury's evidence. I agree that some

of that material is likely to have included letters between the Authority and Clarks, its solicitors, and the May 1990 draft letter. But it may well also have included the letters to and from Councillor Godden. It needs also to be remembered that the question of the purpose of the notices from the Authority's point of view arose here because of the evidence of Mr Banbury, which it chose to adduce, that there was a wider purpose to the notices than the prevention of new rights of way. That being so, the Inspector can hardly be criticised for making a finding on that point even if to some extent it related to the subjective intent of the Authority. The same is true of that part of paragraph 369 where the Inspector rejects Mr Banbury's claimed purpose.

51. More pertinent are the Inspector's references to the Authority's "case" in respect of the footpath application. In paragraph 324 he refers to its case on "the footpath inquiry" (ie general public access as opposed to use of defined paths), in paragraph 363 he refers to the Authority's "own case" to that effect in relation to the footpath modification application and in paragraph 369 he refers to its case in relation to the footpath modification order. I accept that knowledge of what the Authority's case was is likely to have been drawn in part from the internal documents referred to above. I also accept that some aspects of the footpath application process came some considerable time after early 1989 so that what was said at that later stage would not itself qualify as communications to the users at the time when the notices were up. But it is not clear when the Authority first enunciated its "case" in relation to footpaths. What can be said is that the letter to Councillor Godden did explain its position in that specific context – and on a fair reading is clearly limited to the question of rights of way. Moreover the references by Councillor Godden to "restricting access to" the open space suggest a contemporaneous view by her (and presumably the users she was speaking for) that the perceived problem was reduced access, not prohibition of user. So the "case" mounted by the Authority is not exclusively to be drawn from later internal documents. And certainly, at the Inquiry it does not appear as if the Authority was drawing any firm lines in terms of date by reference to the footpath application, such that any "case" mounted by the Authority must have been long after the signs had gone.

52. Moreover as is clear from the last part of paragraph 369 of the Report, part of the reason why the Inspector found that the notices had the more limited purpose is because they would have said something different if it was wider.

53. The actual finding on the notices is at paragraph 384. First the Inspector said that the notices were not referential to the Meadow as a whole. He then said that they did not purport to and were not intended to and did not in fact restrict general use. "Purport" is a reference to objective meaning and intention may have referred to both subjective and objective intent. And what they did in fact is clearly not a matter of subjective intent. The last sub-paragraph of paragraph 384 directly applies that part of the judgment of Pumfrey J in *Brudenell-Bruce* (supra) referred to in paragraph 18 above, concluding that the landowner did not do everything proportionately to the user to interrupt recreational use. The Inspector then said that the evidence showed that the landowner had acquiesced in the general user and the landowner had said as much in his case to the footpath inquiry. Even on this last point if the landowner had said subsequent to the erection of the signs in 1989 that it <u>had</u> acquiesced in the general recreational use there would be nothing to stop the Inspector inferring (as I think he was) that this is what it was doing back in 1989. And that is not a matter of subjective intent either. (See also what the Authority itself said was its position in paragraph 50 of the Further Representations, referred to in paragraph 43 above). So taken as a whole I cannot

see that this paragraph relied on some pure expression of subjective intent to any significant degree at all.

54. It is then said that the Inspector did not in his Further Report directly address the question of the legitimacy of relying on evidence of subjective intent as raised by the Authority in paragraph 51 of its Further Submissions. That is true, but the Authority made many other submissions apart from that one and there were many arguments raised by Mr Deluce in his Response which did not rely upon such evidence and the Inspector expressly accepted all of his further arguments.

55. Mr Whitmey has argued that the Authority's objection to a lesser burden on the land (use of paths as public rights of way) must have by implication and without more included objection to a greater burden ie recreational use of the entire Meadow. I disagree. The two users are simply different. Objection to one does not of itself entail objection to the other. Mr Whitmey also argued that time only started to run against the Authority in June 1999 when the law changed. There is nothing in this. The ability to establish class (c) rights was there in the 1965 Act and in any event ignorance of the law is no excuse. Finally the fact that one of the Councillors on the Committee apparently thought that the Authority could have protected itself by locking the gates for one day, which would not in fact have worked since there was a public footpath, is irrelevant. The Committee clearly adopted the reasoning in the Report and Further Report in its entirety.

56. In my judgment the overall thrust of the Inspector's reasoning did not depend on evidence which did no more than state (a) what the Authority's subjective intent was or (b) a position taken by it which could have had no reference back to its position as at early 1989. While therefore I am prepared to hold that there was an error of law because there was, or may have been, <u>some</u> reliance on uncommunicated subjective intent and/or post-March (or even February) material, it can be safely disregarded, applying the principles in *Simplex* (supra). The Inspector would have come to the same conclusion even absent such reliance.

57. I should add that if this matter goes further, Ms Crail reserves the right to argue in addition, (a) that as the notices here were disregarded this deprived them of any effect and (b) that a "no public right of way" sign is not even capable of rendering contentious, public use for passage of the path to which it refers. See paragraphs 16 and 17 of her Skeleton Argument.

<u>THE NEIGHBOURHOOD ISSUE</u>

The Inspector's findings

58. I have referred in paragraph 10 above to the fact that the Inspector found that the relevant neighbourhood was not DRN but HTRN. He explained the reasoning behind this at paragraph 375 of the Report. At the end of that paragraph he said that he thought that the purported DRN was an artificial construct, the team behind the applicant considering that it was necessary to identify a single neighbourhood which recreational users of the Meadow predominantly inhabited.

59. In paragraph 376 he said that if HTRN was a neighbourhood, as he found, he had no difficulty in concluding that a significant number of its residents used the Meadow for recreational purposes throughout the relevant period.

60. In its Further Representations the Authority submitted first that it looked "odd" for the Inspector to find a different neighbourhood than that contended for. However it is not suggested that he was not entitled *per se* to take that approach. But the point of principle taken by the Authority was that there should be a "fit" between the area where the users came from and the neighbourhood identified. Here it was said that there was no such fit because the users were said by Mr Deluce to come from DRN yet the neighbourhood was found to be HTRN, which is only a part of DRN.

61. This point was addressed by Mr Deluce at paragraphs 44 - 46 of his Response. He argued that if a significant number of the inhabitants of a neighbourhood used the land (as they did here) it was not open to the Council to refuse registration just because other users came from elsewhere. He thus rejected the "fit" argument advanced by the Authority. He also contended that it was clear from the amendment introduced by the 2000 Act, giving rise to s22 (1A) that if there was any ambiguity as to whether there was a "fit" requirement Parliament's intention had been to remove any such requirement. Specific reference was made in paragraph 45 to the speech of Baroness Farrington, the Government spokesman who moved the amendment. Further the description of the amendment process given by Lord Hoffmann at paragraph 26 of the *Oxfordshire* case was cited at paragraph 46 of the Response.

62. The Inspector dealt with this matter at paragraph 12 of the Further Report where he said this:

> "The third point is, I acknowledge, an important point and one on which there is not yet any clear guidance from the courts. ... under the new wording it is sufficient if a significant number of qualifying users are inhabitants of any locality or neighbourhood within a locality. The new wording does not require qualifying users to come predominantly from a single locality or neighbourhood within a locality. I agree with the applicant that his construction is supported by passages from Hansard, but I consider that the statutory wording is unambiguous and that recourse to the principle in *Pepper v Hart* is not required. I agree with the applicant's submission that there is no requirement in the statutory wording for a "fit" between a neighbourhood and the area inhabited by qualifying users. ... I remain of the view that the law is as stated in paragraphs 24-25 and 380 of my report."

The Authority's challenge

63. Although the point was originally raised as one of "fit" the real point made by the Authority is that the Predominance Test applies to s22 (1A). So the application could only succeed here if the users of the Meadow predominantly came from HTRN. But on the evidence, they did not. So it is said that the Inspector erred in law because he did not accept that the Predominance Test applied.

Emergence of the Predominance Test

64. Prior to the amendment effected by the 2000 Act, s22 stated that a TVG was

> "[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 twenty years."

65. I have added the letters in square brackets so as to denote the three different classes of TVGs often referred to as giving rise to class (a) (b) or (c) rights. Class (a) are allotted rights, (b) are customary and (c) are the statutory prescriptive rights at issue in this case.

66. In *R v Oxfordshire County Council Ex p. Sunningwell Parish Council* [2000] 1 AC 335, the House of Lords was concerned with a challenge to a resolution to refuse to register 8 acres of glebe land as a TVG. In that case it was a village green in the traditional sense because the land was near to the village church. There was a public inquiry as in this case and as here the Inspector was Mr Chapman. A number of issues were raised but one concerned the question of who used the land. A point was taken that the glebe was used not only by the villagers but also by other people. Lord Hoffmann explained and dealt with the point thus at pp357E-358B:

> "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."

67. There was some debate before me whether this enunciation of the Predominance Test was part of the *ratio* of *Sunningwell* or not. This is because it was based on an assumption that the user for class (c) rights should be the same as the user for class (b) customary rights. For present purposes however I shall treat it as if it is part of the *ratio*. The other members of the House of Lords agreed with Lord Hoffmann and this part of his judgment forms part of the headnote. Moreover it was regarded as such by Carnwath LJ in the Court of Appeal in *Oxfordshire* (supra) at [2006] Ch 43 at paragraphs 63 and 64 and indeed by Lord Hoffmann himself in that case at [2006] 2 AC 674 at paragraph 25.

68. The Authority submits that this further and implicit requirement of s22 in respect of class (c) rights must necessarily have been carried through into its amended successor, s22 (1A). I disagree for the reasons given below.

69. First, the provision had changed in two material respects. The area from which users must come now includes a "neighbourhood" as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more

fluid concept and connotes an area that may be much smaller than a locality. But in addition the requirement is now not that there is land on which "the inhabitants of any locality ..have indulged.." but rather land on which "*a significant number* of the inhabitants of any locality ..have indulged." It is said that this latter change does no more than state what was obvious anyway – that there needed at least to be a significant number from the locality, rather than just a handful. But without more this need not follow. It could equally indicate a change from a requirement that the users predominantly come from the locality (or now neighbourhood) to a requirement that the users include a significant number from it so as to establish a clear link between the locality (or now neighbourhood) and proposed TVG *even if* such people do not comprise most of the users. That overall, the requirements were relaxed is supported by paragraph 65 of the judgment of Carnwath LJ in *Oxfordshire* (supra) where he said that the 2000 Act introduced

> "the new concept of "*neighbourhood* within a locality", and required no more than a "significant" number of local users. Whatever precisely that expression means (which happily is one of the few issues not before us), it can only have the effect of weakening still further the links with the traditional tests of customary law."

70. Thus there is no reason now to assume that the user required for class (c) rights should be the same as for class (b) rights.

71. On that footing, I reject the notion that the Predominance Test has been carried forward into s22 (1A). That provision is clear in its terms and provided that a significant number of the inhabitants of the locality or neighbourhood are among the users it matters not that many or even most come from elsewhere.

72. However, at best, from the point of view of the Authority, the new provision is ambiguous, in the sense that it is not clear whether the Predominance Test has been imported into it or not. It certainly cannot be said that it is unambiguously the case that it has. That being so and pursuant to the principles laid down in *Pepper v Hart* [1993] AC 593 the Court is entitled to have regard to Parliamentary materials provided that (a) the material consists of one or more statements by a Minister or other promoter of the Bill together with such other parliamentary material as is necessary to understand it and (b) the statements relied upon are clear. See the speech of Lord Browne-Wilkinson at 640B-C. In my judgment, the extracts from Hansard referred to below satisfy both of these conditions.

73. The background can be found in the speech of Baroness Miller on 16 October 2000 at column 864 in support of an amendment to the effect that class (c) rights would apply to land "on which the inhabitants of any locality or residential area have indulged..in lawful sports and pastimes as of right for any period of not less than twenty years ending after 31st July 1990 whether or not other persons have used the land for like purposes." Baroness Miller referred to a "loophole" which may have destroyed (ie prevented registration of) about 50 TVGs. It was said to have arisen because to qualify as a TVG most people using it must live nearby. So if too many people from outside use it they dilute the right of local people to register it. That seems to me to be a layperson's reference to the Predominance Test. Baroness Miller also said that the map must show that there is a recognisable community living close to the land but that this can be difficult to achieve in semi-urban areas. Lord Whitty for the Government said that he would look kindly on this proposal and had reflected on the amendment insofar as it affected the significance of user by outsiders and the circumscribing of a satisfactory community to justify a TVG claim. But he said there may be some difficulty as to precisely how this is done.

74. On 16 November 2000 Baroness Farrington introduced the Government amendment which became s22 (1A). She stated at columns 513-514 that the Government understood the difficulties mentioned by Baroness Miller and the amendment directly addressed two of her concerns.

> "It makes it clear that qualifying use must be by a significant number of people from a particular locality or neighbourhood. That removes the need for applicants to demonstrate that use is predominantly by people from the locality and means that use by people from outside that locality will no longer have to be taken into account by registration authorities. It will be sufficient for a significant number of local people to use the site.."

75. Baroness Farrington then went on to say that the concept of neighbourhood was introduced in the amendment to address the problem of applications being accepted only where it can be shown that the users come from a discrete area like a village or parish (ie the locality test).

76. In my judgment this could not be clearer. The Predominance Test was being removed.

77. That this was the effect of the amendment was also recognised expressly by Lord Hoffmann himself in *Oxfordshire* (supra) at paragraph 26 where he said that the need for users to be predominantly from the local community defined by reference to an ecclesiastical parish or local government area was a loophole and the Government was sympathetic and introduced a "suitable amendment".

78. In paragraph 12 of the Further Report, the Inspector expressly referred to the passages from Hansard set out in paragraph 45 of Mr Deluce's Response and said he agreed that they supported his construction but that for his own part the statutory wording was unambiguous. That approach reflects my own as set out above. On that basis there was no error of law by the Inspector.

79. I should add the following: Mr Mynors (but not Ms Crail) advanced a different argument in relation to the Predominance Test based upon the contention that the inhabitants of a neighbourhood within a locality should be equated with "local people". And if so, the Inspector in fact found that the users predominantly were "local people" because two-thirds of them came from DRN including HTRN. So even if the Predominance Test applied it would not affect the outcome. See paragraphs 41-56 of his Skeleton Argument. I reject that argument because it entails a definition of "neighbourhood" which is extremely vague. While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries had to be "legally significant". See paragraph 27 of his judgment in *Oxfordshire* (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality (as the Inspector's own determination about DRN and HTRN shows) but, as Sullivan J stated in *R (Cheltenham Builders) Ltd v South Gloucestershire Council* [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application. See Model Entry 18. And that can be amended to take account of the adoption of an Inspector's

recommendation to base the registration upon a different neighbourhood than that claimed. See Regulation 7 (2). Moreover, the Inspector in this case did not reach his conclusions based on this argument but rather on the basis that the Predominance Test simply did not apply.

THE SUBSEQUENT RIGHTS ISSUE

80. It is common ground that registration of land as a TVG confers rights to use it for recreational purposes on the inhabitants of the qualifying locality or neighbourhood. No such rights are conferred on other users. In practice, of course, a landowner is most unlikely to seek to eject those without rights because he will not know who they are without specific enquiry. But one of the ironies of this case is that strictly, Mr Deluce is not entitled to use the Meadow for recreational purposes since he does not come from HTRN.

81. In the latter part of paragraph 380 of the Report the Inspector said that it was probable that the Meadow was also used by the inhabitants of other "neighbourhoods" but that this did not damage the application since what was needed was user by a significant number of the inhabitants of "any neighbourhood". But he went on to say that once registered "recreational rights will enure for the benefit of the inhabitants of any neighbourhood who can establish that a significant number of them have used the land in a qualifying manner and for the qualifying time. The register does not define the neighbourhood or locality."

82. It is common ground that this last statement is wrong in law. There was and is no mechanism by which further qualifying neighbourhoods or localities can be added on as it were. And in fact under the regime established by the 2006 Act the neighbourhood or locality is now stated on the register.

83. But in my judgment this error of law did not go anywhere. Mr George QC suggested that it meant that the Inspector thought that those outside HTRN (eg in the rest of DRN) would not be unduly harmed by his recommendation of registration based on HTRN alone because they might qualify and be added on later. But first, he found at that stage that DRN did not qualify and second, it would be speculative as to whether other neighbourhoods would qualify. Moreover there is no challenge to his refusal to qualify DRN as noted above. Nor do I see this erroneous statement as contributing to his finding that the Predominance Test did not apply. And in any event, as a matter of law, he was right about that.

84. Mr George QC also submitted that the last part of paragraph 380 might have caused the Planning and Regulation Committee of the Council to take a more favourable view of his advice as it appeared to hold out at least a prospect that other users might be able to establish rights later on so that without this statement the Committee might have decided the other way. I reject that suggestion as wholly speculative and if one takes this detailed and careful report as a whole I cannot see that the statement at the end of paragraph 380 played any material part in it. Nor is it referred to in the County Solicitor's report.

FURTHER GROUNDS OF CHALLENGE

85. Mr Whitmey has put forward additional grounds of challenge to those advanced by the Authority, which does not support these further points. Mrs Booth asked that they be considered. They may be taken quite shortly.

86. First, Mr Whitmey contends that the Inspector erred in holding that all that was required was a qualifying user of at least 20 years immediately before the application. Before the Inspector, he contended that what was actually required was user sufficient to have given rise to customary rights. The Inspector rejected this argument at paragraph 46 of the Report and again in paragraphs 17 – 19 of the Further Report. On this application, Mr Whitmey has contended that the words in s22 (1A) referring to user "for not less than 20 years" actually mean "for a period equivalent to living memory and in any event not less than 20 years." In my judgment there is no basis whatsoever for such a construction and so there was no error of law on the part of the Inspector in rejecting it.

87. First, and most importantly, the words of s22 (1A) simply do not support it. Not less than 20 years means what it says. Anything less than 20 years will not do. But a period of 20 years or more will. That was the view taken by the House of Lords in *Oxfordshire* (supra) (see paras. 31, 34, 41-44 and 60), *Sunningwell* (supra) (see pp347C-G, 348C-D and 353F-354A) and *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at paras. 2 and 40. The Supreme Court in *Lewis* [2010] UKSC 11 at para. 67 took the same approach. If Mr Whitmey was right all these cases were wrongly decided or at the very least would have clearly proceeded on an assumption that was fundamentally wrong. I do not accept this and the Inspector would have been bound by their approach in any event, as would I. Since the words of the statute are perfectly clear there should be no resort to Parliamentary materials but in fact Mr Whitmey's reliance upon them was misplaced. See the clear references to "a period of at least twenty years" in paragraph 403 of the Royal Commission Report, the evidence of the National Association of Parish Councils in paragraphs 21 and 4376 at pages 104-105 of his bundle and column 420 of the debates which refers to the period being "twenty years" at p107 of his bundle. The Guidance for Applicants for a TVG, also relied upon by Mr Whitmey is equally unhelpful as it refers to user for "not less than 20 years".

88. Mr Whitmey then said that if all that was required was a minimum of 20 years the draftsman would have used the same language as that contained in s 31 (1) of the Highways Act 1980 namely user by the public "as of right and without interruption for a full period of 20 years.." But the expression there means the same thing as "not less than 20 years" although using slightly different words. There is no reason why the draftsman should have felt himself bound to use the same exact form of words when the words he chose were perfectly clear. In a similar vein Mr Whitmey points to s16 (1) of the 1965 Act which makes reference to s1 of the Prescription Act 1832 which in turn refers to user for "the full period of thirty [or later, sixty] years." The mere fact of that reference hardly means that the draftsman of the 1965 Act would have to have chosen that formula if all that had to be shown was 20 years' user for a TVG. More generally, Mr Whitmey argued that because important rights attach to land designated as a TVG and there are criminal sanctions for interference with them, this shows that something more than merely 20 years was required. He made detailed submissions to me about how a village green was one of two "sub-sets" of land used by the public, this being the more advantageous in terms of user. It is not necessary for me to deal with those submissions. It suffices to say that the relative importance of a TVG does not mean that the words of s22 (1A) should be ascribed a meaning they cannot possibly bear.

89. I should add that in *Lewis* (supra) paragraphs 171 and 172 of the report of the Inspector (Mr Chapman) are recorded in paras. 9 and 10 of the judgment of Lord Walker. Here the Inspector made findings as to user "as far back as living memory goes". That might be thought to indicate that at least in that class (c) case, the Inspector applied something other

than a "not less than 20 years" test. In fact, having now been provided by Mr Whitmey with a copy of Mr Chapman's entire report dated 14 March 2006 it is clear that this is not so. Paragraphs 171 and 172 deal simply with his findings of fact. At paragraph 16 he refers to the Applicant's case that there was more than 20 years' recreational user and at paragraphs 180, 181 and 187 he referred to the statutory test of not less than 20 years. At paragraph 212 he gave his conclusion under the rubric "....on which for not less than 20 years..." saying that he found that the land had been used for recreation for far more than 20 years but it was enough to say at least from 1970. So the fact that he found very long user here, and even used the expression "living memory", does not mean that he applied a test other than "not less than 20 years" in the sense in which I have described it above. So what was said by the Inspector in *Lewis* does not assist Mr Whitmey on his first point.

90. Second, Mr Whitmey contended that "lawful" sports and pastimes meant that if such user was trespassory, it would not qualify under s22 (1A). The Inspector rightly rejected this at paragraph 47 of the Report. The adjective here was meant to exclude sports and pastimes which were themselves unlawful or "illegal" because they amounted to criminal offences, which today might include joy-riding in or on stolen vehicles or recreational use of proscribed drugs. Reference was also made to para. 67 of the judgment of Lord Hope in *Lewis* (supra) in which he said that the "lawful" requirement excluded sports or pastimes which would cause injury or damage to the owner's property, by reference to *Fitch v Fitch* (1797) 2 Esp. 543. In that case, the defendants had trampled down the plaintiff's grass, thrown the hay about and mixed gravel with it so as to render it of no value. Strictly, the observations of Lord Hope here are *obiter* but in any event the injury caused in *Fitch* (supra) would amount to the offence of criminal damage, and even if "lawful" was intended to exclude tortious damage as well, Mr Whitmey's key point before the Inspector was that trespassory user was to be excluded. But if he was right about that, this would prevent any claim for class (c) rights since all such claimed prescriptive users are by definition trespassory. So no application for a TVG could succeed. That could hardly have been the intention of Parliament for obvious reasons.

91. Third, Mr Whitmey says that the Authority was not required to do more than it did in relation to recreational user in 1989 because of calls on its financial resources. But it was never contended by the Authority that it could not have afforded to pay for different or further notices and it was not suggested that it needed to have gone to the expense of fencing off FP 80. The erection of notices in the appropriate prohibitory language at appropriate places would not have been beyond its (considerable) means, to the extent that means is relevant here. In oral argument before me Mr Whitmey put this ground in a different way. He said that much of the evidence adduced to show recreational user over the 20 year period related to dog-walking and exercising. But, he said, that included the fouling of the Meadow by dogs which caused or was likely to have caused financial loss to the Authority. Because of this, the dog-related recreational use of the Meadow relied upon should simply be excluded altogether when the Inspector considered whether there was the required user. There is no basis in law for that contention. Nor does it matter that under the Dogs (Fouling of Land) Act 1996 a local authority can designate land such that failure by an owner to remove dog faeces is a criminal offence. There is no evidence that the Meadow was so designated and even if it were it hardly follows that all the dog owners were committing this criminal offence and in any event the provision of a sanction for inappropriate dog-user hardly disqualifies dog-user from counting as recreational user under s22 (1A). The observations made at paras. 36 and 85 of the judgment of the Supreme Court in *Lewis*

(supra) also tend to negate Mr Whitmey's argument here. Finally, the extent of dog-fouling, and its effect, was not something pursued by Mr Whitmey at the Inquiry whether by way of cross-examination of witnesses or otherwise.

92. Finally, Mr Whitmey contends that the Authority, being a public body, is not bound by s22 (1A) because its "fiduciary" obligations to the public are somehow inconsistent with it. If there was anything in this point, it is surprising that the Authority did not take it. In truth there is no such exemption for the Authority. The facility to apply for registration of a TVG applies to all land including Crown land. In practice many owners of such land are public authorities with an array of obligations to the public. That does not render them immune to such applications. The reference to s31 (8) of the Highways Act 1980 is irrelevant. This deals with the incapacity of a public authority to dedicate a highway and in any event there is no question of "dedication" in respect of class (c) TVG rights.

CONCLUSION

93. Accordingly, this application for judicial review must be dismissed.

Case No: CO/3141/2002

Neutral Citation No: [2003] EWHC 1578 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 8th July 2003

Before :

THE HONOURABLE MR JUSTICE SULLIVAN

- -

Between :

	R. **On the Application of** **Laing Homes Limited**	**Claimant**
	- and -	
	Buckinghamshire County Council	**Defendant**
	The Secretary of State for the Environment Food and Rural Affairs	**Interested Party**

- -
- -

Charles George QC, Paul Hardy Esq. and Jeremy Pike Esq. (instructed by **Laytons**) for the Claimant
Stephen Morgan Esq. (instructed by **Buckinghamshire County Council Legal Services**) for the Defendant
James Maurici Esq. (instructed by **The Treasury Solicitor**) for the Interested Party

Hearing dates : 25th March - 2nd April 2003

- -

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 Widmer

Farm, Widmer 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 (Widmer 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, Widmer 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 Widmer 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 (FP11) 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 Widmer 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 Widmer 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 Widmer 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 (1A) of this section."

98(3) After that subsection there is inserted –

(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either-

(a) continue to do so, or

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

31. The amendment came into force on 30th January 2001. The revised definition in the new subsection (1A) 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 (Chapter14).

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.

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, including 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 Widner 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 Plaintiff's 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, Ministry 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 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 … 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.348H-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. Whiteley (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 Mr 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 farmer 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, kite flying, bird watching, family 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 on 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 14.21:

> "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 a new 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. I 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 (7.81). 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 Widmer Farm should "revert to full agricultural use" (7.93). Mr Wainman accepted responsibility for this document. A similar document was submitted by the Widmer 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.356B). 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) Ltd [1987] 1 WLR 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.284F:

> "There is then *W.H. Smith (Eziot) Ltd* [1987] 1 WLR 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 L.J., 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 Widmer 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(1):

> "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 Widmer 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 modern 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" (13.2)

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 J.'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 "overwhelmingly 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 1"). 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 1 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 8th April 2002 must be quashed, on grounds (1), (2) and (3) of the domestic law challenge.