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CO/563/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

18th July 2008

B e f o r e :

MR JUSTICE SULLIVAN

Between:

THE QUEEN ON THE APPLICATION OF LEWIS	**Claimant**
v	
REDCAR AND CLEVELAND BOROUGH COUNCIL	**Defendant**
PERSIMMON HOMES PLC	**Interested Party**

Mr George QC and Mr Pike (instructed by Irwin Mitchell) appeared on behalf of the Claimant
Mr G Lawrence QC (instructed by Redcar & Cleveland BC) appeared on behalf of the Defendant
Miss R Crail (instructed by Ward Hadaway) appeared on behalf of the Interested Party

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1. MR JUSTICE SULLIVAN:

Introduction

2. In this rolled up hearing of the claimant's application for permission to apply for judicial review, with the substantive hearing to follow if permission is granted, the claimant seeks a quashing order in respect of the decision of the defendant's General Purposes and Village Greens Committee on 19th October 2007 to reject an application under the Commons Act 2006 ("the 2006 Act") to register part of the land known as Coatham Common ("the Report Land") in Redcar as a town or village green. The land is owned by the defendant and was used until 2002 as a golf course. The defendant wishes to see the land, together with the adjoining land, developed for a mix of leisure and residential purposes. It entered into a development partnership with the interested party and planning permission for the 'Coatham Development Project' was granted on 24th May 2007.

3. The history of the Coatham Development Project is set out in the judgment of Jackson J in *R (on the application of Kevin Paul Lewis) v Redcar and Cleveland Borough Council* [2007] EWHC 3166 Admin. Jackson J quashed the grant of planning permission but the interested party's appeal

against that decision was allowed by the Court of Appeal on 1st July 2008 ([2008] EWCA Civ 746).

4. There had been an earlier application to register the land as a town or village green. That first application which was made on 1st March 2005 was made under the Commons Registration Act 1965 ("the 1965 Act"). The defendant appointed an independent Inspector, Mr Chapman QC, to hold an inquiry and report. Mr Chapman held a public inquiry in Redcar on 13th, 14th and 15th December 2005 and 3rd, 4th and 5th January 2006. In his report to the defendant dated 14th March 2006, ("the report"), he recommended that the first application should be rejected. The defendant accepted that recommendation and rejected the first application on 7th April 2006.

5. On 7th July 2006 the claimant filed an application for permission to apply for judicial review of that decision. His application was refused on the papers by Collins J on 22nd August 2006 and was not renewed. One of the reasons why Mr Chapman had concluded that the first application failed was because the defendant had erected in 2003 "permissive signs", ie, signs granting the public revocable permission to use the land for recreation [176]. (References in square brackets are references to paragraph numbers in the report unless otherwise indicated). In paragraph 222 Mr Chapman concluded:

"Recreational user as of right is not continuing because user has been permissive since the permissive signs were erected in [2003]. Mr Cooper [the principal spokesman for the applicants for registration] conceded that the permissive signs were fatal to the present application as the law now stands."

In paragraph 224 Mr Chapman pointed out that this reason for refusing registration would be reversed by the Commons Bill if it was enacted in the form then proposed. The Commons Bill became the 2006 Act which repealed the 1965 Act (see section 53 and Schedule 6 and the various commencement orders made under section 56). Section 15 of the 2006 Act provides so far as material:

"15. Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies . . .

(4) This subsection applies (subject to subsection (5) [not relevant]) where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b)."

The commencement date for section 15 was 6th April 2007.

6. The second application to register the land as a town or village green, this time under the 2006 Act, was made on 8th June 2007. The claimant was one of the applicants. In the first application he had been one of those persons whose written evidence in support of registration had been considered by Mr Chapman. The defendant sought Mr Chapman's advice in respect of the second application. In the report he had referred to the forthcoming appeal to the House of Lords in what he referred to as the 'Trap Grounds case'. The decision of the House of Lords in that case was published on 24th May 2006: *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, [2006] UKHL 25 ("the Oxfordshire case").

7. In a further report dated 9th June 2006 ("the further report") to the defendant, Mr Chapman considered the implications of the Oxfordshire case and advised the defendant that the decision of 7th April 2006 could not be reopened but that, even if it could, he would not alter his recommendation that the first application should be refused.

8. In respect of the second application, Mr Chapman's advice to the defendant is contained in an opinion dated 12th June 2007, a further opinion dated 29th July 2007, a second further opinion (revised) dated 13th October 2007, and a third further opinion dated 18th October 2007. It is unnecessary to rehearse the detail in those opinions because the defendant accepted Mr Chapman's advice, and the parties are agreed that that advice was, in summary, that the second application should be refused on the two grounds that are set out in paragraphs 217 and 221 of the report, as qualified by the further report:

"[217] I consider that the applicants have established 20 years recreational use of the Report Land nec vi before 1998. In that year the golf club erected signs on the Report Land which made it clear that the club was asserting that local users were trespassers. User in disregard of these signs was, in my judgment, vi. After the signs were taken down, user nec vi resumed. User as of right was thus interrupted in 1998 . . .

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

The relevant paragraphs in the further report are paragraphs 3.1 and 3.2:

"3.1. <u>Relevant 20 Years</u> . . .

However, I found as a fact in my report that recreational user by local people as of right was interrupted by prohibitory notices in 1998 and terminated by permissive notices in 2003 (report paras 176, 217 and 219). Accordingly, it appears to me quite plain that the application must fail under the law as it now stands after the Oxfordshire ruling. Thus, even if the decision of 7th April 2006 could be reopened, my advice to the Council that the application should be rejected would be the same.

3.2. <u>Relationship Between Golf and Other Use</u>

The reasoning in para 221 of my report requires reconsideration in the light of the doubts cast upon some of the reasoning in the Laing Homes and Humphries cases in para 57 of Lord Hoffmann's opinion. This para of Lord Hoffmann's opinion was not directed to any of the specific issues on which the House of Lords made any order and did not raise an issue expressly discussed by any of the other law lords. Nonetheless, there was majority support for Lord Hoffmann's speech in general and these comments of Lord Hoffmann must be very carefully considered.

As I understand Lord Hoffmann's comments, he is identifying the need carefully to distinguish between two distinct points about the relationship between the user of the land (a) by (or on behalf of) the landowner and (b) by the local inhabitants.

First, he disagrees with the views of Sullivan J in the Laing Homes case and of Judge Howarth in the Humphries case that the fact that the landowner is carrying on activities during the relevant 20 year period which would be in breach of the Victorian statutes if the land had been a green necessarily disqualifies the land from becoming a new green. He says that the recreational activities of local inhabitants can create a new prescriptive green if in practice they are not inconsistent with the use of the land made by the landowner. In so far as I relied on the Victorian statutes in this part of my report, I was wrong, according to Lord Hoffmann's reasoning.

However, second, Lord Hoffmann says that the use made of the land by the landowner may be relevant to the question whether the landowner would have regarded persons using the land for sports and pastimes as doing so 'as of right'. It seems to me that this is a critical issue on the facts of the present case. My finding of fact (para 175) was that recreational use of the Report Land by local people overwhelmingly deferred to golfing use. My conclusion was that such deferral precluded user 'as of right' (para 221). This is a conclusion which still seems to me to be correct and in accordance with the comments of Lord Hoffmann. If local recreational users overwhelmingly deferred to golf use, they did not have the appearance of asserting a right as against the landowner to use the land for recreation.

Thus, even if the decision of 7th April 2006 could be reopened, I would not alter my conclusion and recommendation on this point either."

The Grounds of Challenge

9. The claimant challenged the lawfulness of the defendant's decision to reject the second application on those two grounds. In respect of the signs that were erected in 1998, the claimant submitted that even on the assumption that the hitherto notices could prevent subsequent user being "as of right", the particular notices erected on the land in 1998 did not have that effect. They were simply warning notices not prohibitory notices.

10. So far as deference was concerned, the question was not whether there was conduct which could be described as deference, but what was the inference reasonably to be drawn by the defendant from such conduct by the local inhabitants who were using the land for recreation. Were they deferring to the right of the golf course to use the land for its own purposes, so that there was no reason why the defendant should have been aware that they were exercising a public right, or were those who used the land for recreational purposes simply co-existing in a spirit of give and take with the users of the golf course and giving way to golfers when they were taking individual shots as a matter of elementary prudence (to avoid being struck by a golf ball) and mutual courtesy? In a nutshell, it was not sufficient to describe their conduct as 'deference' without considering whether that deference meant that it would have appeared to the reasonably vigilant landowner that no rights were being asserted by those who were using the land for recreational purposes. I will deal with these two arguments in turn.

Ground 1: The Notices

11. The relevant finding of fact in the report is contained in paragraph 176:

" . . . I find that signs were erected on the Report Land in 1998 stating –

'Cleveland Golf Club

Warning

It is dangerous

to trespass on

the golf course'

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

12. Unlike the Highways Act 1980 (see section 31), the 2006 Act is silent as to the effect, if any, of the erection by a landowner of notices on his land. A proposal in the consultation document Greater Protection and Better Management of Common Land in England and Wales, published by the Department for the Environment, Transport and the Regions in February 2000, that there would be a similar provision to that under section 31 of the Highways Act 1980 was not carried forward in the 2006 Act. Absent any deeming provision in an enactment, the argument for the effectiveness of prohibitory notices presumes that subsequent use is a form of forceful use ("vi").

13. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] 4 PLR 95 at paragraph 64, I expressed the view (in a case where one of the issues was the efficacy of correspondence from the landowner's solicitors objecting to an application for registration under the 1965 Act) that:

"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 8 there was a dispute as to the existence of a right of way. Kerr LJ referred to Megarry and Wade's The Law of Real Property (5th ed):

'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 . . .

If there is to be 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 . . . "

Having analysed the authorities, Kerr LJ said 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."

14. In the circumstances of that case where the letters of objection from the landowner's solicitors had caused the applicants for registration to withdraw their application, I concluded that the letters had "seen off the applicant's contention that its land was a village green", and added that they had:

" . . . 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 8th June 2001."

However, it should be noted that the landowner's 'opening shots' in that particular war with the applicants for registration had apparently been wholly successful (see paragraph 71). What is the legal consequence if the 'opening shots', whether by correspondence or by the erection of notices, are not successful is less clear. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 Lord Walker referred (obiter) to the:

" . . . paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely, a landowner who puts up a notice stating 'Private Land – Keep Out' is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: 'The public have permission to enter this on foot for recreation, but this permission may be withdrawn at any time'."

15. There is no binding authority which is directly on point. In the Oxfordshire case in the Court of Appeal [2006] Chancery 43, [2005] EWCA Civ 175, Carnwath LJ said that the purpose of a notice which was worded in the following terms: "Oxford City Council trap grounds and reed beds. Private Property. Access prohibited except with the express consent of Oxford City Council" was "to put an end to the period of qualifying use by ensuring that it could no longer be as of right". This aspect of the Court of Appeal's decision was not considered by the House of Lords.

16. While reserving the right to argue on appeal that disregarded prohibitory notices do not have the effect of rendering subsequent use forceful and not as of right, Mr George QC, on behalf of the claimant, realistically accepted that this court, while not strictly bound by what was said by Carnwath LJ in the Oxfordshire case, was likely to be guided by his approach. However, he submitted that the notices erected on the land in 1998 in the present case (see paragraph 11 above) were not prohibitory notices. He referred to a passage in paragraph 12 of the judgment of Pumfrey J in *Smith v Brudenell Bruce* [2002] 2 P&CR 51:

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

That case was concerned with a right of way, not a village green, and was not concerned with the effects of erecting a notice. While I would not question the general proposition, it is of limited relevance in the present case because the key question is whether, given their wording, the notices erected on the land were prohibitory notices, ie, whether they made sufficiently clear to local users that the defendant was not acquiescing in their use of its land for recreational purposes.

17. Although Mr George submitted that the Inspector had not made any findings as to where the notices were erected, how many of them there were or how long they had remained in place, these criticisms of the report are of no consequence because Mr Chapman concluded that the notices:

" . . . were in place long enough for regular users of the Report Land to know of them. Indeed, it seems that they caused a stir locally because of the implication that local people using Coatham Common were trespassers. They also received publicity in the local newspaper [176]."

Thus, whatever the message that was being conveyed by the notices, it was sufficiently brought to the attention of those who were using the land for recreational purposes.

18. The argument that the message was simply a warning that those who continued to trespass on the land did so at their own risk was put to the defendant by the claimant in writing before 19th October 2007 and the point was made in oral submissions to the Committee on 19th October 2007 by Mr Davis, one of the applicants for registration in the second application. However, neither Mr Chapman nor the defendant expressly considered the wording of the notices and whether they were more properly described as warning notices.

19. In paragraph 193 of the report, Mr Chapman said:

> "'Force' does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates, if it involves ignoring notices prohibiting entry, or if it is under protest. There is a dictum in the Beresford case that assumes that user can be as of right notwithstanding that it involves ignoring the prohibitory notice. There was no argument on that point in the House of Lords and, in my view, the assumption is contrary to principle. It was held by the Court of Appeal in the Trap Grounds case that a prohibitory notice prevented user as of right."

But there is no analysis of the wording of the notices beyond the statement in paragraph 217 of the report that they "made it clear that the club was asserting that the local users were trespassers". I accept that a notice may combine both functions: prohibition and warning. However, in my judgment, a notice which told the local users that they were trespassers but did not tell them to stop trespassing, and instead warned them that it was dangerous to continue to trespass (because they might be struck by golf balls), would not be sufficient to make it clear to them that the defendant was not acquiescing in their recreational user of the land. Rather it would be an indication that since the defendant was acquiescing in their trespassory use of the land for recreational purposes, it was thought prudent to warn them that if they continued so to use the land then they did so at their own risk, and the defendant could not be liable if they were hit by a golf ball.

20. Mr Lawrence QC on behalf of the defendant and Miss Crail on behalf of the interested party submitted that the notices served a dual purpose. They were not simply warning notices, they made it clear to local users of the land that they were not allowed to use the land (because they were trespassers) and that such trespass was dangerous. Hence the stir caused locally by the description of the local users as trespassers in the notices.

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. The contrast between the reactions of those to whom the notices/letters were directed in the present case and the Cheltenham case (see above) is very marked. In the latter case, from the landowner's perspective, since the correspondence from its solicitors "had seen off the applicant's 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?"

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 [138]. 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. For these reasons, the claimant's first ground of challenge succeeds.

24. However, Mr George rightly accepted that for the application for judicial review to succeed the claimant had to succeed on both grounds of challenge.

Ground 2: Deference

25. I have referred to Mr Fletcher's evidence to the inquiry. He was a member of the Management Committee of the golf club and its Secretary from 1998 to 2002. He said that the club had around 600 playing members and non-members could play by arrangement. The course was busiest in the mornings and all day on Saturdays. It closed on only three or four days a year.

26. Having considered all of the evidence submitted at the inquiry, whether summarised in the report or not, the Inspector made a number of findings of fact. Under the sub-heading "Use of Report Land by Golfers", he said:

> "[171] I find that, from as far back as living memory goes (at least as far back as the 1920s), the Report Land was continuously used as part of the Cleveland Golf Club links. The only exception is that golfing was suspended during World War II. Golfing use ceased in 2002. I find that the club was a popular one and that the golf links were well used nearly every day of the year. In the years before 2002, the Report Land was used for the club house, the first and eighteenth holes and for a practice ground. There is some evidence that the precise configuration of the course changed somewhat over the years. The club house, tees, fairways, greens and practice ground did not, however, take up the whole of the Report Land and there were substantial areas of rough ground beside and between these features."

Under the sub-heading "Use of Report Land by Non Golfers", Mr Chapman's finding of fact was:

> "[172] I find that from as far back as living memory goes, the open parts of the Report Land have also been extensively used by non golfers for informal recreation such as dog walking and children's play. Some of the walking has been linear walking in transit. Thus the informal paths running east-west have been used by caravan residents to get access to the centre of Redcar with its shops and public houses. Also, there is evidence of people taking a short cut north-south from Church Street to the gap in the fence in Majuba Road. However, I am satisfied that the open parts of the Report Land has been extensively used by non golfers for general recreational activities apart from linear walking. I prefer the evidence on this point of the applicants' witnesses and of Mr Fletcher to the evidence of the objector's other witnesses that such use was occasional and infrequent."

Under the sub-heading "Relationship Between Golf and Other Use", the finding of fact was:

> "[175] I find that the relationship between the golfers and the local recreational users was generally cordial. There was evidence of only a few disputes. Only Squadron Leader Kime seems to have caused problems by actively asserting a right to use the Report Land and the golf club appears to have tried to avoid any formal dispute with him. In my judgment, the reason why the golfers and the local people generally got on so well was because the local people (with the exception of Squadron Leader Kime) did not materially interfere with the use of the land for playing golf. Many of the applicants' witnesses emphasised that they would not walk on the playing areas when play was in progress. They would wait until the play had passed or until they were waved across by the golfers. Where local people did inadvertently impede play, a shout of 'fore' would be enough to warn them to clear the course. I find that recreational use of the Report Land by local people overwhelmingly deferred to golfing use."

That finding of fact led to Mr Chapman's conclusions in paragraph 221 (see above) which he reconsidered in paragraph 3.2 of the further report in the light of Lord Hoffmann's opinion in the Oxfordshire case (see above).

27. Mr George accepted that a landowner's activities on the subject land would prevent an application under section 15 of the 2006 Act from succeeding in two circumstances: (a) where the landowner's use of the land had interrupted the 20-year use of the land referred to in paragraph (a) in subsections (2), (3) and (4) of section 15 for significant periods; what constituted such interruption would be a question of fact and degree in each case ("Interruption"); and (b) where, even in the absence of such interruption, the use of the land by the local inhabitants had not been inconsistent with the landowner's use of his land, so that it would have appeared to the landowner that the local inhabitants were not asserting any rights and were deferring to his right to use his land for his own purposes as he wished ("Deference").

28. In *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P&CR 36, [2003] EWHC Admin 1578 ("the Laing case"), the defendant had accepted an Inspector's conclusion that three fields owned by the claimant should be registered as a village green because the annual cutting of grass and its collection as hay for well over half of a 20-year period had not interfered sufficiently with the use of the fields for lawful sports and pastimes to indicate that that use was not enjoyed as a right (see paragraph 69-71).

29. I quashed the defendant's decision for two reasons:

(1) While two rights to use land for low-level agricultural activities such as growing a hay crop and a customary right to indulge in local sports and pastimes on the land could co-exist before the enactment of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 ("the 19th century" or "the Victorian legislation"), they could not co-exist following the enactment of the 19th century legislation. "Given the restrictions imposed by sections 12 and 29 [even] grazing would have to be very low key indeed . . . in order to be lawful and compatible with the establishment of village green rights" [see paragraph 67 of the judgment].

(2) " . . . 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 [the farmer'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 [paragraph 82 of the judgment]."

In paragraph 84 I said:

"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."

In paragraph 85, after referring to the effect of the 19th century legislation, I said that such a user for sports and pastimes (ie, one which did not interfere with the way in which the owner had chosen to use his land):

" . . . 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."

In paragraph 86 of the Laing case, I concluded:

"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."

30. There was no appeal against the decision in the Laing case, but one of the questions raised in the Oxfordshire case in the House of Lords was whether the Victorian legislation applied to land registered as a town or village green under the 1965 Act. In paragraph 56 of his opinion Lord Hoffmann concluded that it did. In paragraph 57 he went on to consider a further question which had not been in issue in the Oxfordshire case, namely the effect of that Victorian legislation. He said:

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

Although this particular issue is not referred to in the other opinions, there is nothing in them which might suggest any disagreement with the views expressed by Lord Hoffman in paragraph 57 of his opinion.

31. Mr Lawrence reserved the right to challenge on appeal the correctness of paragraph 57 but he accepted that, even though not strictly bound to do so, I would follow it in determining this application. All parties were agreed that the second limb of the reasoning in Laing Homes was not disapproved by Lord Hoffman. Indeed, his acceptance that "the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so as of right", would appear to confirm that the proper approach is that set out in paragraph 82 of Laing (see above), ie, whether those using the land for recreational purposes were interrupting the landowner's use of the land for his own purposes in such a manner or to such an extent that the landowner should have been aware they were exercising a public right.

32. I accept Mr George's submission that the words "believed that they" at the end of the first sentence in paragraph 82 of the judgment in Laing were superfluous and that the proper test was not to consider the users' beliefs, which were irrelevant (see *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 235 ("the Sunningwell case") per Lord Hoffman at pages 352 F to 356 E), but solely the inferences that would reasonably have been drawn by the landowner from their conduct on his land. Mr George submitted that once it was recognised that there was no necessary inconsistency between low-level agricultural activities and the exercise of village green rights, and the question was whether the two activities were in practice incompatible, it followed that there need be no incompatibility between low-level non-

agricultural activities by the landowner and the acquisition of village green rights by the local inhabitants.

33. I accept the principle that in practice low-level activities by the landowner may not be inconsistent with the use of his land for sports and pastimes for the purposes of section 15 of the 2006 Act, but I do not consider that, on the basis of Mr Chapman's findings of fact, the activities of the golf club could sensibly be described as "low-level activities". The land was not some far flung corner of a little used golf club. In the years before 2002 it was used for the club house, the first and the eighteenth holes (so that balls were being driven both from east to west and from west to east) and as a practice course, although there were substantial areas of rough ground beside and between the club house, the tees, fairways, greens and practice ground. The club was a popular one and the links were well used nearly every day of the year [171]. In paragraph 221 Mr Chapman described the club's use of its land as "extensive". Although he did not say so in the report, as a matter of common sense, with the presence of the club house and the first and last holes and the practice ground, the land must have been the busiest part of a popular and well used golf course. The part of the course where all of the players would begin and end their games.

34. In these circumstances, the earlier authorities dealing with "give and take" between the landowner's use of his land and its use for recreational purpose by local inhabitants are of no real assistance. It is true that in *Lancashire v Hunt* [1894] 10 TLR 310, on appeal 11 TLR 49, the landowner had asserted a "right of sport, rights of digging, rights of plantation" (see per Lord Hailsham at page 50), but the land in question was very extensive downland (see per Lord Scott in paragraph 73 of his opinion in the Oxfordshire case). It is unclear to what extent the asserted rights were actually exercised by the landowner and the court did not, it seems, attempt to reconcile the apparent conflict between such rights and the rights that had been established by the local inhabitants. Mr George referred to the defendant's summary of Mr Davies's submissions to the meeting of the General Purposes and Village Greens Committee on 19th October 2007:

"Mr Davis accepted that some members of the public had deferred to golfers; he also stated that he had deferred to them. He would not throw his frisbee if golfers were taking their shot and vice versa. There had been a mutual respect for each other, with the exception of ex-Squadron Leader Kime, the persons who had defaced the signs, and one or two of the golfers. They had gotten on with each other for 20, 30, to 60 years.

Mr Davis stated that the golfers had been deferred to out of politeness but in the main there had been no deference in any way, shape or form. [Emphasis added as in the claimant's skeleton argument]."

35. The difficulty with that submission is that, having heard six days of evidence and considered numerous written submissions, Mr Chapman did not conclude that the local users deferred to the golfers and vice versa. He concluded that "the recreational use of the Report Land by the local people overwhelmingly deferred to golfing use" [175]. He repeated that conclusion in paragraph 3.2 of his further report, having considered the implications of the House of Lords decision in the Oxfordshire case.

36. Mr Chapman summarised the relevant part of Mr Davis's own evidence at the inquiry in paragraph 105:

"There was an amicable relationship between the golfers and local people. When Mr Davis and his family were on the common, they took care not to interfere with the golf. Mr Davis could only recall two or three occasions when golfers shouted at him or his family. These were warning shouts of 'fore'. Often local people used the common in the early morning or the evening when golf was not being played."

There was one witness, Mrs Alton, who had asserted that the golfers deferred to her. However, Mr Chapman did not accept her evidence on that point:

"[64] Mrs Alton's evidence about the relationship between the golfers and other recreational users was not wholly consistent. In her evidence in-chief, she said that the other users had priority and that the golfers would stand back if she walked on the golf course. There was only one occasion when she had been ordered off the golf course by a golfer. She told him that she had every right to be there and later telephoned the secretary of the golf club to complain. He apologised profusely. When cross-examined by Miss Crail, she said that at weekends there were golf competitions and she respected them. At those times, the golfers did not stand back.

[65] Mrs Alton's evidence that golfers generally gave way to other users of the Report Land is out of line with the evidence of many other witnesses whose evidence I prefer on this point. However, I accept the rest of her evidence."

37. Although Mr George referred in his skeleton argument to the evidence of numerous witnesses, as summarised in Mr Chapman's report, their evidence was all consistent with Mr Chapman's conclusion that there was, in practice, overwhelming deference to the golfing use. I realise that the report must be read as a whole and that it is unwise, and perhaps unfair, to pluck out short extracts from the evidence of individual witnesses, but the extent of that deference by local users is confirmed by the lack of any evidence that, from a golf club's point of view, its use of the land was being interfered with or inhibited by local people using the land for recreation. Squadron Leader Kime was one of the applicants in the first application for registration. Mr Chapman found him "to be a man of very strong views which he expressed forcefully", but said that "he seems to have been the only user of the Report Land who impressed himself on the golf club as a nuisance" [24].

38. The fact that Squadron Leader Kime apart, local users of the land did not impress themselves on the golf club as nuisances was confirmed by the next witness, Mr Judson, whose evidence Mr Chapman accepted:

"[26] In 1970/71 Mr Judson worked as a green keeper for the golf club. There were regularly dog walkers on the golf course. His instructions were to ask the public not to walk on the fairways and greens, but there were in fact no problems with the public and he never had to ask a member of the public not to use the land. He used to cut the greens once or twice a week with a big lawnmower and cut the fairways weekly with a gang mower. The rough was cut about twice a year. The greens were top dressed about 12 times a year. There were no animals on the land except that horses were sometimes led on the land."

I realise that Mr Judson's evidence related to 1970/71 but there was no suggestion that it was in any way untypical in respect of the period under consideration.

39. Since the land was probably properly the busiest part of a golf course that was "popular" and "well used", the local users would have impressed themselves on the golf club as a 'nuisance' and would have caused problems for the likes of Mr Judson if there has not been the "overwhelming deference" found by Mr Chapman. Mr George submitted that the periods of interruption were very brief, "at most a few seconds at a time whilst a particular shot was being played". However, there was no evidence before Mr Chapman as to how long a local user would have to wait for a particular shot to be played. Presumably the length of time would vary depending upon the skill of the player and the intrepidity and agility of the local user. But that is not the question. It is unrealistic to examine the length of each 'interruption' shot by shot. This was not an interruption case. It is necessary to consider the overall extent of the golf club's "extensive use" of the land as a golf course and whether local users appeared to have been deferring to its chosen use of the land.

40. Mr George submitted that there had been "give and take" between the local users and the golf club. There was give and take, but on Mr Chapman's findings of fact, which were reasonably open to him on the evidence, there was overwhelmingly "give" on the part of local users and "take" on the part of the golfers. Mr George submitted that there were good practical reasons for

the deference found by Mr Chapman which had nothing to do with the local inhabitants deferring to the landowner's property rights, thus there was no proper basis on which the defendant could have assumed that no rights were being asserted by the public. It would be stupid and dangerous to walk across the line of play when a ball was about to be struck and most people would naturally defer to those using the land for other recreational pursuits, including golf, as a matter of common courtesy.

41. I can readily accept the submission that when deciding whether or not to defer to golfers the local users would have been concerned to ensure their own safety and to behave in a courteous manner towards other users of the land, and would have been most unlikely to have been in the least concerned with any question of competing legal rights, but the motives of the local users for showing "overwhelming deference" to the golf club's use of its land as a golf course are irrelevant (see the reference to Lord Hoffmann's opinion in the Sunningwell case in paragraph 32 above). The question is: how would the matter have appeared to the golf club? It would not be reasonable to expect the club to resist the recreational use of the land by local users if their use of the land did not in practice interfere with its use by the club as part of a popular and well used golf course (see paragraph 82 of Laing and paragraph 57 of the Oxfordshire case above). What matters to the landowner is the fact of deference to his use of the land, not the reasons for it which might vary from individual to individual.

42. For these reasons the second ground of challenge fails and it follows that the application for judicial review must be dismissed.

The Additional Ground of Challenge

43. In the claimant's skeleton argument an additional ground of challenge was raised. It was submitted that if, as has occurred, the court accepted the claimant's submission on ground 1, but found against the claimant on ground 2, then the defendant should be required to consider whether there were two areas within the land which should be registered because there was no evidence of any deference to the golfers by local inhabitants resorting to those parts of the land. The two areas of the land in question were not defined on any plan but were said to be (1) the area around the edge of the land, and (2) the central strip between the first and second holes.

44. Mr George applied for permission to amend the claim form to add the following ground:

"16A. Alternatively, if the Inspector's conclusion on deference was justified, both he and the registration authority erred in law in not considering and determining, in the light of all the evidence, whether the inference to be drawn from such deference applied in respect of the inhabitants' user of all, or only part, of the application site."

I refused that application. While I accept that the defendant as registration authority had power to register a different area of land than that which was originally applied for in the second application (see paragraph 61 of the Oxfordshire case per Lord Hoffmann), it was under no obligation to reformulate the case as presented by the applicant for registration, and if it had been minded to do so it would have had to have acted fairly to all parties, including itself as landowner (ibid).

45. The suggestion that a lesser area should be registered was not put to Mr Chapman, was not put to the defendant when it was considering whether or not to accept Mr Chapman's recommendation, and was not raised in the claim form. Had it been raised at the inquiry, no doubt Mr Chapman would have made the relevant findings of fact and reached a conclusion based upon those facts, having given the defendant as landowner a fair opportunity to present evidence and/or to make submissions on the point. Since that was not done, it would be wholly inappropriate and most unfair to the defendant to allow the point to be raised at this very late stage.

Delay

46. The defendant and the interested party submitted that the application to apply for judicial review had not been made promptly and that permission, alternatively relief, should be refused on the ground of delay. In the light of my conclusions in respect of ground 2 of the challenge, I can deal with this issue quite shortly.

47. Like Sir George Newman, who refused permission to apply for judicial review on the papers on 6th March 2008, I am not impressed with the explanation for leaving this application until the last minute. The application was not made promptly and there was therefore undue delay for the purposes of section 21(6) of the Supreme Court Act 1981. However, if I had found for the claimant on both grounds 1 and 2, I would not have considered that either the extent of the delay or, more importantly, the detriment to good administration and/or the prejudice to the rights of the interested party and the defendant as landowner were so serious as to warrant a refusal to grant relief on delay grounds alone.

48. The defendant's conclusions in respect of 'notices' and 'deference', challenged in grounds 1 and 2, were not in respect of some peripheral procedural issue. They were the determining issues which caused the application for registration to be refused. If both of those conclusions had been legally flawed, any delay and its consequences would have had to be particularly egregious to justify a refusal to grant relief. There would have been a strong public interest in correcting, however belatedly, errors of such consequence.

49. The interested party's evidence makes it clear that the three applications for judicial review have caused considerable delays to the Coatham Development Project and that those delays have been very expensive for the defendant and the interested party. The development costs for the scheme are rising at some £415,000 (excluding housing), and £214,000 (housing) every three months. However, I have to consider whether the delay in making this application for permission to apply for judicial review from the 19th October 2007 until 18th January 2008 has caused any detriment to good administration or substantial prejudice. No particular detriment to good administration has been identified by the defendant and there has, as yet, been no substantial prejudice, because the planning permission was quashed on 20th December 2007 and so the development project has remained "in limbo" until the Court of Appeal's decision on 1st July, just over two weeks ago. I realise that the cumulative effect of the three applications for judicial review has been most frustrating for the defendant and the interested party, but in the somewhat unusual circumstances of the planning permission being in limbo until shortly before this decision, the lack of promptness in making this application would not have been a sufficient ground for refusing relief.

50. Having had the benefit of hearing argument for a whole day, it would be somewhat artificial for me to refuse permission to apply for judicial review. I therefore grant permission to apply for judicial review, but I do so only in order to dismiss the substantive application.

51. MR LAWRENCE: My Lord, in those circumstances would your Lordship make an order accordingly and also an order that the defendant, albeit legally aided, pay the costs of the claimant in the normal way.

52. MR JUSTICE SULLIVAN: The normal order.

53. MR PIKE: My Lord, there is one matter. I cannot take terribly long over this. There are two substantive issues, my Lord, the first of which you decided theoretically in the claimant's favour, in the sense that you agreed with the ground on notices, my Lord. As you recorded in your judgment, that was a point which was taken before Mr Chapman issued his opinions and also was reinforced to the registration authority. The point was taken a very long time ago that the notice was not prohibitory. My Lord, ultimately you agreed with the submissions of Mr George. In those circumstances, my Lord, my principal submission would be that the claimant ought to get

its costs from the defendant of arguing that ground. Effectively, I would be submitting that there should be a 50/50 order in that respect. We should get our costs for that ground and, as far as the unsuccessful ground, it could be the normal Legal Aid order under section 11 of the Access to Justice Act 1999.

54. MR JUSTICE SULLIVAN: What do you want to say about that, Mr Lawrence?

55. MR LAWRENCE: Certainly not, my Lord.

56. MR JUSTICE SULLIVAN: I rather thought that you would say that. I think there is some force in the argument, but not quite as much as Mr Pike contends for and not as little as Mr Lawrence contends for, on the basis that there is no doubt that the deference argument occupied rather more time and authorities and paper generally than the notices argument. Moreover, I also bear in mind that there were issues about delay and the alternative ground. In all the circumstances, I think a fair order is that, subject to what I still call a normal Legal Aid order, the claimant should pay two thirds of the defendant's costs, those costs to be the subject of a detailed assessment.

57. MR PIKE: My Lord, I am grateful. There is one other matter, my Lord. Permission to appeal.

58. MR JUSTICE SULLIVAN: Miss Crail, can I just check, you are not making any applications?

59. MISS CRAIL: No, my Lord.

60. MR JUSTICE SULLIVAN: Thank you very much. Forgive me. Permission to appeal.

61. MR PIKE: My Lord, clearly your Lordship found in favour of the claimant on the first point so it relates to the deference issue. I will put the matter very shortly. As your Lordship observed during the hearing, this is a novel matter, not before the courts previously in this form and, as your Lordship said, is likely to go higher in any event, whichever way it goes. In my submission, it is an appropriate matter for the Court of Appeal to consider. It is important, it is novel, and it does raise a point of principle. My Lord, I accept that clearly your findings are very much rooted in the facts of this particular case.

62. MR JUSTICE SULLIVAN: I think deference is only in a sense subject to whatever Lord Hoffmann may have said in paragraph 57 of Oxfordshire. Deference is judge-made law; judge-made by me, therefore and you might well say there is a real prospect of persuading the higher courts to change it.

63. MR PIKE: My Lord, I would not be so impertinent as to go that far, but I do say that there is good reason why the Court of Appeal should hear this matter. In essence it comes down to this. Your Lordship referred to the requirement, in effect, for local inhabitants to impress themselves upon the landowner through their use and if they had not done so there would be overwhelming deference. My Lord, I say, with respect, what that does not take into account is precisely what Lord Hoffmann had in mind in the sense of give and take. Where one has a piece of land which has long been used, as the case here, by two different groups happily co-existing (and it is the co-existence point we say is important here), where there has been that and, all things being equal, it has gone on amicably, the fact that the users did not then interfere with the golf club use so as to prevent it occurring through overt acts, regularly, in my submission was not really the point, with respect.

64. My Lord, in addition, as you will recall, there is this question of the issue that there was impact upon the golf club use. You will remember the matter of the local bye-law to do with moving a ball when it came into contact with substances left by walkers' dogs.

65. MR JUSTICE SULLIVAN: Your faeces point.

66. MR PIKE: Exactly, my Lord. Not the point I would always wish to lead with but it is there all the same. It clearly was an impact on use. That, taking into account the issue of give and take and the fact that the two uses co-existed, I respectfully submit it gives rise to a clear issue here as to what the Court of Appeal was saying and how that interacts with the judgment your Lordship has given.

67. MR JUSTICE SULLIVAN: What do you want to say about that, Mr Lawrence?

68. MR LAWRENCE: My Lord, as far as we are concerned, what Lord Hoffmann said in paragraph 57 – although, as you know, I had my reservations about the correctness of it – what survives perfectly clearly is that your Lordship's judgment in Laing was affirmed on the second of the two grounds that you referred to on your judgment. This is not a new point at all. This is a point where the House of Lords have confirmed that where in practice the activities of the landowner are not in any material way interfered with by those of the recreational users, that is exactly the kind of case where the necessary test – well-established since Sunningwell and before – that the landowner should be able to be aware from the activities of local people that a right has been asserted is not going to be satisfied.

69. Accordingly, although it would be very nice to have the views of the Court of Appeal and no doubt those of the House of Lords in due course reaffirming the correctness of Lord Hoffmann's approach in his obiter dictum at paragraph 57 and very nice for me, I hope, to be involved in those proceedings and so on, it is my respectful submission this is classically a case where it should be for the Court of Appeal to decide whether permission to appeal should be granted.

70. MR JUSTICE SULLIVAN: Thank you. Do you want to add anything to that, Miss Crail?

71. MISS CRAIL: I do not think so, my Lord. Your decision is firmly routed on the particular facts and findings in this case based on Lord Hoffmann's dictum as my learned friend has said.

72. MR JUSTICE SULLIVAN: Mr Pike, I think it is appropriate, in fact, to give you permission to appeal in this case. I accept the point that the decision is indeed founded on the facts, but the implications of those facts depend very much on the correctness of the principle. It does seem to me that the ambit of the deference principle is something which is not determined, and therefore there is a real prospect of success in terms of the possibility of you being able to persuade the Court of Appeal to determine it differently. I give you permission to appeal.

73. MR PIKE: I am grateful.

74. MR JUSTICE SULLIVAN: Any more for any more?

75. MISS CRAIL: My Lord, in that case I would ask your Lordship to abridge the time for lodging the appellant's notice from 21 days. Your Lordship is well aware of the urgency of the matter, having read the evidence. Everything is now fresh in the minds of the claimant and his advisors. You will recall that these proceedings were got ready and issued in a matter of four days, according to Mr Lockley's evidence. In all those circumstances we would ask for an abridgement to 10 days, or 14 if your Lordship is feeling generous.

76. MR JUSTICE SULLIVAN: I have just been discussing with the shorthand writer as to when the transcript of the judgment can be given to me for approving and subject to minor corrections.

77. MR PIKE: I am grateful, my Lord. That was a point I was going to raise with you.

78. MR JUSTICE SULLIVAN: That is going to be done on Tuesday because next week I am away. I have three days compensatory leave on Wednesday, Thursday, Friday. So I will turn round a correct transcript on Tuesday. In those circumstances, it does seem to me that since this matter is relatively familiar and so forth that I would be minded to give 14 days.

79. MR PIKE: From?

80. MR JUSTICE SULLIVAN: I think 14 days from Tuesday.

81. MR PIKE: I was going to suggest 14 days from the transcript. Fourteen days from Tuesday.

82. MR JUSTICE SULLIVAN: Yes. Starting on Wednesday your 14 days starts.

83. MR PIKE: I can see the force, my Lord. I am entirely happy with that.

84. MR JUSTICE SULLIVAN: It is not much of an abbreviation, Miss Crail but it is the sort of case where it simply is not sensible to start drafting an appeal unless you actually have the judgment you are appealing against.

85. MR LAWRENCE: My Lord, may I ask a question wearing a hat I do not wear which is that of the Council as landowner in the sense of having an interest in an expeditious disposal of any appeal. I ask purely as a matter of information. Is there anything which the first instance judge can properly do by way of an informal note to the Court of Appeal to indicate that in a case where he has thought it right to give permission to appeal, it is highly desirable that the appeal be dealt with just as quickly as possible or do we have to go through the whole rigmarole of persuading the court at a higher level?

86. MR JUSTICE SULLIVAN: The answer to your question, Mr Lawrence, is that there is nothing to prevent me and I have in a case that was exceedingly urgent, the challenge to the PPP process about the Tube by the former Mayor of London. I have got in touch with the Registrar at the Court of Appeal effectively ticking him off that there was going to be an appeal and please have a couple of OJs ready. There is nothing to prevent it, but I think it has to be really quite an exceptional case to justify that course. Really (a) it would be presumptuous of me to tell the Court of Appeal how fast or slow to do anything, and (b) there is nothing to prevent the parties from getting in touch with the Court of Appeal office and saying this is something that must be dealt with urgently and asking them to expedite. That is the way to do it, frankly.

87. MR LAWRENCE: I have no doubt that there would be the same cooperative attitude were such an approach to be made as happened to get this case on. Can we just thank your Lordship and the court staff concerned particularly for the expedition which has proved possible to arrange this hearing.

88. MR JUSTICE SULLIVAN: Nice to know we can provide a decent service for some people some of the time.