Neutral Citation Number: [2009] EWCA Civ 3

Case No: C1/2008/1918

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
Sullivan J.

Royal Courts of Justice
Strand, London, WC2A 2LL

15/01/2009

B e f o r e :

LORD JUSTICE LAWS
LORD JUSTICE RIX
and
LORD JUSTICE DYSON

Between:

The Queen on the Application of Kevin Lewis	**Appellant**
- and -	
(1) Redcar and Cleveland Borough Council	
(2) Persimmon Homes (Teesside) Limited	**Respondents**

Charles George QC and Jeremy Pike (instructed by Irwin Mitchell Solicitors) for the Appellant
George Laurence QC (instructed by Redcar and Cleveland Borough Council, Legal and Democratic Services Division) and Ross Crail (instructed by Ward Hadaway Solicitors) for the Respondents
Hearing date: Tuesday 25 November 2008

Lord Justice Dyson:

1. This is an appeal with the permission of Sullivan J against his decision to refuse an application for judicial review of the decision of Redcar and Cleveland Borough Council ("the Council") not to register part of the land known as Coatham Common, Redcar ("the Application Site") as a town green under the Commons Act 2006 ("the 2006 Act").

2. On 1 March 2005, the appellant and 3 other local residents applied ("the first application") for the registration of the Application Site as a town green under the Commons Registration Act 1965 ("the 1965 Act"). The Council appointed Mr Vivian Chapman QC as an Inspector to hold a public inquiry and provide a report and recommendation to the Council as to whether the application should succeed. The Inspector recommended that the Application Site should not be registered for two reasons. First, he found that the fact that certain signs had been erected on the Application Site in 1998 and in 2003 meant that local inhabitants' use of the Application Site was not "as of right" within the meaning of section 22(1) of the 1965 Act, at least in the period during which the signs were in place. Secondly, he found that local inhabitants' use of the Application Site was not "as of right" because it "deferred" to the extensive use of the land by the Cleveland

Golf Club to which the Council had leased the Application Site until 2002. The Council accepted the Inspector's recommendation.

3. On 9 June 2006, the Inspector produced a further report in the light of the House of Lords decision in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 ("the *Oxfordshire* case"). This report confirmed the previous recommendation.

4. On 8 June 2007, the appellant and others made an application for registration of the Application Site as a town green under the 2006 Act ("the second application"). For present purposes, the only material difference between the provisions of section 15 of the 2006 Act and those of section 22(1) of the 1965 Act is that reliance on the 2003 notices as a ground for rejecting the second application was precluded by section 15(4)(c), quoted in [6] below. The Inspector considered the second application in no fewer than 4 opinions and recommended that it should be rejected. On 19 October 2007, the Council rejected the application. On 18 January 2008, judicial review proceedings were issued to challenge this decision.

5. The judicial review application was heard by Sullivan J. He upheld the challenge to the first of the Inspector's reasons, but rejected the challenge to the second. Accordingly, he dismissed the application for judicial review. Mr Charles George QC on behalf of the appellant submits that the Inspector and the judge should have concluded that the use of the Application Site by the local inhabitants was "as of right" and that the notion of "deference" is an unwarranted judicial gloss on the meaning of that expression. There is no respondent's notice challenging the judge's decision on the first reason.

The relevant statutory provisions

6. Section 15 of the 2006 Act provides:

> "(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)) where—
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the commencement of this section; and
>
> (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b)."

7. The 2006 Act replaced the 1965 Act. The differences between the two statutes are not material to the issues that arise on this appeal. It is necessary to mention the 1965 Act only because (i) the principal authorities in this area of the law were decided in the context of the 1965 Act, and (ii) the first application for the registration of the Application Site as a town green was made under the 1965 Act.

Mr Chapman's reports

8. On 14 March 2006, Mr Chapman produced his report in respect of the earlier application under the 1965 Act. It is necessary to refer to this report because it forms the basis of his later recommendation that the application under the 2006 Act should be rejected. He wrote his first report after holding a public inquiry in Redcar over 6 days in December 2005 and January 2006.

The report is long. It reviews the evidence in detail. At [170] to [177], Mr Chapman sets out his findings of fact. These include:

"**Use of Report Land by Golfers**

[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 the golfing was suspended during World War II. Golfing use ceased in 2002. I find that the club was a popular one and that the golf links were well used nearly every day of the year. In the years before 2002, the Report Land was used for the club house, the first and eighteenth holes and for a practice ground. There is some evidence that the precise configuration of the course changed somewhat over the years. The club house, tees, fairways, greens and practice ground did not, however, take up the whole of the Report Land and there were substantial areas of rough ground beside and between these features.

Use of Report Land by Non Golfers

[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 south-north from Church Street to the gap in the fence in Majuba Road. However I am satisfied that the open parts of the Report Land have been extensively used by non golfers for general recreational activities apart from linear walking. I prefer the evidence on this point of the applicants' witnesses and of Mr Fletcher to the evidence of the objector's other witnesses that such use was occasional and infrequent.

…

[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."

9. At [178] to [209], he discusses the law. At [210] to [222], he applies the law to the facts. At [212], he says that the applicants have established that the Application Site (other than the public footpath) has been used for informal recreation by local people at least since 1970 and for more than 20 years. He then says that the recreational use (predominantly walking, with or without dogs, and children's play) has constituted "lawful sports and pastimes" as construed in *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335 ("the *Sunningwell* case") and has been "as of right" in the sense that it was *nec vi, nec clam, nec precario.* At [221], he says:

"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 Club would have been in breach of IA 1857 s. 12 and CA 1876 s 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."

10. At [223], the conclusion is expressed in these terms:

"My conclusion is that the application fails for the following reasons:

• Recreational user of the public footpath was by right as a public footpath.

• Recreational user of the rest of the Report Land by the inhabitants of Coatham was not as of right before 2002 because it deferred to the extensive use of the Report Land by the Cleveland Golf Club.

• Recreational user of the Report Land as of right is not continuing because such user has been permissive since the erection of the permissive signs in 2003."

11. Mr Chapman was asked to reconsider his recommendation in the light of the *Oxfordshire* case and in particular the opinion of Lord Hoffmann at [57] which is in these terms:

"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* (1797) 2 Esp 543. This was accepted by Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, 588. In that case the land was used for "low-level agricultural activities" such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not. Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application. I have a similar difficulty with paragraph 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council* (unreported), 18 June 2004, in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the section 22 definition."

12. On 9 June 2006, Mr Chapman produced a further report which includes the following:

"**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. Insofar 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 use "as of right" (para 221). This is a conclusion which still seems to me to be correct and to be 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 re-opened, I would not alter my conclusion and recommendation on this point either."

13. On 7 April, the Council decided to accept Mr Chapman's advice and reject the first application.

14. As I have said, the second application was made on 8 June 2007. Mr Chapman's advice to the Council in relation to this application is contained in an opinion dated 12 June 2007, a further opinion dated 29 July 2007, a second opinion (revised) dated 13 October 2007 and a third opinion dated 18 October 2007. It is sufficient to say that Mr Chapman advised that he could see nothing in the second application which required him to reconsider the second and third of the reasons that he had given at [223] of his earlier report for concluding that the application should be rejected.

The principal previous authorities

15. It is necessary to refer to certain passages in three previous authorities in order to understand the reasoning of both Mr Chapman and the judge. They are all cases concerned with section 22(1) of the 1965 Act which, as I have said, for present purposes, does not differ materially from section 15 of the 2006 Act. In *Sunningwell*, the House of Lords decided that the provision that the inhabitants of a locality have indulged in lawful sports or pastimes "as of right" reflected the common law concept of *nec vi, nec clam, nec precario* and did not require subjective belief on the part of the users in the existence of the right. Lord Hoffmann explained at p350H that:

"…It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see *Mills v. Colchester Corporation* (1867) L.R. 2 C.P. 476, 486). The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period…"

16. The importance in prescription-based claims of how matters appear to the reasonable landowner is a central theme of Lord Hoffmann's speech: see p 352H-353B. At p 357D-E, he said that the user had to "carry the outward appearance of user as of right".

17. In *R (Laing Homes Limited) v Buckinghamshire County Council* [2003] EWHC 1578, [2004] 1 P& CR 573 ("the *Laing Homes* case"), Sullivan J quashed the decision of the council to register land as a village green. The local inhabitants had enjoyed substantial recreational use of the land for lawful sports and pastimes. The landowner had granted a grazing licence to a farmer for light grazing and an annual cutting of hay. The judge quashed the decision for two reasons. The first was based on the effect of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. In view of the criticism by Lord Hoffmann in the *Oxfordshire* case at [57] of this part of his reasoning, Sullivan J did not rely on this reason in the present case. Neither Mr George nor Mr George Laurence QC sought to rely on it before us, although Mr Laurence reserved his right to argue in the event of an appeal from our decision that Sullivan J's first reason was sound. But I propose to say no more about it in this judgment.

18. Sullivan J's second reason was described by him in the present case as an application of the "deference principle". He explained what he meant in the following passages in his judgment in *Laing Homes.* At [82], he said:

> "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."

19. At [84], he 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."

20. At [85], he seems to have fused the two reasons:

> "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."

21. At [86], he concluded that he did 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."

22. In the *Oxfordshire* case, the council sought rulings from the court on a number of issues on which it considered that it required assistance before it determined an application to register land as a town or village green. The second issue was whether registration as a town or village green created any rights in the local inhabitants. Lord Hoffmann dealt with this issue in the following way:

> "49. So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending Commons Commissioners round the country on a useless exercise. If the Act conferred no rights, then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court. There would have been no point in the conclusive presumption in section 10. Another possibility is that registration conferred such rights as had been proved to support the registration but no more. So, for example, if land had been registered on the strength of a custom to have a bonfire on Guy Fawkes Day, registration would confer the right to have a bonfire but no other rights. But this too would make the registration virtually useless. Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.
>
> 50. In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell* case [2000] 1 AC 335, 357A-C.
>
> 51. This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides. *Fitch v Fitch* (1797) 2 Esp 543 was a sequel to *Fitch v Rawling* 2 H Bl 393, in which the custom of playing cricket on land at Steeple Bumpstead had been established. The evidence was that the defendants had trampled the grass which the owner had mowed, thrown the hay about and mixed some of it with gravel. Heath J said:
>
> "The inhabitants have a right to take their amusement in a lawful way. It is supposed, because they have such a right, the plaintiff should not allow the grass to grow: there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded."

23. Lord Rodger (at [114]) and Lord Walker (at [124] and [127]) agreed with Lord Hoffmann. Baroness Hale (at [137]) refused to make a ruling on the issue on the grounds that it was hypothetical. Lord Scott did not agree that registration gave rise to rights for the local inhabitants extending to sports and pastimes generally and not merely that use which had been the basis for registration.

24. Lord Hoffmann also referred to the Victorian statutes relied on by Sullivan J in the *Laing Homes* case at [57] in a passage which I have already set out at [11] above.

The judgment of Sullivan J in the present case

25. As I have said, the judge upheld the first ground of challenge. I say no more about that. He then dealt with the second ground of challenge which he entitled "Deference". He referred to paras

171, 172 and 175 of Mr Chapman's first report (see [8] above). Having referred to the *Oxfordshire* case and his own decision in *Laing Homes,* he said at [31]

"…All parties were agreed that the second limb of the reasoning in *Laing Homes* was not disapproved by Lord Hoffmann. 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), i.e. 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."

26. He then accepted that the words "believed that they" at the end of the first sentence of [82] in *Laing Homes* were "superfluous" and that the proper test was not to consider users' beliefs, which were irrelevant, but solely the inferences that would reasonably have been drawn by the landowner from the users' conduct on the land.

27. At [33] he said:

"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."

In these circumstances, he said that the earlier authorities dealing with "give and take" between the landowner's use of his land and its use for recreational purposes by local inhabitants were of no real assistance.

28. Having referred to some of the evidence considered by Mr Chapman, the judge continued:

"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 appellants' arguments

29. The submissions of Mr George may be summarised as follows. Where local inhabitants' use of land is intermittent because of the owner's own activities on the land, a claim under section 15 of the 2006 Act will not succeed. That is because, as a matter of fact, the owner's use will interrupt for significant periods the running of the 20 years' period. Mr George refers to this as an application of "the principle of interruption".

30. The concept of "deference" as a bar to the creation of a new village/town green is a creation of Sullivan J (in *Laing Homes*). It is an unwarranted gloss on section 22 of the 1965 Act and section 15 of the 2006 Act to require that local inhabitants' use must have been in such a manner that, where it came into potential conflict with an owner's use of his land, the local inhabitants interfered with the owner's use of the land. The fact that local inhabitants may give way to the activities of the landowner is no more than recognition that all rights of local inhabitants (particularly those of a customary nature) must be exercised reasonably. This involves mutual give and take between the owner and those exercising these rights. That is why, for example, the fact that an owner continues to graze animals on land does not prevent the land from being registered as a village green, provided that there has been the necessary 20 years' use "as of right" by local inhabitants.

31. Thus, once it is recognised that there is no incompatibility between certain agricultural activities by an owner and the exercise of village/town green rights, there is likewise no incompatibility between certain non-agricultural activities by the owner and the running of the 20 year period for registration of a village/town green, provided that the owner's activities do not prevent the 20 year period from accruing under the principle of interruption. There is no room for a principle of deference. Provided that there is sufficient continuity of use by the local inhabitants such that the local inhabitants' user is not interrupted, their user is as of right, provided that it is *nec vi, nec clam, nec precario.*

32. The true analysis in a case such as the present is that the right of the local inhabitants to use the land after registration is subject to, or qualified by, the owner's right to use the land. This right must be exercised reasonably and sensibly by give and take. An example of such an approach is

to be found in *Fitch v Fitch* which was cited by Lord Hoffmann in the *Oxfordshire* case: see [22] above.

33. In any event, even if there is a principle of deference, it is not enough to defeat a claim for registration of a village or town green that the local inhabitants defer to an owner's occasional use of the land. It is necessary to ask the further question: does the deference manifest to the owner that the inhabitants' user is not "as of right"; or does it rather manifest that the inhabitants appear to recognise that their own rights must be exercised safely and courteously? Thus, even if there is a principle of deference, it is necessary to consider whether on the facts of the particular case the deference is or is not consistent with village/town green rights accruing.

34. Finally, Mr George submits that, if there is a principle of deference, the Inspector and the defendant did not apply it correctly to the facts of the case. In particular, they failed to consider that (i) the behaviour of local inhabitants was objectively consistent with conduct which had nothing to do with deferring to priority rights (since they were doing no more than acting courteously in the interests of their own safety); (ii) the behaviour of the local inhabitants was precisely the sort of conduct one would expect from persons using the land "by right"; and (iii) there is no inconsistency between the creation of a village/town green and the continued exercise by the owner of activities on the land which are compatible with the exercise on it of lawful sports and pastimes by local inhabitants.

Discussion

35. I would reject these submissions largely for the reasons given by Mr Laurence (supported by Miss Crail). There is no longer any doubt as to the principles that should be applied in determining whether local inhabitants have indulged in lawful sports and pastimes "as of right" within the meaning of section 15 of the 2006 Act. It must be shown that their user is such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right. This requirement has been stated in many authorities. In *Hollins v Verney* (1884) 13 QBD 304 at 315 (a Prescription Act claim), Lindley LJ said:

> "It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the dicta to be found in them; the only safe course is to fall back on the language of the statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No use can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) *the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended*. Can an user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute. Without therefore professing to be able to draw the line sharply between long and short periods of non-user, without holding that non-user for a year or even more is necessarily fatal in all cases, without attempting to define that which the statute has left indefinite, we are of opinion that no jury can properly find that the right claimed by the defendant in this case has been established by evidence of such limited user as was mainly relied upon, and as was contended by the defendant to be sufficient in the present case" (emphasis added).

36. In *Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* (1992) SLT 1035, 1041, Lord President Hope said: "….where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by…" This was approved by the House of Lords in (1993) SC (HL) 44, 47 and in *R(Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, at [6] and [77].

37. For user to be "as of right", it must also be shown that it has been *nec vi, nec clam, nec precario.* In *Beresford*, after referring to the *Sunningwell* case, Lord Bingham said at [3]:

> "as of right" means nec vi, nec clam, nec precario, that is "not by force, nor stealth, nor the licence of the owner": see pp 350, 351, 353-354. In this case there was no question of force or stealth. So the only question is whether the inhabitants' user was by the licence of the owner."

38. But Lord Bingham was not purporting to say that it is a *sufficient* condition for user to be "as of right" that it has been *nec vi, nec clam, nec precario.* The sole issue in *Beresford* was whether the owner had granted the local inhabitants an implied licence to use the land. It was not in dispute that, if (as was held by the House of Lords) no such licence had been granted, the local inhabitants established their use "as of right". Lord Bingham was not casting doubt on the need to establish that the user was sufficient to bring home to the reasonable landowner that the local inhabitants were asserting a right.

39. In what follows, I shall use the word "owner" to mean "owner, his lessees or licensees". Where there are no competing uses by local inhabitants and the owner, the answer to the question whether the local inhabitants' use of land has been *nec vi, nec clam, nec precario* will usually determine whether they have been using it "as of right". The answer to that question will usually be sufficient to determine whether the user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to the use of the land.

40. But where there are competing uses, the position may be factually more complicated. In principle, however, the question remains the same: has the user been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land? That will depend on an analysis of the manner and extent of the user.

41. In my judgment, there is no more a "principle of interruption" (as contended by Mr George) than there is a "principle of deference" (as Sullivan J suggested when granting permission to appeal in the present case). Neither "principle" finds expression in section 15 of the 2006 Act and its predecessors. But "interruption" and "deference", which are aspects of the "amount or manner" of the use (to adopt the words of Lord Hope), may be relevant to a determination of whether the user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land. As Lord Hoffmann said in *Sunningwell* at p 357D, the user may be "so trivial and sporadic as not to carry the outward appearance of user as of right". Thus, user by the local inhabitants may be interrupted sufficiently often and/or for sufficiently long periods of time that it does not carry the outward appearance of user as of right. It is a question of fact and degree in every case. As Mr Laurence concedes, user of the kind required to found an entitlement to registration is in its nature intermittent. Thus, where the owner does not put the land to any competing use, a claim founded on activities such as walking, picnicking and kicking a football about does not fail just because those activities are not carried out all the time.

42. That is to be contrasted with the situation where the land is not used by local inhabitants at certain times *by reason of the activities of the owner* on the land at those times. Where that occurs, local inhabitants will usually not be physically prevented from indulging in lawful sports or pastimes despite the owner's competing activities. Thus, in *Laing Homes* the local inhabitants could have walked in front of the farmer's machinery had they chosen to do so. In the present case, they could have walked across the golf course while the golfers were playing if they chose to do so. The reality in such cases is that they voluntarily desist from interfering with the owner's activities, not that they are physically prevented from doing so.

43. As Mr Laurence puts it, it is not a misuse of ordinary language to say in such cases that the use of the local inhabitants is "interrupted" during such periods, in the sense that they are not using the land while the owner is doing so. Equally, it is not a misuse of language to say that if the users refrain from using the land while the owner is doing so, they are "deferring" to the owner. What matters is not what label one puts on it, but how it would have appeared to the reasonable owner of the land at the time, and in particular whether it would have appeared to the reasonable landowner that the local inhabitants were asserting a right to use the land for the sports or pastimes in which they were indulging.

44. I agree with Mr Laurence that this analysis is consistent with what Lord Hoffmann said at [57] of the *Oxfordshire* case. It is true that this paragraph contains *obiter dicta* and none of the other members of the House of Lords commented on it. Nevertheless, Lord Hoffmann clearly chose his words carefully and neither Mr Laurence nor Mr George suggested that we should not apply them. (As I have said, Mr Laurence reserves his right to argue on a future occasion that what Lord Hoffmann said about the Victorian statutes was wrong, but that is another matter). It is worth repeating what he said:

> "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…I do not agree that 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."

45. In other words, there are cases where, in practice, the activities of the owner will be inconsistent with user by the local inhabitants of the land for sports and pastimes for the purposes of section 22 of the 1965 Act (and section 15 of the 2006 Act). The inconsistency will manifest itself where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees). By adjusting their behaviour, they give the impression to the owner that they are not claiming a right to do what they are doing. That leads the owner not to regard the users as acting as of right.

46. It seems to me that all of this is implicit in what Lord Hoffmann said at [57]. In particular, it is consistent with what Lord Hoffmann said about the *Laing Homes* case. As we have seen, there were two strands to the reasoning of Sullivan J in that case. By way of shorthand, these may be called the "Victorian statutes point" and the "deference point". Lord Hoffmann disagreed with Sullivan J on the Victorian statutes point. But, as I have said, what he said at [57] is consistent with an acceptance that the deference point may be relevant to the question whether the user is as of right. If Lord Hoffmann had been of the view that Sullivan J had been wrong to derive from *Sunningwell* the proposition at the end of [85] of *Laing Homes* that use for sports and pastimes would not be "as of right" if "the local inhabitants would have appeared to the landowner to be deferring to his right to use the land", he would surely have said so. The fact that he did not provides further support for the view that the second strand of Sullivan J's reasoning was correct.

47. Thus I accept the submission of Mr Laurence that it is a question of fact and degree for the fact-finder to resolve whether in practice there is inconsistency between the activities on his land of the owner and the recreational activities of the local inhabitants. In some cases, the activities of the owner may "in practice" make no difference to the activities of the local inhabitants in the sense that they will not need to adjust their activities to allow for those of the owner. In such cases, provided that the use has been *nec vi, nec clam, nec precario*, it is likely that it will be held that the activities of the local inhabitants have the necessary appearance of asserting a right against the owner. But in a case where there is a conflict between the activities of the owner and the local inhabitants, and the activities of the local inhabitants can only be accommodated with those of the owner by the local inhabitants deferring to the owner's use, then the activities of the local inhabitants may not have the appearance of asserting a right against the owner. On the contrary, those activities may have the appearance of an acknowledgment by the local inhabitants that they have no right at all. Those who *always* defer to the owner whenever his competing use

of the land threatens to interfere with their use of the land are not likely to convey to the reasonable owner the impression that they are claiming the right to use the land.

48. In the present case, the question of whether the local inhabitants were using the land "as of right" depended on the extent to which they deferred to the golfers where there was a conflict between the two uses. There was no doubt that the local inhabitants indulged in sports and pastimes continuously over the land for a period of more than 20 years. Their use was not trivial or sporadic and it was *nec vi, nec clam, nec precario.* The full extent of their user of the Application Site is set out by the Inspector at [171] and [172] of his report dated 14 March 2006 and summarised by the judge at [33] of his judgment. The manner of their user in relation to the user by the golfers is set out by the Inspector at [175] of his report and repeated at [3.2] of his report dated 9 June 2006. It is summarised and interpreted by the judge at [39] to [41] of his judgment. In short, the user of the local inhabitants was extensive and frequent, but so too was the use by the golfers. Crucially, the Inspector found that the local inhabitants "overwhelmingly deferred" to the golfers.

49. As I have said, it was a question of fact and degree to be resolved by the decision-maker whether the local inhabitants did sufficient to bring home to the reasonable owner of the Application Site that they were asserting a right to use it. In making that finding, the extent to which they deferred to the rights of the owner (ie, the golfers) was a relevant factor. The greater the degree of deference, the less likely it was that it would appear to the reasonable owner that they were asserting any right to use the land.

50. As I have stated at [32] above, Mr George submits that the local inhabitants' right to use the Application Site for sports and pastimes after registration would be subject to, or qualified by, the owner's right to use the land. The difficulty with this submission is that, as Mr Laurence points out, Lord Hoffmann made it clear in the *Oxfordshire* case in the paragraphs cited at [22] above that registration of a town or village green confers the unqualified right to use the land generally for sports and pastimes. There is no scope for the conferring of qualified or limited rights. It must follow that what is required for the purpose of registration of a green is user "as of right" as that expression has been explained in the authorities to which I have referred earlier in this judgment. Either the user has been or it has not been "as of right". To introduce the concept of a limited or qualified right does not illuminate the answer to the question whether the user has been "as of right".

51. That is not to say that in a case where the use of the local inhabitants competes with that of the owner, the exercise of the right of the owner to use the land will necessarily preclude user by the local inhabitants being "as of right". As Lord Hoffmann said in the *Oxfordshire* case at [51], there has to be give and take on both sides. Thus, if on the facts, there had been give and take between the local inhabitants and the golfers, the Inspector might have found (and the Council might have accepted) that the golfers' use did not prevent the use by the local inhabitants being "as of right". But as Sullivan J said at [40] of his judgment, on the findings of the Inspector, there was overwhelmingly "give" on the part of the local users and "take" on the part of the golfers. I agree that those findings were reasonably open to the Inspector on his careful review of the evidence.

52. Mr George has drawn our attention to what Lord Hope said in the *Cumbernauld* case at p 1041. In that case, the district planning authority raised an action for declarator of a public right of way. Lord Hope said at p 1041 that the question to be decided was one of fact, but the point at issue was about the proper inferences to be drawn from facts which it was accepted had been proved. He said that the appellate court was in as good a position as the trial judge to decide what inference should be drawn. So too here, Mr George submits that this court is in as good a position as the Council whose decision is under challenge to decide whether, on the facts found by the Inspector, the local inhabitants were using the Application Site as of right.

53. But that case was an appeal. We are concerned with judicial review proceedings. The decision of the Council (based as it was on the recommendation of the Inspector) could only be challenged on the usual public law grounds. These include that the decision is unreasonable in the *Wednesbury* sense. That is the idea that Lindley LJ was expressing in *Hollins v Verney* when he said that no reasonable jury could properly find that the right claimed in that case had been established "by evidence of such limited user".

54. In my judgment, there is no basis for challenging the decision on public law grounds. The decision for the Inspector was on a question of fact and degree. Mr George cannot realistically submit that he failed to have regard to relevant factors or took account of irrelevant factors; nor in my judgment can he realistically submit that the decision was perverse. I would content myself by agreeing with what Sullivan J said at [33] and [39] to [41] of his judgment: see [27] and [28] above.

Conclusion

55. In the result, I would dismiss this appeal.

Lord Justice Rix:

56. I agree with the judgment of Lord Justice Dyson, with its conclusion and reasoning. I add some comments because of the interest and difficulty of the problem which arises in circumstances where public use (strictly speaking, the local or neighbourhood public use) of someone else's land for the purposes of lawful sports and pastimes, albeit lasting over a period of at least twenty years, is in competition with the landowner's dominant use and therefore merely partial and intermittent. In at least some such circumstances it may seem surprising and counter-intuitive to think of such land as a town or village green, or that Parliament intended that the dominant power over the use of such land should be transferred from the landowner to the public by registration. The problem may arise because of limited and intermittent public use of a private sports field, or, as here, of a private golf course, or even of use as limited as an annual Guy Fawkes bonfire. "What is a village green?" asked Lord Hoffmann in *Oxfordshire* (at paras 37/40), and answered that question by saying in effect that it depended on the modern statutory test. Lord Rodger (at para 115) and Lord Walker (at paras 124/8) expressed some misgivings about the consequences, but agreed. Lord Scott and Baroness Hale wished to proceed much more cautiously in answering the examination paper which their Lordships had been set, and Lord Scott dissented in part.

57. The principal statutory test is that "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 twenty years" (section 15(2)(a), (3)(a) and (4)(a) of the Commons Act 2006 (the 2006 Act), re-enacting the materially identical test in section 22 of the Commons Registration Act 1965 (the 1965 Act) as amended.

58. The concept of "as of right" has a long history. It certainly reflects the common law concept of *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner: see *Sunningwell* at 350H and 356A per Lord Hoffmann and *Beresford* at para 3 per Lord Bingham. The question is "how the matter would have appeared to the owner of the land" (*Sunningwell* at 352H/353A; see also per Lindley LJ in *Hollins v. Verney* at 315). In this context, the element of *nec precario* has caused some difficulty but has been explained in *Sunningwell* (the licence of the owner requires more than mere neighbourly toleration: at 358/9); and in *Beresford* (the owner must *do* something, take some overt action: at paras 78/83). Thus it is not possible to infer *precario* simply from the context. Once the owner is on notice of public use "as of right", he must act positively if he wishes to avoid that acquiescence which is at the root of the concept.

59. Where, however, the public use is limited, the question has arisen whether it can be right that registration can or should bring with it all the damaging consequences for the owner and his future use of the land which it would appear to do. That question was canvassed in their

Lordships' speeches in *Oxfordshire*. One solution might in theory have been that the element of *nec precario* could be rebutted by an inference to be derived simply from the context of a limited use in competition with the owner's dominant use. However, as already explained, that solution had already been closed off. Moreover, because, as it might be important to bear in mind in considering *Oxfordshire*, the land in that case was mere scrubland, "a disused and unprotected open area" (see at paras 64 and 66), there was no competing use of it by its owner, Oxford City Council. That was the context of the debate which occurred in that case.

60. Another solution to the problem of competing uses might have been to find in the protection given to such greens by the Victorian legislation (the Inclosure Act 1857 and the Commons Act 1876) a reason for carving out an exception from the 1965 and 2006 Acts in cases where the consequences of registration would have been to impose criminal sanctions on the owner for what would otherwise have been his lawful competing use of the land. However, that solution was rejected in *Oxfordshire* (see at paras 54/57), for it is not to be found in the modern statutory test for registration. In any event the Victorian statutes might not have been intended to prevent the owner from using the land consistently with the rights of the inhabitants (at para 57).

61. A third solution might have been to say that the inhabitants' rights upon registration were merely formally preserved, not created, or that registration would bring in its trail only the possibility of finding, or of creating, rights limited to that use which had given rise to the entitlement of registration in the first place. That would have been Lord Scott's minority solution, but it did not appeal to the majority (see at paras 45/50), on the basis that it would have made the concept of registration pointless.

62. A fourth solution adopted by Lord Hoffmann to resolve the conflict of shared uses was found in the doctrine of reasonable give and take derived from *Fitch v. Fitch* (1797) 2 Esp 543 (see at paras 51 and 57). That would permit the owner to continue to use his land consistently with the rights of the inhabitants, while the latter must not abuse their rights. In *Fitch v. Fitch* it had been established that the inhabitants could by custom use the owner's land for playing sport: but that did not mean that they were entitled to trample the grass (which had been mowed) and mix gravel in the soil, thereby rendering the land valueless. However, that assumes that the parties' several rights are consistent and compatible and that the inhabitants' rights have been established. The prior question that may arise, and has arisen in this case, although it did not in *Oxfordshire* where the land was disused scrubland and the finding of Mr Chapman was that the inhabitants had used it "as a whole" (at paras 64 and 66), is whether the uses of inhabitants and owner are consistent and compatible. That arises in an acute form where the uses are competing.

63. In my judgment Lord Hoffmann was not seeking to answer that question, which did not arise on the facts of that case. His general observations (in relation to the different case of *Laing Homes*) were that –

> "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" (at para 57).

It follows that the facts relating to competing activities may well be relevant to, and thus possibly antithetical to, the establishment of the inhabitants' use to be "as of right", and the example of such a case which Lord Hoffmann canvassed is one where in practice the uses of inhabitants and owner are inconsistent. I agree with Mr Laurence QC that Lord Hoffmann is there dealing with the most basic notion of "as of right" (with which *vi, clam* and *precario* are in conflict), namely that the inhabitants' use must demonstrate to the owner that they assert a right to do what they do.

64. These are matters of fact which are in this case resolved by the findings of Mr Chapman summed up by his conclusion that the inhabitants "overwhelmingly deferred to golfing use". That is not to

create a new concept of deference, but to express findings which undermine the assertion of right: and it was in this way that the judge understood the matter.

65. In my judgment, if it were otherwise, then there would be no way of resolving questions which would subsequently arise, if a right of registration were to be assumed in this case, of whether, for instance, the inhabitants had a right of walking on the golfing greens themselves during play; or of playing golf as though they were members of the club itself. Registration does not confer qualified or limited rights. Registration confers the unqualified right to use the land generally for sports and pastimes. Quite apart from the fact that the question of establishing use "as of right" is prior to any issue which might subsequently arise (after such use had been established) as to how uses might be maintained compatibly with one another, it does not seem to me that the doctrine of *Fitch v. Fitch* is there to resolve competing or incompatible uses. If it were otherwise, then the doctrine of *Fitch v. Fitch* would raise all the issues which *Oxfordshire* decided that registration was there to resolve, and there would have to be constant enquiries as to the nature and limits of the use established as of right in the first place. *Fitch v. Fitch* is there to maintain compatibility, not to resolve a priori incompatibility.

66. In sum, I am in full agreement with Dyson LJ and would dismiss this appeal.

Lord Justice Laws:

67. I also agree.