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Case No: A3/2010/1194

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT
CHANCERY DIVISION
HH JUDGE BEHRENS
CO/4193/2007

Royal Courts of Justice
Strand, London, WC2A 2LL
02/12/2011

B e f o r e :

LADY JUSTICE ARDEN
LORD JUSTICE SULLIVAN
and
LORD JUSTICE TOMLINSON

Between:

LEEDS GROUP PLC	**Appellant**
- and -	
LEEDS CITY COUNCIL	**Respondent**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**First Interested Party**
- and -	
DOUGLAS JONES	**Second Interested Party**

Mr George Laurence QC and Ms Jane Evans-Gordon (instructed by DLA Piper UK LLP) for the Appellant
Ms Clare Parry (Instructed by Leeds City Council) for the Respondent
Mr David Forsdick (instructed by Treasury Solicitor) for the First Interested Party
Mr Robert Williams (instructed by Zermansky and Partners) for the Second Interested Party
Hearing dates: 25 & 26 October 2011

Lord Justice Sullivan:

Introduction

1. The background to the resumed hearing of this appeal is set out in our judgements reported at [2011] 2 WLR 1010, [2010] EWCA Civ 1438. After the conclusion in November 2010 of the hearing of the original grounds of appeal we gave Mr. Laurence permission to raise a new ground of appeal: that sections 98 and 103(2) of the Countryside and Rights of Way Act 2000 ("the 2000 Act") should be construed so as to postpone the operation of the amended definition of town or village green (TVG) to 30 November 2020 in any case (such as the present) where an applicant needs to rely, for the purposes of his application to register land as a TVG, on user which up to 29th January 2001 would have been, as a matter of law, incapable of supporting such an application (Ground 4A, "Retrospectivity").

2. We directed that the appeal on this new ground be heard on a date to be fixed: see paragraphs 61 and 62 of the judgement of Arden LJ. Mr. Laurence subsequently applied for permission to appeal on a second new ground: that an interpretation of section 98 giving it a retrospective effect would breach the Appellant's right to the peaceful enjoyment of its land at Yeadon Banks contrary to Article 1 of The First Protocol ("A1P1") to the European Convention on Human Rights (Ground 4B "Human Rights").

3. There were difficulties in arranging the resumed hearing. Lack of funds had prevented the applicant for registration, Mr Jones, the Chairman of KEYBAG, from playing any part in the hearing in November 2010. The registration authority, Leeds City Council, had responded to the Appellant's original grounds of appeal. However, the City Council was not prepared to respond to the new grounds, for financial reasons. At a hearing on the 10th March 2011 we indicated that the Court would be much assisted if the Secretary of State for Environment, Food and Rural Affairs was prepared to appear at the resumed hearing: see the judgement of Arden LJ [2011] EWCA Civ 313.

4. The Secretary of State applied for permission to be joined as an Interested Party. We granted the application. At the resumed hearing the Secretary of State was represented by Mr. David Forsdick. His submissions were of great assistance to the Court. Shortly before the resumed hearing Mr. Jones, having secured funding, applied to be joined as an Interested Party. We granted his application. Mr. Jones was represented by Mr. Williams, who largely adopted Mr. Forsdick's submissions, but helpfully amplified them in a number of respects. Ms. Parry appeared on behalf of the City Council, but, consistently with the City Council's position (see para. 3 above), did not make any submissions.

The 2000 Act

5. The relevant parts of the statutory scheme are summarised in paragraphs 2-4 of my earlier judgement. The definition of TVG in section 22(1) of the Commons Registration Act 1965 ("the 1965 Act") as originally enacted is set out in paragraph 2. For convenience I set it out below: ([a], [b] and [c] added):

   "town or village green' means [a] land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years"

6. In order to consider grounds 4A and 4B it is necessary to set out the full text of sections 98 and 103 of the 2000 Act:

"98. – (1) Section 22 of the Commons Registration Act 1965 (interpretation) is amended as follows.

(2) In subsection (1), in the definition of 'town or village green' for the words after 'lawful sports and pastimes' there is substituted 'or which fall within subsection (1A) of this section'.

(3) After that subsection there is inserted –

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

(a) continue to do so, or

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

(1B) If regulations made for the purposes of paragraph (b) of subsection (1A) of this section provide for the period mentioned in that paragraph to come to an end unless prescribed steps are taken, the regulations may also require registration authorities to make available in accordance with the regulations, on payment of any prescribed fee, information relating to the taking of any such steps."

"103. – (1) The following provisions of this Act come into force on the day on which this Act is passed –

Section 81(2) and (3),

this section, and

section 104.

(2) The following provisions of this Act come into force at the end of the period of two months beginning with the day on which this Act is passed –

section 1 and Schedule 1,

sections 3 to 11 and Schedule 3,

sections 15 to 17,

section 19,

Chapters II and III of Part I,

sections 40 to 45

section 52

section 58 and 59,

sections 64 to 67 and Schedule 7 (apart from paragraphs 6 and 7 of that Schedule),

Part III (apart from section 81(2) and (3)), and Schedules 8, 9, 10, 11 and 12 and Parts III and IV of the Schedule 16.

Section 98.

(3) The remaining provisions of this Act come into force on such day as the Secretary of State (as respects England) or the National Assembly for Wales (as respects Wales) may by order made by statutory instrument appoint.

(4) Different days may be appointed under subsection (3) for different purposes or different areas.

(5) An order under subsection (3) may contain such transitional provisions or savings (including provisions modifying the effect of any enactment) as appear to the Secretary of State or the National Assembly for Wales (as the case may be) to be necessary or expedient in connection with any provision brought into force by the order."

7. The 2000 Act was passed on the 30th November 2000. Section 98 therefore came into force on 30th January 2001: see sub-section 103(2). The application to register Yeadon Banks as a TVG was made on 16th July 2004 (para. 5 of my earlier judgement), so a twenty year period prior to, and continuing until, the date of the application would run from 16th July 1984 – 16th July 2004.

Ground 4A

8. At the heart of Mr. Laurence's submission was the fact that under section 22(1) of the 1965 Act as enacted, and prior to the coming into force of section 98 of the 2000 Act, an application to register land as a TVG could not be based on user, for however long a period, by the inhabitants of a neighbourhood. The landowner could permit such user, confident in the knowledge that it was incapable of "ripening into a legal right" (to have the land registered as a TVG).

9. In a nutshell, Mr. Laurence submitted that it would have been "grotesquely unfair" for Parliament to have recharacterised previously "harmless" acts of user by the inhabitants of a neighbourhood (harmless to the landowner because, as a matter of law, they were incapable of leading to the registration of his land as a TVG) as "harmful" (because they were deemed, as from 30th January 2001, to be capable of supporting an application to register the land as a TVG). It was no answer to say that the landowner had acquiesced in the user for the previous 20 years. During the period when the user had no legal potential to harm the landowner he had had no reason to seek to prevent it.

10. The potential unfairness of what Mr. Laurence submitted was a "retrospective" construction of section 98 was illustrated by his "Scenario A". A small estate of 20 houses is built in 1980. By January 1981 all of the houses are occupied. By the end of January 1981 a significant number of the householders begin, and thereafter continue, to use an adjoining piece of land for recreation. The smallest administrative area known to the law in which the land is situated (the "locality" for the purpose of a Class C TVG under the 1965 Act as enacted) is an ecclesiastical parish of 20,000 houses. The estate is situated in one corner of the parish. A claim to register the land as a Class C TVG under the original definition will obviously fail. So advised, the landowner, who may live in the estate and know his neighbours, does not object to their use. On 30th January 2001 an application is made to register the land as a TVG, and the landowner discovers that the, legally innocuous, user by his neighbours over the previous 20 years has suddenly hardened into a legal right to have the land registered as a TVG.

11. Mr. Laurence submitted that such a result was so unfair that Parliament cannot have intended to produce it. How was the unfairness to be avoided? The Appellant did not contend that section 98 did not come into force until 2020, nor did the Appellant contend that the original definition in

section 22(1) of the 1965 Act continued in force after 30th January 2011. The Appellant accepted that the new subsection (1A) came into force on the 30th January 2001, but contended that it should be read as follows:

> "(1A) Land falls within this subsection if it is land on which for not less than 20 years *beginning in the case of limb 2 below on or after 30th November 2000* a significant number of the inhabitants of any locality (*limb 1*) or of any neighbourhood within a locality (*limb 2*) have indulged in lawful sports and pastimes as of right and either – [(a) or (b), as set out in paragraph 6 above]."

12. The practical consequence of reading subsection (1A) in this way would be that no application to register land as a TVG based on user by a significant number of the inhabitants of a neighbourhood could be made until a period of 20 years had elapsed after the passing of the 2000 Act. The short answer to ground 4A is that it is inconceivable that Parliament in enacting the 2000 Act intended to bring about such an absurd result. I describe the result as absurd because it is common ground that Parliament's intention in enacting section 98 was to remove the evidential difficulty posed by the need for users to be predominantly from an administrative area known to the law (a locality). It was in order to plug this "loophole" which "allows greens to be destroyed" that the 2000 Act was passed: see paragraph 26 of the opinion of Lord Hoffmann in *Oxfordshire County Council v Oxfordshire City Council* [2006] 2 AC 674 ("The Trap Grounds case"). Any construction of the 2000 Act which preserved the "loophole" for a period of 20 years after enactment would be manifestly contrary to Parliament's intention.

13. In enacting section 98 Parliament was striking a balance between two competing interests: users who wished to apply for the registration of land as a TVG, and landowners whose land might be the subject of such an application. The new subsection (1A) introduced a number of new features into section 22(1) of the 1965 Act. In addition to introducing the "neighbourhood" limb, subsection (1A) also introduced two new requirements: that the recreational use had to be (a) by a "significant number" of the inhabitants of a locality or neighbourhood; and (b) continue until the date of the application for registration: see paragraph 44 of The Trap Grounds case. The Appellant's construction of subsection (1A) brings these two new requirements, which potentially disadvantaged applicants for registration, into effect on 30th January 2001, while postponing for 20 years the operation of the new feature which was intended to assist applicants for registration. Even if there had been some lack of clarity in the words used by Parliament it would be unrealistic to attribute to Parliament an intention to enact such a one-sided provision.

14. I accept Mr. Forsdick's submission that there is no lack of clarity in the words used by Parliament. The combined effect of sections 98 and 103 is plain and unambiguous. Section 98 amends section 22(1) of the 1965 Act by substituting for the words "or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less that 20 years" the new definition in subsection (1A). Since the user must have continued up to the date of the application (see per Lord Hoffmann at para. 44 of the Trap Grounds case), the new definition requires one to ask whether, as at that date, there has been 20 years continuing user. By definition, for applications made in the period 2001-2019 some or much of that 20 years continuous use will have been before commencement. Section 103 distinguishes between those provisions of the 2000 Act which will come into force two months after the passing of the Act (subsection (2)), and those provisions which will be brought into force by an order made under a statutory instrument (subsection (3)). In respect of the latter, but not the former, the order may make transitional provisions. If Parliament had wished to delay the coming into force of the new "neighbourhood" limb, and/or to make any transitional provisions consequent upon its coming into force, section 98 would have been omitted from subsection 103(3), and it would have been left as one of the "remaining provisions" to be dealt with under subsection 103(3).

15. In the Trap Grounds case the House of Lords had to consider whether the amended section 22 applied to situations which were already underway when section 98 came into force. Miss Robinson had applied to register the Trap Grounds as a TVG on 21st June 2002, 18 months after

section 98 came into force. She relied on 20 years user from 1970 – 1990. It was submitted on her behalf that the amendment to section 22 did not apply "retrospectively", so where the 20 year period had been completed before section 22 came into effect an applicant, such as Miss Robinson, did not need to prove that the user by the inhabitants had continued up to the date of the application: see paragraph 118 of the opinion of Lord Rodger. That submission was rejected. In paragraphs 119-123 Lord Rodger said:

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

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

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

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

123. I am accordingly satisfied that section 98 applied generally and that the amended version of section 22 applied to situations which were already underway when section 98 came into force, including situations where an application was made after that date on the basis of the inhabitants' activities before that date. Therefore the amended version of section 22

applied to Miss Robinson's application. It is unnecessary to express any view on the rather different issue of applications which had been made but which had not been determined when section 98 came into force."

16. Mr Laurence submitted that the Trap Grounds case was a "locality" case. The new "neighbourhood" limb was not in issue. The House of Lords was not therefore considering the date from which the 20 year period for the new neighbourhood limb had to run. That is true, but it seems to me that Lord Rodger's reasoning applies with equal force to the issue in the present case. Mr. Laurence's interpretation of the new subsection (1A) would mean that Parliament had chosen to postpone the operation of one key element of the amendment, the ability to apply for registration on the basis of user by a neighbourhood, for a period of twenty years. Other than the contention that it would be "grotesquely unfair" to bring this element of the amendment into operation on 30th January 2001, there is no reason why Parliament would not have intended that the totality of the new policy it was enacting in subsection (1A), including the neighbourhood limb, should apply to all applications made after section 98 came into force.

17. Was there any real unfairness in bringing the whole of the new policy contained in section (1A) into effect on 30th January 2001? The answer to this question depends in large part upon the extent to which, if at all, section 98 can properly be described as "retrospective." If subsection (1A) had not contained the new requirement that user by the inhabitants must have continued up to the date of the application so that user by the inhabitants of a neighbourhood for any 20 year period prior to 30th November 2000 would have sufficed for the purposes of an application to register the land as a TVG made on or after 30th January 2001, then section 98 would have been retrospective, and there would have been unfairness to landowners, because the amendment would have conferred a new legal right to apply for registration (and a corresponding disability upon the landowner) by altering the legal character of past events.

18. However, the combined effect of (a) the new requirement that user must have continued up to the date of the application, and (b) the fact that no application to register a TVG based on the new neighbourhood limb could be made until 30th January 2001 meant that, when enacted on 30th November 2000, subsection (1A) was prospective: there had to be both continuing user and an application for registration post enactment. An applicant who complied with these prospective conditions had to show 20 years user, but

"It is well established that the presumption against retrospective legislation does not necessarily apply to an enactment merely because 'a part of the requisites for its action is drawn from time antecedent to its passing'……. " See *Secretary of State for Social Security v Tunnicliffe* [1991] 2 A11 ER 712, per Staughton LJ at p. 723h.

19. At page 724 of *Tunnicliffe*, in a passage cited with approval by Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita – Shinnihon Steamship Co. Ltd.* [1994] 1AC 486 at p. 525, Staughton LJ said:

"In my judgement the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

How great is the unfairness in the Appellant's Scenario A above?

20. First, it must be noted that the hypothetical example is the most extreme case, where the whole of the 20 year period has expired on 30th January 2001 and an application is made on that day. If the 20 year period has not expired and/or an application is made after 30th January 2001 the landowner will have had more time to respond to the introduction of the neighbourhood limb.

Even in the most extreme case the landowner will not merely have acquiesced in the actual user that a significant number of the inhabitants of the neighbourhood have been making of his land for the past 20 years, he will have done so because he has been advised, or ascertained as a result of his own legal researches, that since this user is not a use by the inhabitants of a locality it is incapable of, in Mr. Laurence's words, "ripening into a legal right" (to have the land registered as a TVG).

21. As Mr. Forsdick pointed out, such a well advised, or well informed, landowner had a period of two months between enactment on 30th November 2000 and commencement on 30th January 2001 in which, by taking very simple steps such as locking gates, fencing gaps in boundaries, erecting appropriately worded notices, or even turning intending users away, he could ensure that the user by the inhabitants of the neighbourhood did not continue up to the date of the application, and thus did not ripen into a legal right on 30th January 2001. Mr. Laurence submitted that the two months period could be regarded as *de minimis.* I do not agree. Given the relative ease with which the landowner in Scenario A could ensure that continuity of user was broken, two months was a sufficient period in which to take the necessary steps.

22. In any event, I do not accept that the underlying premise on which Scenario A is based – the hypothetical landowner who was content to allow a significant number of the inhabitants of a neighbourhood to use his land for very many years because he was confident that their user was not a use by the inhabitants of a locality, and so could not ripen into a legal right – is realistic. Since the decision of the House of Lords in *R v Oxfordshire County Council ex p. Sunningwell Parish Council* [2000] 1 AC 335, all landowners have effectively been put on notice that those using their land for recreational purposes may well be asserting a public right to do so if their user of the land for that purpose is more than trivial or sporadic: see paragraph 31 of my earlier judgement.

23. Unless he is in the fortunate position of the landowner in Scenario A, who happens to live in the estate and so is able to be confident that it is only his neighbours who are using his land, a landowner will not know, without carrying out a detailed investigation, whether those persons using his land for recreation are coming from a particular locality, or merely from a neighbourhood or neighbourhoods. The fact that their recreational user of his land is more than trivial or sporadic will have been sufficient to put him on notice that a right may well be being asserted. The hypothetical landowner in Scenario A is doubly fortunate in his knowledge of both the law and the facts. Despite the fact that a significant number of people are using his land for the purpose of recreation (a) he knows that for the use to ripen into a legal right it must be a use by the inhabitants of a locality; and (b) because he knows his neighbours he can be confident that the use being made of his land is merely a use by those in the neighbourhood, and not a use by the inhabitants of a locality.

24. It must be emphasised that Scenario A is purely hypothetical. There is no evidence that any landowner was in fact placed in the position of the landowner in Scenario A. The facts in Scenario A are far removed from those in the present case. The application for registration of the Appellant's land was not made until 16th July 2004, so the Appellant had a period of just over 3½ years from 30th November 2000 in which it could have taken action to prevent the user continuing. There is no suggestion that the Appellant was lulled into a false sense of security because it believed that the "ample and open recreational use" that was being made of its land by a "significant number of local inhabitants" could not ripen into a legal right because the use was not by the inhabitants of a locality: see paragraph 32 of my earlier judgement. There was no unfairness to the Appellant.

25. Mr. Laurence submitted that whether the 2002 Act was retrospective, and whether a retrospective interpretation resulted in unfairness, should be considered as questions of principle, rather than by reference to the facts of the Appellant's case. I agree. Legislation necessarily addresses a wider problem, in the case of the 2000 Act the perceived deficiencies in the definition of TVG in Section 22(1) of the 1965 Act, rather than the particular circumstances of an individual case.

However, I do not accept that it is appropriate to answer the question whether an enactment is retrospective and/or whether it produces a result that is "grotesquely unfair" by reference to its potential operation in a purely hypothetical situation, however extreme and improbable that situation might be.

26. Mr Laurence submitted that section 98 should be treated as retrospective because regulations could have been made so as to provide for a period of grace in paragraph (b) of subsection (1A) such that user need not have continued after 30th November 2000: see paragraph 6 above. If such regulations had been made the 20 year period of use by the inhabitants of a neighbourhood could have expired before the landowner was aware that it was capable of ripening into a legal right. Again this question is purely hypothetical. No regulations were made for the purpose of paragraph (b) of subsection (1A). It is possible that such regulations were not made precisely because it was recognised that they might have retrospective effect. If regulations had been made then questions of retrospectivity might have arisen in respect of those regulations, but since they were not the question does not arise, and the possibility that retrospective regulations might have been made does not require additional wording to be read into the new subsection (1A).

27. We were referred to a large number of authorities. I have not mentioned them because I am satisfied that they obscure, rather than illuminate, a straightforward question of statutory interpretation. In summary:

    (a) Sections 98 and 103(2) are clear and unambiguous. Adapting the words of Lord Rodger in the Trap Grounds case, the new policy in subsection (1A) applies in its entirety to all applications made on or after 30th January 2001.

    (b) Even if sections 98 and 103(2) were ambiguous, the proposition that Parliament intended to defer the operation of one element of the new policy, the new neighbourhood limb, for a period of 20 years after enactment, is absurd.

    (c) If the impact of the new policy as a whole (including the requirement for continued use and the inability to make an application based upon the new neighbourhood limb until 30th January 2001) is considered it was prospective, not retrospective, in its effect when enacted on 30th November 2000.

    (d) If and insofar as there was an element of retrospectivity, there was no real likelihood of unfairness to landowners; any possibility of unfairness is purely hypothetical, and there was no unfairness on the facts of the present case.

28. For these reasons I would dismiss the appeal on ground 4A.

Ground 4B

29. Ground 4B adds nothing of substance to ground 4A. It was submitted on behalf of the Appellant that, by reason of retrospectivity and unfairness to landowners the amendment to section 22(1) of the 1965 Act was "manifestly without reasonable foundation" and that a fair balance was not struck between the demands of the general interest and the requirements of protecting the landowner's rights: see paragraphs 74 and 75 of the Grand Chamber's judgement in *JA Pye (Oxford) Ltd. and JA Pye (Oxford) Land Ltd. v United Kingdom* Application No. 44302/02, [2007] RVR 302 at p. 309.

30. For the reasons set out above, and for the reasons given in the judgement of Arden LJ section 98 struck a fair balance between the general interest in stopping up the "loophole" which "allow[ed] village greens to be destroyed" and the need to give those landowners who wished to do so sufficient time to protect their position before the "loophole" was stopped up on 30th January 2001.

Conclusion

31. I would dismiss the appeal on ground 4A. While I would grant permission to appeal on ground 4B, I would dismiss the appeal on that ground also.

Lord Justice Tomlinson:

32. In the light of the view which I reached on the main issue in this appeal, the issues argued on the resumed hearing do not arise. However I would, had they arisen, dispose of them in the same manner as proposed by Sullivan LJ with whose judgement and that of Arden LJ on these points I entirely agree.

Lady Justice Arden:

33. I agree with the clear and compelling judgement of Sullivan LJ, and with the order he proposes. This judgement amplifies my reasons for dismissing the appeal on Ground 4B (Human Rights).

34. Ground 4B is not determined by this Court's conclusion on Ground 4A. The fact that legislation is not retrospective according to domestic standards does not mean that it is not capable of violating A1P1. Likewise, as Mr Williams points out, the fact that legislation is retrospective (if that be the case) does not necessarily mean that it violates A1P1: see *MA v Finland* (Application No 27793/95).

35. The sole question to be answered under A1P1 in this case is: has a fair balance been struck by the relevant measure between the rights of the individual owner of land and the state?

36. At the hearing of the main appeal, I referred to the decision of the Court of Justice of the European Union in Case C-62/00 *Marks & Spencer v IRC*. In that decision, the Court of Justice held that, where national legislation is passed reducing the period within which a person may bring proceedings to recover sums collected in breach of European Union law, that legislation must contain transitional arrangements allowing for an adequate period after the enactment of the new legislation for lodging claims for repayment permitted under the earlier law.

37. I considered then, as I do now, that that line of authority lends general support to the submissions of Mr Laurence QC. As emerged from his submissions on the case of *Fairey v Southampton Borough Council* [1956] 2QB 439 (see below), another way of putting his challenge on this ground is to say that Parliament failed to create appropriate transitional arrangements and that, by parity of reasoning with the *Marks & Spencer* case, a fair balance is not struck by legislation adversely affecting the rights of a landowner, when the landowner is not given a last opportunity to take steps previously open to him to prevent that diminution in his rights.

38. There is a cross-fertilisation of ideas about human rights between the Court of Justice and Strasbourg: the Court of Justice seeks to apply fundamental rights and, in doing so, it has regard to the principles established by the Strasbourg court; and in turn the Strasbourg court does not hold there has been a violation of Convention rights where an act has been done under European Union law and European Union law has provided safeguards which are equivalent to those guaranteed by the Convention.

39. Accordingly, I would not necessarily accept in the present context the submission on behalf of the Secretary of State that Parliament could have introduced neighbourhood-based claims without allowing any transitional period at all.

40. To recap, the exercise to be performed for the purposes of this ground of appeal is to consider whether or not a fair balance has been struck by sections 98 and 103 of the Countryside and Rights of Way Act 2000 ("CROW"). The burden of showing that these sections violate A1P1 is on the appellant. It has in effect to show that, although it was open to Parliament to introduce

neighbourhood-based claims, it has done so in a way that is unfair as between the state and a landowner.

41. I start with the factors in favour of the landowner. The period of two months is very short. It is in striking contrast to the equivalent period of seventeen months, which Parliament allowed before the Rights of Way Act 1932 was brought into force so that a landowner could make it clear that he did not intend to dedicate a right of way to the public, provided, that is, that the twenty-years' user had not already taken place: see *Fairey v Southampton Borough Council*, above. Furthermore, CROW does not, as did the Rights of Way Act 1932, provide a system of notices whereby the landowner could demonstrate his intention not to dedicate a right of way to the public.

42. If a person owns land simply as an investment and makes no other use of it, he may inspect it irregularly, and certainly not within a period of two months. It can thus be said that the two-month period is unfair to owners of land and is also potentially arbitrary.

43. Furthermore, as Sullivan LJ explains, some landowners will have longer than two months to take action. It all depends when the twenty-year period is completed and when the application for registration is made. That, it can be said, makes the clause potentially unfairly discriminatory as between different landowners. There is no reason why one landowner should only have a two-month period while another landowner has a much longer period.

44. On the other hand, there are other factors going in the other direction. The change in the law came in by way of amendment to an existing regime permitting locality-based claims. Landowners, therefore, must be taken to already have been on notice that recreational user of a site could give rise to an application for registration as a TVG.

45. Landowners would be put on notice by members of the public using the land and that would be the same whether the risk of registration was of a locality-based claim or neighbourhood-based claim. It would be practically impossible for them to distinguish between users who were inhabitants of a relevant locality as opposed to a neighbourhood.

46. In addition, locality-based claims were regarded by Parliament as unsatisfactory since user by inhabitants of the locality (and not others) had to be shown. The legislation as it stood prior to amendment was perceived to create a loophole for developers. It is evident that Parliament must have taken notice of the concerns expressed about developers taking advantage of that loophole. It was also said in Parliament to be in the public interest to have smaller areas of open space, which neighbourhood-based claims were expected to produce.

47. There is no suggestion that landowners could not find out about the change in the law in the time available. The transitional period is set out on the face of primary legislation. No doubt organisations representing those who hold or invest in land made many of those concerned well aware of the point either when the CROW received Royal Assent or while the Bill that became the CROW was making its passage through Parliament. Furthermore, the speed of communication has increased beyond recognition since the Rights of Way Act 1932. It was not impossible for a landowner exercising reasonable diligence to inspect his property within the two month period to see if it was subject to qualifying recreational user.

48. We have not been pointed to any evidence going in the other direction on the risks said to be posed by developers. Nor have we been informed that the fears for loss of open space were not realised or that in any sense the legislation was "overkill".

49. This Court has a duty to consider whether a fair balance has been struck when it is said that legislation violates A1P1, notwithstanding that the conditions for a neighbourhood-based claim and the commencement period were laid down by primary legislation. However, in my judgement, in the absence of evidence that the fears expressed in Parliament were ill-founded,

this Court must give full weight to the views on the basis of which Parliament enacted sections 98 and 103. Without such evidence, the Court is not in a position to assess those views otherwise.

50. There was no need for Parliament to provide for any special procedure in this case because what the landowner had to do to stop user was relatively simple. The landowner had to bar entry by members of the public or to put up sufficient notices to make it clear that user was without permission.

51. Although the period of two months was short, the period was never, as the appellant suggests, as short as one day. Even if a period of twenty years' user had elapsed prior to section 98 coming into effect, there still had to be at least another two months' user for the reasons that Sullivan LJ has explained.

52. Having considered the various factors on each side of the scale, I am satisfied that, in the particular circumstances of this case, which were regarded by Parliament as urgently requiring a legislative solution, the period of two months was sufficient to enable a fair balance to be struck.

53. This disposes of the appellant's case on this ground, which challenged the Convention compatibility of an interpretation of sections 98 and 103 which enabled user to include user which had taken place before sections 98 and 103 came into force, and not any other feature of those sections.

54. As already stated, I agree with the judgement of Sullivan LJ and would make the order he proposes.