

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

Manchester Civil Justice Centre
1 Bridge Street West, Manchester M60 9DJ

21/03/2016

B e f o r e :

MR JUSTICE STEWART

Between:

Somerford Parish Council

Claimant

- and -

Cheshire East Borough Council

Defendant

- and -

Richborough Estates Limited

Interested Party

**Vivian Chapman QC (instructed by Wedlake Bell LLP) for the Claimant
Philip Petchey (instructed by Cheshire East Borough Council) for the Defendant
Morag Ellis QC (instructed by Gateley LLP) for the Interested Party
Hearing dates: 24 February 2016**

Mr Justice Stewart:

Introduction

1. On 16 March 2015 the Defendant rejected an application dated 2 May 2013 made by Mr Nicholas Bell to register land at Somerford as a new town or village green ("TVG") under s. 15(2) of the Commons Act 2006 ("the 2006 Act"). The Claimant challenges this decision. There is no issue between the parties as to standing, even though Mr Bell made the application and the Claimant is Somerford Parish Council.
2. The Interested Party is a developer. If the TVG application succeeded then their development plans for adjoining land would be impeded if not thwarted.
3. The Defendant instructed a Mr James Marwick of counsel, independent legal expert, and made its decision in reliance on his opinion dated 12 February 2015.
4. There are four procedural challenges to the Defendant's decision. These are:

- (i) Did the Defendant act in breach of the rule of natural justice that no one should be judge in their own cause?
 - (ii) If the Defendant was entitled to act on the advice of an independent legal expert, was Mr Marwick such an expert?
 - (iii) Was Mr Marwick's advice vitiated by procedural error by allowing the Defendant to put in evidence opposing the TVG application out of time and not giving Mr Bell the opportunity to comment on the late evidence before giving his opinion?
 - (iv) Was the decision of the Defendant procedurally erroneous in that Mr Marwick did not hold a public inquiry to find facts?
5. Permission to bring judicial review was granted by HH Judge Pelling QC (sitting as a Deputy Judge of the High Court) by order dated 21 August 2015. This permission was on the basis of the four above grounds.
 6. A central issue is whether the TVG application land is part of the highway. If it is, as found by Mr Marwick, then in the circumstances of this case he was entitled to find that it cannot be registerable as a TVG.¹ This is because the use could properly then be found as a use by right, not a use as of right. The one ground upon which Judge Pelling QC refused permission was that the Claimant in due course would ask the Supreme Court to reconsider the decision in *DPP v Jones*.

Factual Summary

7. In January and February 2013 the Defendant consulted upon a Development Strategy and Emerging Policy Principles document which it had produced. This proposed the development of an area of land called Site Congleton 1. To put this in context, Somerford is a parish north of Congleton. There is a triangle of land formed by the A54 main road and two minor roads leading off it. The minor roads are Chelford Road to the west and Black Firs Lane to the east. These both go broadly in a northerly direction but Black Firs Lane joins up with Chelford Road forming the triangle. There is development to the south of Somerford and the south of the triangle. However within the triangle and north of the triangle is undeveloped farm land. There are wide verges on the east side of Chelford Road and on the west side of Black Firs Lane. Site Congleton 1 includes the north end of the triangle and the north end of Black Firs Lane. It does not include the verge on the east side of Chelford Road. These two verges are the application site. They comprise undeveloped land between the tarmaced surface of the highway and adjoining land.
8. On 2 May 2013 Mr Bell (a resident on Chelford Road) applied under section 15(2) of the 2006 Act to register parts of the two verges as a new TVG. His application was supported by 31 evidence forms completed by local residents. They all described their use as going beyond that which they understood they would lawfully be entitled to do on a public highway, namely restricted to a right to pass and re-pass. In his application Mr Bell said this:

“Somerford Green has always been open to the road but hedged from the field during this time (i.e. from at least 1952). There is ample evidence that from at least 1952 until the present day, the green has been continuously and extensively used by the residents of the local neighbourhood as of right for lawful sports and pastimes.”
9. On 26 June 2013 the Interested Party applied for outline planning permission for residential development of most of the remaining open land within the triangle. Five access points were identified, three from Black Firs Lane and two from Chelford Road. All cross land subject to the TVG application. Two of the access points from Black Firs Lane are within Site Congleton

1; the other access point may or may not be. The two access points from Chelford Road are not within Site Congleton 1.

10. On 5 December 2013 the Interested Party objected to the TVG application. On 23 January 2014 (and subsequently on 30 June 2014) the Defendant objected to the application on the basis that the application site was adopted highway.
11. On 31 March 2014 the Interested Party obtained an Advice from Ms Ruth Stockley of Counsel in which she opined that the land was highway maintainable at public expense and therefore not registrable as a TVG, because the use of it by local people would have been by virtue of their highway rights and not “as of right”.
12. On or about 19 August 2014 the Interested Party obtained outline planning permission to develop part of the application site. There was a section 106 Town and Country Planning Act 1990 Agreement.
13. On 5 September 2014 Mr Bell responded to the objections. He did not accept that any part of the application site formed part of the highway.
14. On 15 September 2014 a meeting of the Defendant’s Public Rights of Way Committee was held. Mr Bell’s father attended and spoke in support of the application. That meeting resolved:
 - “1. The Head of Legal Services offer the applicant and the objectors 28 days to make representations on the potential trigger event which may affect part of the land subject to the village green application.
 2. Following expiration of the 28 day period the Head of Legal Services be authorised to appoint an Independent Expert to consider the application on the basis of written representations and provide a report.
 3. The Head of Legal Services be given delegated authority to determine if a non-statutory public enquiry should take place upon the recommendation of the Independent Expert, after consulting the Chairman of the Public Rights of Way Committee.”

(The identified “trigger event” was the Development etc document consulted upon in January/February 2013)

Mr Bell, the Defendant and the Interested Party all submitted comments in October 2014 and there were representations, also dated October 2014, from Dr Julie Brown of SPRAG (Somerford Parish Residents Action Group).

15. Mr Marwick was instructed by the Defendant. He produced a Preliminary Review Note. Because he considered that on a preliminary view of the papers the factual issues raised were relatively narrow, and that there were several potentially determinative legal challenges to the application, he took the view that it was reasonable, proportionate and fair for the Defendant to obtain in the first instance written advice and recommendations as regards the merits of the application, without first proceeding with a non statutory inquiry. He ordered any further evidence to be filed and exchanged by 13 January 2015 and written representations to be filed and exchanged by 27 January 2015. He added:

“...the parties should be warned that the failure to produce any further evidence and representations in accordance with the above timetable may lead to the same not being taken into account.”

16. Mr Bell filed a further witness statement and written representations by the due dates. He again submitted that he did not accept that the application land or any part of it was part of the public highway and addressed the question of the occurrence of the trigger event in the light of the Interested Party's representations dated 13 October 2014.
17. On 27 January 2015, Amanda Timpany on behalf of the Defendant's Highway Authority wrote to Elaine Field of the Defendant (representing the registration authority), objecting to the application. She enclosed a bundle of papers comprising 11 documents or groups of documents relating to the highway status of the land, three documents relating to a possible trigger event and reports of four legal cases. Ms Field sent this material to Mr Marwick and copied it to Mr Bell, who received it on 29 January 2015.
18. On 29 January 2015 there was a short exchange of emails between Mr Bell and Ms Field which culminated in Ms Field saying that no extension of time was applied for or granted and "It will be for the Inspector to decide whether or not to take any late evidence into account."
19. On 30 January 2015 Mr Marwick emailed Ms Field stating "I note the issue with the late service of some documentation and will deal with this in my Advice or by a separate note if appropriate. I will advise if any procedural point arises which causes any delay in providing my formal Advice but this is unlikely."
20. On 12 February 2015, Mr Marwick produced his Opinion. He referred to the Defendant's late service of documentation in paragraphs 10 and 11. He recommended that the TVG application should be rejected.
21. The Defendant convened a meeting of its Rights of Way Committee for 16 March 2015. On that day Mr Bell sent an email to the members of the Committee. He objected to the contents of Mr Marwick's Opinion recommending that the Defendant could proceed to determine the application itself and without holding a public inquiry. This was a detailed email in which he took a number of points which are the subject of the present procedural challenge.²
22. At the 16 March 2015 meeting the Committee had a report from Mr Jones recommending that the application be rejected for the reasons given by Mr Marwick. A motion to defer the consideration of the application to allow Mr Bell to attend was lost. Mr Bell's communication of 16 March 2015 was considered. The Committee resolved by a majority to reject Mr Bell's application to register the land as a TVG.
23. The Claimant sent a Pre Action Protocol letter on 22 May 2015 to which the Defendant registration authority replied on 10 June 2015. The present proceedings were commenced on 15 June 2015.

The Application for Disclosure

24. On 30 March 2015 Mr Bell asked the Defendant for disclosure of its instructions to and correspondence with Mr Marwick relating to the TVG application. On 1 May 2015 the Defendant refused on the basis that the documents would be the subject of legal advice privilege. Judge Pelling QC rejected the application for disclosure.

Outline of Law and Procedure: New TVGs

25. The Commons Registration Act 1965 (CRA 1965) provided for the registration of commons and greens and introduced the concept of a new type of TVG. This required at least 20 years use of land as of right for lawful sports/pastimes by local people. It enabled anyone to apply to the Commons Registration Authority (CRA) to register land as a new TVG. The 2006 Act is

not fully in force, but section 15 is in force everywhere in England and Wales. As amended by the Growth and Infrastructure Act 2013 (the 2013 Act) the relevant sections are:

“15(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) ... applies.

(2) This subsection applies where—

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

(b) they continue to do so at the time of the application.”

26. Of importance also is section 15C of the 2006 Act (as amended by the 2013 Act) which provides:

“15C Registration of Greens: Exclusions

(1) The Rights under section 15(1) to apply to register land... as a town or village green ceases to apply if an event specified in the first column of the Table set out in [the relevant Schedule] has occurred in relation to the land (“a trigger event”).”

Under paragraph 3 to Schedule 1(A) the draft of the development plan document consulted upon in January/February 2013 was a trigger event. This is now common ground following Mr Marwick’s opinion. Therefore the legality of the Defendant’s decision of 16 March 2015 is in issue only in relation to that part of the land not covered by Site Congleton 1. This case and this judgement therefore deals with the validity of the TVG application and the Defendant’s decision in relation to it solely insofar as concerns the land in the application which falls outwith Site Congleton 1.

27. The procedure for applications material to this case is dealt with by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (the 2007 Regulations). These Regulations are for present purposes identical to the 1969 Regulations which they replaced. Once an application has been made and it has not been rejected on preliminary consideration there is provision for publicity and the lodging of objection statements. Thereafter Regulation 6 states:

“6. Consideration of objections

(1) Where an application is made under section 15(1) of the 2006 Act to register land as a town or village green, as soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority must proceed to the further consideration of the application, and the consideration of statements (if any) in objection to that application, in accordance with the following provisions of this regulation.

(2) The registration authority—

(a) must consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application under paragraph (1); and

- (b) may consider any such statement which it receives on or after that date and before the authority finally disposes of the application.
 - (3) The registration authority must send the applicant a copy of every statement which it is required under paragraph (2) to consider, and of every statement which it is permitted to consider and intends to consider.
 - (4) The registration authority must not reject the application without giving the applicant a reasonable opportunity of dealing with—
 - (a) the matters contained in any statement of which copies are sent to him under paragraph (3); and
 - (b) any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application.”
28. It will be seen that according to the 2007 Regulations the regulation authority is expected to determine the application on paper. Nevertheless in certain circumstances this is not appropriate. In *R (Whitney) v Commons Commissioners*³ Arden LJ said:
- “29 ...In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If, however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act, to hold an inquiry. We are told that it is the practice for local authorities so to do either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application...it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority’s request held a non-statutory public inquiry....”
- At paragraph Waller LJ said:
- “66 ...in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration.”⁴
29. Finally, in relation to procedure, there are pilot authorities where the 2007 Regulations have been replaced by the Commons Registration (England) Regulations 2014 (the 2014 Regulations). Under the 2014 Regulations a registration authority must refer a determination to the Planning Inspectorate in a case where the registration authority has an interest in the outcome of the application or proposal such that there is unlikely to be confidence in the authority’s ability impartially to determine it.⁵

Ground 1 – Did the Defendant act as Judge in its own cause and thereby in breach of natural justice?

30. The Claimant submits:
- (i) The Defendant had a strong interest in rejecting the TVG application, being a formal objector to the application and having submitted evidence and representations; further, the Defendant’s case that the land was part of the public highway meant that, if correct, the Defendant owned the land as local highway authority; finally under the section 106 Agreement the Defendant would be in line to receive some £1 million from the Interested Party.

- (ii) The decision on the application involved no discretion. Either the requirements of section 15 of the 2006 Act were made out by the applicant and the Defendant had to register the application land as a new TVG; if not the application had to be rejected. It is said that this is a *quasi* judicial process and even if the Defendant takes legal advice or appoints a lawyer to hold a public enquiry the decision is nevertheless the Defendant's. There is no appeal, only the limited remedy of judicial review.
- (iii) The principle that no one should act as judge in his own cause is a fundamental principle of natural justice.⁶
- (iv) The Defendant, under the 2007 Regulations, could not have referred the application to the Planning Inspectorate but could have utilised section 101(1)(b) of the Local Government Act 1972 (the 1972 Act) which provides:

“...a local authority may arrange for the discharge of any of their functions...by any other local authority.”
- (v) This particular problem was recognised and dealt with by the provisions in the 2014 Regulations which are referred to previously. Though not expressly dealt with by the 2007 Regulations, it cannot be the case that a registration authority can thereby act in breach of natural justice. In support of this the Claimant says that it would be extraordinary if a pilot authority could not act as judge in its own cause whereas authorities not subject to the new regulations could do so. This would lead to natural justice applying to a TVG decision applying in some parts of the country but not in others.

31. I reject the Claimant's submissions on Ground 1 for the following reasons:

- (i) In the *Whitney* case⁷ Arden LJ said:

“32. ... where the registration authority has a conflict of interest because it also owns the land in question...it may well be that the right course is to allow any dispute to be determined by the courts. Alternatively, it can appoint an independent legal expert to conduct a non-statutory inquiry into the factual position and make findings.”
- (ii) There is agreement that this is an *obiter dictum* in that the registration authority in *Whitney* was not also the landowner, the point was apparently not argued and there is no evidence that the alternative suggested by the Claimant, namely the use of section 101(1)(b) of the 1972 Act, was considered by the Court.
- (iii) Counsel referred me to their own anecdotal evidence as to what has happened in such situations, but I do not consider that it is appropriate for me to take this into account. This is a question of law.
- (iv) It seems to me that, as a matter of principle, appointing an independent legal expert to conduct a non statutory enquiry and make findings is an appropriate mechanism. If the registration authority then rejected those findings that may well give rise to apparent bias. However, subject to the Claimant's arguments on other grounds, that is not the case here. The Defendant accepted Mr Marwick's recommendations.
- (v) The fact that the 2014 Regulations make provision for a different mechanism for pilot authorities does not necessitate that the mechanism adopted in this case was a breach of natural justice. In coming to this conclusion I take account of the following further factors:

- (a) the statement by Sullivan J⁸ that:

“registration authorities have a discretion as to the procedure to be adopted (assuming that the limited requirements in the regulations have been complied with), but that discretion is not unfettered. It must be exercised in a manner which is fair to applicants and objectors. What fairness requires by way of procedure will depend upon the circumstances of the particular application.”

- (b) The Defendant’s interest (as with many registration authorities/highway authorities) was (arguably) that of highway authority who own the “top spit” of the publicly maintainable highway and have the duty pursuant to s.130(1) Highways Act 1980 to assert and protect the rights of the public to the use and enjoyment for any highway. As to the benefits of the section 106 agreement these were by law⁹ such as were necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development. The section 106 Agreement provides for contributions to mitigate development impacts.¹⁰ I do not regard these factors in the circumstances taken as a whole, to be such as to change my decision.

Ground 2: Was Mr Marwick an independent legal expert?

32. The Claimant essentially makes two points challenging whether Mr Marwick could be objectively perceived as independent.
33. The first point is that Mr Marwick was instructed and paid by the Defendant. It is submitted that looking at this situation from the layman’s point of view, this appears to be the Defendant paying a lawyer to give favourable advice.¹¹
34. So as to set out the factual context of Mr Marwick’s position, it is right to note that his advice was first sought on whether a trigger event had occurred under the 2013 Act. Further he was asked about the procedure for determining the application and advised that although the Defendant could determine the application, it would be best practice to appoint somebody independent to assess the evidence. He advised that the Rights of Way Committee decide the procedure. That Committee’s decision was to appoint an independent expert. Further, Mr Marwick provided village green training to members of the Rights of Way Committee on 15 September 2014. His further instructions from the Defendant were two occasions between the date of his advice (12 February 2015) and the Committee meeting on 16 March 2015 and on two occasions subsequent to the 16 March 2015 meeting.
35. The Claimant’s case is expressly not that Mr Marwick was guilty of actual bias. Therefore his actual independence is not challenged. In my judgement the allegation of apparent bias, based on the suggestion that the situation looks like the Defendant paying a lawyer to give favourable advice, is one that is misplaced in all circumstances of this case. He is a barrister in independent practice and, adopting the objective test of a reasonable member of the public who is “neither complacent nor unduly sensitive or suspicious,”¹² there is no proper basis for a finding of apparent bias based on this point.¹³
36. Secondly, apparent bias was alleged because the Defendant refused to disclose its instructions to and correspondence with Mr Marwick. It was said that they could have made it crystal clear that Mr Marwick was to consider the application impartially, but if so the Defendant would surely have produced the documents. In addition the Claimant said:
- The Defendant was under a duty to disclose these documents since they were engaged in a *quasi judicial* process and seeking advice was part of that process as part of the exercise of a public duty.

- The public are entitled to know whether the Defendant mentioned irrelevant matters (e.g. the planning merits of the Interested Party's application). Other possible suggestions are that the Defendant emphasised to Mr Marwick that they wished a speedy decision on the matter rather than have the costs/delay of a public inquiry; finally was Mr Marwick made aware by the Defendant that Mr Bell did not receive its late evidence until 29 January 2015?
37. I return briefly to the history of these proceedings. Judge Pelling QC gave permission on ground 2 on the basis that it was arguable that there was an appearance of bias, because instructions were delivered to Mr Marwick concerning matters other than the application subject to the proceedings and to deliver a training programme to staff. That in itself I have found did not give rise to apparent bias. Judge Pelling continued, saying that "this situation was enhanced by the failure to disclose to all parties all communications between the Defendant and the assessor concerning the subject matter of these proceedings." He refused the application for disclosure on the basis of irrelevance saying this:

"I accept that any such material ought to have been disclosed to all parties involved in the non statutory enquiry... If there is such material that was not disclosed the fact of such non disclosure is material to grounds 1 and 2. However the content of any such communications is not material because actual bias is not alleged against the assessor (or for that matter the Defendant). The independence of the assessor is challenged only on the basis that there was a subsisting professional relationship between him and the Defendant. It is the fact of non disclosure of communications (if any) from the Defendant that is material, not the substance of those communications. The Defendant has not denied the existence of such communications."

After some encouragement from the Bench, the Defendant decided it would disclose communications between it and Mr Marwick. Instructions were received during the short adjournment from the Defendant to agree to this. It was a difficult task at short notice. By the end of the afternoon a number of communications had been obtained remotely by keyword search. However these appear not to have captured some of Mr Marwick's responses. The Claimant submitted that certain references¹⁴ were suggestive of the Defendant possibly pressurising Mr Marwick not to hold a public inquiry. I have read those messages and I do not agree.¹⁵

Ground 3: Was Mr Marwick's advice vitiated by procedural error in allowing the Defendant's evidence out of time and without giving Mr Bell the opportunity to comment on the late evidence?

38. In his opinion Mr Marwick dealt with this as follows:

"10. As a final procedural matter I note that the applicant has objected to the late service of evidence by the Council in its capacity as objector. From what I understand the Council disclosed its evidence and further representations together in a bundle on 27 January 2015. Thus, any evidence therein was technically disclosed two weeks after the 13 January 2015 deadline. The evidential part of the Council's bundle primarily relates to dedication of the land as public highway and includes a number of conveyancing documents from the 1930s. As I understand it, at least some of the documentation has been disclosed previously and indeed is commented on in the applicant's representation.

11. In my view, no prejudice is caused to the other parties by the late disclosure. The disclosure is relatively incontrovertible documentary evidence and having considered it in detail, it does not significantly alter the Council's position or my view of the issues in this matter. I therefore had due regard to it but emphasise that it has not proven determinative on any point."

39. As to what if any difference a submission made by Mr Bell might have made, this is a matter of controversy between the parties. I propose to deal firstly with whether there was a procedural error by Mr Marwick.
40. There are preliminary matters which are of some importance but which are not central to my decision on this ground. These are:
- (i) In fact the evidence and further representations were not sent to Mr Bell until 29 January 2015, not 27 January 2015.
 - (ii) Mr Marwick said that some of the documentation was commented on in Mr Bell's representations which was not the case.
41. I now deal with the position up to and including the date when Mr Marwick provided his report. I have previously set out the directions issued in the preliminary review note dated 15 December 2014. These clearly envisaged any further evidence to be filed and exchanged by 13 January 2015, with written representations to be filed and exchanged by 27 January 2015. Therefore the intention was that each party would have two weeks following the filing and exchanging of further evidence in order to draft their written representations based on all the evidence to be seen by Mr Marwick. Mr Bell followed this pattern. He had engaged Mr Chapman QC to draft the representations based on the evidence filed and exchanged by 13 January 2015. In the event the Defendant filed the additional evidence 14 days late, filed the representations on time, but exchanged the evidence 16 days late and exchanged the representations 2 days late.
42. The Defendant's answer is that it was open to Mr Bell to submit representations out of time and he could have objected to Mr Marwick receiving the late served evidence and/or requested a period to make further representations.¹⁶ The Defendant says that Mr Marwick would not have refused to consider additional representations if they had been made within 14 days of receipt by Mr Bell of the Defendant's evidence; also that if application had been made by Mr Bell for additional time to make representations, Mr Marwick would have had to consider this. In the absence of Mr Bell objecting to the late service and/or asking for a period in which to comment upon it and/or making representations as soon as possible after 29 January 2015, he cannot complain about the procedure adopted by Mr Marwick.
43. Mr Bell filed a witness statement in these proceedings dated 23 November 2015. He is a criminal solicitor. He felt that the Defendant had gained an unfair advantage by its late filing of evidence because he/the Claimant had paid Mr Chapman QC to draft the representations and that work had been completed before he received the Defendant's further evidence. Therefore he would have expected to have to pay Mr Chapman QC an additional fee to draft further representations dealing with the late evidence. In correspondence with the Defendant Ms Field informed him in the email of 29 January 2015 that no extension of time was applied for or granted and it would be up to the inspector to decide whether or not to take late evidence into account. Given the direction made by Mr Marwick, he thought that Mr Marwick would not take into account the further evidence or, if he was prepared to, then he would make a further direction allowing the other parties time to submit further representations. This was also in the context that the Defendant had not sought to offer any explanation for their failure to comply with the time limit.
44. In short, up to the time when Mr Marwick produced his opinion, there was a significant procedural default by the Defendant. The fact that the Defendant's representations were exchanged 2 days late may not be regarded as particularly significant, especially as they were filed on the due date. However the delay in filing further evidence until after Mr Bell had submitted his written representations is clearly of real importance. I have regard to the Defendant's case as to what Mr Bell should or should not have done. Nevertheless, in my

judgement, where it was apparent to Mr Marwick that this defect had occurred, it was up to him if he was to consider taking the evidence into account to offer to Mr Bell the opportunity to make further representations. Proceeding to give an opinion without giving Mr Bell that opportunity was a serious procedural defect which vitiated the fairness of the procedure.

45. I now turn to the situation post Mr Marwick providing his report. The Defendant points to the fact that the Claimant was told on 25 February 2015 that having spoken to Mr Marwick,¹⁷ the application was to be taken to Committee on 16 March 2015 and Mr Bell's representations were invited on the report by 4 March 2015 (a period of 7 days). This email said:

"Any representations made will be forwarded to Mr Marwick for him to prepare a short note confirming whether or not any matter raised materially affects his conclusions."

46. On 2 March Mr Bell emailed the Defendant asking for the meeting to be put back because he was on holiday on 16 March 2015. The response was "Mr Marwick advises that in his view there is no obligation to postpone the Committee meeting as the parties have been afforded the opportunity to make representations in writing based upon the report, which is the central item to be considered by the Committee, and every opportunity to make relevant submissions has been afforded during the preparation of the report..." Mr Bell did not feel that he had been given every opportunity to make relevant submissions but decided to draft further representations himself. This took some 12 days, acting as a lay person, and that is why the representations were not ready until shortly before 16 March 2015.¹⁸

47. In my judgement what happened after the provision by Mr Marwick of his opinion does not affect the fact that his opinion was procedurally flawed. In summary this is because:

- (i) Although the decision was not made by the Defendant until 16 March 2015, in the circumstances of Mr Bell's application Mr Marwick's opinion was of immense importance if not technically determinative.
- (ii) The fact that the Defendant said that any representations would be forwarded to Mr Marwick to prepare a short note confirming whether his conclusion was materially affected was not sufficient to remedy the procedural defects. Mr Marwick had already by this stage disseminated his opinion without giving Mr Bell the opportunity to make proper representations on the late evidence.

48. Finally, the fact that not all of the arguments made before me in respect of the additional evidence received by Mr Bell on 29 January 2015 were contained in Mr Bell's document presented to Committee on 16 March 2015, does not change my judgement. Mr Bell has explained the background of his drafting of those submissions. Had the Defendant's evidence been filed by 13 January 2015, there is no reason to doubt that Mr Chapman QC would have drafted representations in line with his submissions to this court.

49. The next question is the applicability of section 31 Senior Courts Act 1981 (as amended) to this procedural error. Section 31(2A) provides:

"The High Court –

- (a) must refuse to grant relief on an application for judicial review, and
- (b) may not make an award under subsection (4) on such an application,

if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

The Defendant and the Interested Party rely on this provision.

50. Had there not been the procedural error, the Defendant's evidence would have been submitted to Mr Chapman QC and his submissions before me on behalf of the Claimant put before Mr Marwick before his provided his report. It is on that basis that I consider the point.
51. It is to be recalled that Mr Marwick¹⁹ said that the new evidence filed by the Defendant was "relatively incontrovertible documentary evidence" and that having considered it in detail it did not significantly alter the Defendant's position or his own view of the matter. He emphasised that as far as he was concerned it had not proven determinative on any point. In paragraphs 41-48 Mr Marwick considered whether the land was highway land. In paragraph 46 he was satisfied that there was strong evidence that the land in its entirety is highway maintainable at public expense and he rejected Mr Bell's argument that there was insufficient evidence in this respect. Earlier in paragraph 42 he had said that he was "satisfied that there is overwhelming evidence that the land is public highway." He continued:
 - "43. The inclusion of the land as publicly maintainable highway on the list kept by the Highways Authority pursuant to section 36(6) of the Highways Act 1980 (the 1980 Act) has not been challenged. This is strong evidence in itself that the land is highway land.
 44. The inclusion of the land on the list is consistent with the dedication of the wide verges adjacent to Chelford Lane and Black Firs Lane to Congleton Rural District Council (a predecessor-in-title to the present highways authority) in the late 1930s as evidenced in the relevant conveyancing material disclosed by East Cheshire Council as objector and the exchange of correspondence in September and October 2007 in this respect. The plan marked "area of land coloured red 10,950 sq yards" supports that the land was being dedicated to such use.
 45. Further, the land has been maintained as highway verge by the highways authority at all material times. Whilst it is plain that there has been some concurrent maintenance of parts of the land by adjacent landowners, such use has been tolerated by the highways authority (per email dated 5 October 2007) and I do not consider it to be a factor which takes the Applicant any further forward."
52. As the Claimant points out, the matters relied upon in support of the list referred to in paragraph 43 – i.e. those matters in paragraphs 44 and 45 of Mr Marwick's opinion – arose from the documentary evidence filed by the Defendant out of time. In order to be confident that the high threshold under section 31(2A) of the 1981 Act is satisfied, it would have to be the case that:
 - (i) Absent the matters in paragraphs 44 and 45, it is highly likely that Mr Marwick would have come to the same opinion and,
 - (ii) (if he had done so) coming to such decision without a public inquiry would not have been challengeable by way of judicial review if the Defendant had followed such an opinion.
53. In other words was it determinative of the status of the land as highway land, without more, that the land was included on the list of streets kept by the highway authority, in the context of the fact that Mr Marwick had seen the general layout of the land? To this I must add that according to the Claimant, the late evidence strengthens its case.
54. The Defendant submits that the highway authority consulted its plan of the list of streets and discovered that the verge was included in the area of public highway. It concedes that the complete plan was not produced until 27 January 2015, but submits that it was apparent from an early stage that the whole of the application site was shown on the list of streets as public

highway. For this it relies upon a plan dated 24 September 2012 and produced on 6 December 2013 which it submits shows the whole of the application site to be a public highway. I shall return to this point later. First I shall consider the Claimant's submissions in relation to the late evidence and Mr Marwick's report insofar as it relates to the late evidence. The finding that the land was highway was central to Mr Marwick's opinion. In paragraph 65 he said this:

"...the whole of the land falls to be rejected for registration regardless of any trigger event having occurred for reasons stated above, namely, that user has been by right and not as of right by virtue of the land being highway land."²⁰

55. I therefore examine the new evidence upon which the Claimant did not make representations prior to Mr Marwick's opinion.
56. Firstly there is the conveyancing material from the 1930s. There are agreements dated 18 April 1936, 16 March 1938 and 25 January 1939. In turn these relate to the "acquisition and dedication of land at Somerford for widening the county road:"
 - (i) In relation to the first agreement "from Middlewich to Congleton and also Black Firs Lane"
 - (ii) "Known as Black Firs Lane" (the second and third agreement)

The agreements all have plans attached which appear to show that only one relates to the Black Firs Lane verge within the application land and then to part only of it. That is the 954 square yards on the first agreement. This would suggest that very little of the application land material to my decision was the subject of these agreements.

57. Next the Claimant submits that creating a public highway requires dedication and acceptance by the public. Until section 71 of the Highways Act 1959²¹ highway authorities had no statutory power to accept dedication on behalf of the public. Prior to the 1959 Act the use relied upon to establish acceptance was use by the public. It could also be proved by the highway authority carrying out works on the dedicated land or part of it.²² There was an issue between the parties as to whether section 146 of the Public Health Act 1875 or section 154 of that Act was relevant to the 1930s agreements.²³ The Claimant's argument was that section 154 was to empower the Local Authority to purchase land for the purpose of making a new street (highway) and section 146 was relevant to creating highways. Therefore if the 1930s agreements (particularly agreement 1) were section 146 agreements then the land could only become highway on completion. If this is correct it enables the Claimant to submit that there is an issue whether the highway authority completed the relevant works on the verges. My finding on this point is that the agreements were section 154 agreements. This is because there was nothing in them which required the making of roads "at the expense of" the Grantor rather than the Council. In the absence of any other contemporaneous documents, it would be a reasonable inference without more that the 1930s agreements (though only one is directly relevant to the application land, and then to only a small part of it) reflect how the Defendant's predecessors in title acquired such land as they did acquire, and which subsequently became the verge.
58. In short in relation to the 1930s agreements the Claimant submits that Mr Bell did not have the opportunity to address the effect of the 1930s agreements. Had he been given that opportunity he would reasonably have wanted to cross-examine the Defendant's witnesses as to whether there had been agreements dedicating the majority of the verges as highways and, if so, as to whether there had been any acceptance so as to create a highway in respect of the relevant land. In the light of my ruling as to s146/s154, acceptance could also be by use by the public.

59. Next is the “correspondence in September and October 2007” and the supporting documents.²⁴ This refers to two emails from a Mr Wood, District Engineer, Congleton at Cheshire County Council.

- The first email was dated 19 September 2007 and said:

“Subject: Land Ownership, Black Firs Lane/Chelford Road, Somerford

...

Both these roads have very wide verges. Historically we have maintained the verge on Chelford Road, but because this road is subject to a national speed limit, we have only cut the standard 1.8m wide swath. However, it is my understanding that Somerford PC have cut the remainder of the verge themselves.

Black Firs Lane is a little different. For a start it is subject to a 40mph speed limit. Hence, we would normally cut the full width of the verge to our normal performance specification standard...however it is my understanding, that the Parish Council cut this section of the verge themselves. The verges on the remainder of Black Firs Lane tend to be cut by adjacent householders. My understanding is that, partly because of this, a presumption has arisen over the years that these verges “belong” to the adjacent householders. I have never had any evidence to the contrary.

After talking to Cllr Oliver, I did a little bit of research and as a result I had a look at the historical OS maps for the area (circa 1937) and then compared these with the current OS plans. A copy of this “comparative” plan is attached.

As you will see, it does appear that the Eastern boundary of Chelford Road and the Western boundary of Black Firs Lane have changed during the intervening period. Whilst I have no proof at present, we suspect that this might have been due to land having been acquired by the highway authority at that time for some future highway improvement (the Congleton by pass has been mentioned). If the land was purchased, this scheme was never pursued...”

- The second email was dated 5 October 2007 and stated:

“...I can now confirm that the wide verges on both Chelford Road and Black Firs Lane are owned by the County Council by virtue of them having been dedicated to Congleton Rural District Council – who were then the highway authority for the area – in 1936. Enclosed are the plans to show that we do hold title over these areas.

As I stated in my original mail, most of the adjacent landowners maintain the verges themselves (and, it has to be said, to a far higher standard than we would do). However, there has been no encroachment by them so I am not planning to take any further action regarding this matter at this moment in time...”

60. The Claimant’s submissions in respect of these emails are:

- (i) It is challenged that “the wide verges on Chelford Road and Black Firs Lane are owned by the County Council...” This is because (a) there is no documentation which demonstrates that all the verges were dedicated (b) the reason given by Mr Wood, namely that they were dedicated “in 1936” does not appear consistent with the 1930s Highways Agreements which post date 1936 and which do not show dedication of all of the verges. Therefore Mr Marwick’s conclusion that the verges were dedicated in the late

1930s²⁵ as evidenced by the “conveyancing material ...and the exchange of correspondence in September and October 2007 in this respect” – is flawed.

- (ii) It is not accepted that historically the Defendant maintained the verge on Chelford Road but only cut the standard 1.8m wide swath. The Claimant says there is no documentation to support this; also it is inconsistent with an email from Mr Davies.²⁶ Mr Davies said “The verges in question in Somerford form part of the swathe cut which is a 1 metre cut from the edge of the carriageway and visibility cuts at the junctions...”.

Finally it is said that Mr Wood’s statement that the verge on Chelford Road had historically been maintained by the Defendant was perhaps, at best, a statement of what he thinks would have happened. The Claimant would have wanted to test Mr Wood’s evidence as to this assertion and, in a public inquiry, cross-examine him about it. Nevertheless this maintenance of the verge was relied upon by Mr Marwick.²⁷

- (iii) Finally²⁸ Mr Marwick relied upon the plan marked “Area of land coloured red 10950sq yards” supporting that land was dedicated to highway use. This plan was attached to the 2007 emails. It is undated and the red marking corresponds to most of the TVG application land. The Claimant does not accept that the plan supports that the land was dedicated to highway use. The Claimant submits (a) the plan was not attached to any deed/document; nor does it contain reference to any other document (b) the inside of the verges contain the wording “improvement line”. The plan could be showing land proposed to be used for road improvements under a proposal never in fact implemented. (c) these concerns are particularly valid, given that the three highways agreements from the 1930s which the Defendant did produce relate to only a small part of the verges and no highways agreement relating to the majority of the application land verges has been forthcoming. Therefore Mr Bell would have wanted to make these submissions and to have cross-examined Mr Wood about the plan, its provenance and what searches had been made by Mr Wood for other highways agreements.
- (iv) There is a document from Mr Welch²⁹ dated 12 December 2013. He says that he would say that the area “is highway maintainable at the public expense. It is maintained by the highway authority as highway verge. Highway law and rights take precedence. As such people in the locality have not had the right for lawful sports and pastimes for 20 years”. This does not sit easily with Mr Wood’s emails to the effect that, apart from part of Chelford Road verge, the Parish Council and the adjacent householders maintain the verges. No documentary records of maintenance of verges have been disclosed. [There is nothing to suggest Mr Marwick relied on this document from Mr Welch].
- (v) Finally there is the email from Mr Davies which is copied into an email from Amanda Timpany of the Defendant to Elaine Field, the Defendant’s solicitor. Ms Timpany said “I have not received evidence that the highways department of Cheshire East Borough Council has maintained the land which is the subject of the Somerfield Village Green application. However I received the following email from Paul Davies of highways department.” She then copies and pastes Mr Davies’ email. He said that the highway authority had done a search of the records but had been unable to find copies of verge maintenance records. He then states that the verges are public highway and maintainable at public expense. He continues:

“Swathe and visibility cutting is the highway team’s responsibility and the locations at Somerford village green are part of the workload that is undertaken by the verge maintenance sub-contractor ...

It is important to note that the grass cutting contractor will not cut highway verges in the rural or urban environment where others, namely residents and businesses, have on their

own volition cut highway verges. Generally these other parties cut the highway verge junctions opposite their properties to enhance their local environment and visual outlook and generally cut it to a higher standard than the Council does because of the number of times and extents to which they cut the grass...the verges in question in Somerford form part of the swathe cut which is a 1 metre cut from the edge of the carriageway and visibility cuts at the junctions to provide clear views for road users.”

As previously stated there is some inconsistency with Mr Davies’s evidence and that of Mr Wood and Mr Welch. The Claimant would wish to cross-examine Mr Davies on these inconsistencies and the basis upon which he asserted that the verges were public highway maintainable at public expense.

61. On the basis of the above it seems to me to be clear that:

- Mr Marwick did in fact rely upon the additional evidence filed late by the Defendant
- That he was wrong³⁰ to describe the disclosure as “relatively incontrovertible documentary evidence”
- The question is whether, having regard to the other evidence relied upon by the Defendant, it can be safely said that it is “highly likely that the outcome for the applicant would not have been substantially different” if Mr Bell had had the opportunity to put in further representations; alternatively whether in those circumstances Mr Marwick should have advised a public inquiry and the Defendant should have held one.

Insofar as any of the fresh evidence could be regarded as assertion only then I am prepared to discount it in the Claimant’s favour. To make my decision I have to look at the hard evidence, what it demonstrated and what (if any) inferences may properly be drawn from it. What does not carry any determinative weight with me is the Claimant’s criticism of the differences between the documents of Mr Davies, Mr Wood and Mr Welch in relation to maintenance of the verges. These were very probably assumptions on their part. Nevertheless I believe it right to assume in the Claimant’s favour that anything they said about verge cutting by the Defendant could not be relied upon as evidence that the verges were highway.

62. This leads me to consideration of the plan dated 24 September 2012 which had been produced by the Defendant as long ago as 6 December 2013. The Defendant relies upon this plan as showing that the application site was shown on the list of streets as a public highway. The Defendant says that this, and the layout of the land, is strong evidence that the verge is public highway. In fact a further plan described as “the complete plan” by the Defendant was not produced until 27 January 2015 and therefore formed part of the late material received by Mr Bell on 29 January 2015. This plan is dated 23 April 2013. It shows all the verges coloured yellow as opposed to part of the verge on Black Firs Lane not being coloured yellow.

63. In Mr Chapman QC’s representations filed by Mr Bell prior to the late evidence he pointed out³¹ that on the plan 24 September 2012 half of Black Firs Lane and the application land adjoining that part is not regarded as a public highway. Further³² that the plan therefore did not show that the whole of the application land was public highway. He added “If it is a different plan, the applicant has not seen it.” Finally he added “There is nothing in HA 1980 s36(6) which makes such a plan conclusive of the public highway status of the street. The value of the plan under HA 1980 s36(6) is no greater than the evidence upon which it is based. However no such evidence has been adduced.” He continued:

“[19] The onus lies upon the objectors to prove that the whole of the application land is public highway. They have singularly failed to do so. Their assertions are confused as to

whether the whole or only part of the application is public highway and they have produced no evidence that any part of the application land is public highway.”

(In fact nothing turns on the difference between the two plans. It is explained by the fact that the incomplete list of streets was that part relevant to the Interested Party’s proposed development).

64. The Defendant submits that in the absence of other evidence the plan based on the list of streets, together with the layout, enabled Mr Marwick properly to conclude that the land was public highway. There is a duty on the Council to keep and keep corrected up to date a list of streets. This can be in written form or electronic form.³³

Discussion

65. The starting point is the list of streets. It is agreed that this is not determinative. However it is a statutory document and the presumption of regularity applies. This particularly so in the context of the Defendant’s duty under section 36(6) of the Highways Act 1980. Mr Marwick found that the list of streets was “strong evidence in itself that the land was highway land.”³⁴
66. It is accepted that the 1930s agreements only show only 954 square yards (the first agreement) of the application site being acquired by the Defendant for widening part of Black Firs Lane. There is then the Ordinance Survey plan of 1936 which shows, in respect of Chelford Road and the part of Black Firs Lane which adjoins Chelford Road, them not having the verge at that stage.³⁵ Therefore the land next to the road was then part of the adjoining agricultural land. Part of the late evidence was Mr Wood’s email³⁶ of 19 September 2007 which attached a copy of what he described as a “comparative” plan showing the boundary as of the date of the OS map and the current boundary. The Claimant accepts the physical layout of the comparative plan but says that, that is not evidence that the Chelford Road verge and top part of Black Firs Lane was public highway, and it does not follow that if the landowner has pulled back fences, or the Defendant acquired the land, or that the land was highway or became accepted as highway. This I accept as correct on the narrow point. Nevertheless, the Defendant/Interested Party properly submit that the evidence must be considered as a whole.
67. As to the plan referred to in “area of land covered red 10950 square yards”.³⁷ Again there is merit in the Claimant’s points. The question is whether, as part of the totality of the evidence, it can be supportive to some extent of the finding that the verges were highway.
68. I pause there to determine whether the Court should grant relief on the basis that it appears to be highly likely that the outcome for the applicant would not have been different had there not been the procedural error. At this stage I am considering only whether it is highly likely that Mr Marwick would have found that the verges were highway land. I am not so persuaded to the requisite threshold for the following reasons:
- (i) I accept that the plan showing the list of streets is strong evidence that the land is highway land, though not determinative. I accept the force in the point made about the presumption of regularity. Yet the list of streets is not the only evidence and the later evidence does raise serious questions as to its accuracy. The Claimant should be entitled to explore the question of what, if any, evidence supports it.
 - (ii) There is unfortunately a cloud of unknowing as to any documents proving title to the land being vested in the Defendant, save as to the 954 square yards, the subject of the first 1930s agreement.
 - (iii) I also see the force in the Defendant’s point that it is *prima face* unlikely that the adjacent landowner would effectively give up the land the subject of the verges, by fencing the

agricultural land leaving roadside verges at some stage after the 1936 Ordinance Survey map.

(iv) However:

- a. Paragraph 44 of Mr Marwick's opinion telescopes the information in the 1930s agreements and the plan marked "area of land coloured red 10950 square yards". There are many valid points (which I have set out above) which undermine his reliance upon that material as supporting his finding that the land was "on balance highway land".³⁸
- b. Further the Claimant has produced witness evidence from Emily Toomer and Frank Walton. Their statements were made in April 2015. Mrs Toomer says that in the mid 50s to early 60s era, potatoes were grown on the land and the farmer asked local people to respect the crops and keep off the land until any crops had been harvested. From 1960 onwards she rode on the land and in the early years remembered being asked to avoid riding through the long grass which was being grown for hay. Mr Walton says that the strip of land adjacent to Chelford Road and Black Firs Lane was farmed as agricultural land throughout the period 1954 to 1959 when he was regularly travelling through Somerford. He remembers the land being mainly used for growing cereal crops although potatoes may also have been grown on it. Although once land is a highway it is always a highway the potential relevance of this evidence is that it does raise real questions as to whether the land was highway even as late as the 1950s/1960s. It potentially undermines the Defendant's argument that at some stage predating the Second World War the land became highways land.
- c. If the first 1930s agreement is to be considered in the context of section 154 of the 1875, as I have found, and if it can be assumed that any other verge acquired by the Defendant was similarly acquired, then completion of the works was not necessary for the land to be treated as highway. It could be proved by use of the land as such by the public.³⁹ For reasons which I give below in rejecting the Defendant/Interested Party's alternative case on section 31(2A) of the 1981 Act, I cannot be satisfied that, absent the procedural error, it is highly likely that this would/should have been the finding.
- d. Finally, in coming to his conclusion in paragraph 45 that the highway verge had been maintained by the highway authority at all material times, Mr Marwick relied on the late email evidence. There were inconsistencies in this evidence and, in conjunction with the above points, it leads me to refuse to accept that the high threshold of section 31 has been satisfied in relation to upholding Mr Marwick's finding that the verges were highway land.
- e. The Defendant had submitted that I should make a definitive ruling on whether or not the verges are highway. The Defendant said that it was for it, as highway authority, to show that the land was highway and if they failed to do so Mr Marwick was wrong to conclude it was highway; alternatively, the Defendant's case was it was highway. The difficulty with this submission is that the new evidence and the Claimant's submissions upon it were not before Mr Marwick. Absent the procedural error they would have been. Had they been before him, in my judgement, then he should not have determined the issue on paper. The reasons for this are set out under Ground 4, paragraph 74 below. Similarly, it is not for me to rule on submissions only, when there is further explanation/evidence which is relevant to the decision of whether the land was/was not a highway.

69. That is not the end of the matter. The Defendant/Interested Party submits that even if Mr Marwick had found that the land was not highway land then the reasonable owner of the land would assume that the use by local people was a use of incipient highway rights and not TVG rights.

70. In the *Barkas* case⁴⁰ Lord Carnwath said:

“Where there is room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right.”

In *R (Laing Homes Limited) v Buckinghamshire County Council*⁴¹ Sullivan J said:

“It is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.”

Also at paragraph 108:

“From the landowner’s point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.”

71. In *Oxfordshire County v Oxford City Council*⁴² Lightman J said (first instance) paragraph 102:

“Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential Green will ordinarily be referable only to exercise of a public right of way to the Green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential Green may be recreational use of land as a Green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a Green).”

72. Mr Marwick dealt with this issue⁴³ in paragraphs 60-62 of his opinion. Having reviewed the evidence of user, he concluded that practically all the user relied upon by the applicant could be regarded as having been enjoyed pursuant to the public highway rights and therefore must be discounted as qualifying user. Given the layout of the land as a broad highway verge he said it was not a case where a reasonable landowner could readily discern between use by right by virtue of it being a highway and any use as of right for green activities. Finally, to the extent it might be argued that evidence at a public inquiry would come out so as to demonstrate user in a matter which fell outside user by right, in his view any user evidence at an inquiry would likely be found to present to a reasonable landowner of the land as either (a) reasonable use by right of the public highway or (b) if not such reasonable use by right of the public highway, then a private or public nuisance amounting to an obstruction of the highway and therefore not qualifying user for lawful sports and pastimes.⁴⁴ Mr Marwick was not considering the evidence in the specific context of which it is now used by the Defendant/Interested Party. He had already found that the land was properly public highway and in that context he found that the use relied upon could be regarded as having been enjoyed pursuant to highway rights and therefore to be discounted as qualifying users. Although clearly the statement of Lord Carnwath

in *Barkas* applies in relation to the position where there is room for ambiguity, the circumstances in the *Laing* and *Oxfordshire* cases were different. Here the evidence was that use by the public was use of all the verge, not just part of it. I cannot say that it is highly likely that Mr Marwick would have come to the same conclusion had he had the information which I have. Nor do I accept that it was necessarily the case that the use was by implied permission of the highway authority, rather than a qualifying use by trespass.⁴⁵ Again the relevant threshold is not therefore reached for me to find that even if the verges were not highway then the reasonable owner of them would assume that the use was of incipient highway rights and not TVG rights.

Ground 4: Should there have been a public inquiry?

73. In the *Whitney* case it was said:

“In any case where there is a serious dispute, a registration authority will almost invariably need to appoint an Independent Expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration”.⁴⁶

74. Having considered in detail the further representations made by Mr Chapman QC in relation to the issue as to whether the application land was a highway, Mr Marwick, had he had the benefit of those representations, could and should have concluded that a public inquiry was necessary to determine the issues. There were sufficient disputes of factual issues raised to require this to be done. For example in relation to the highway, given the uncertain state of the documentary evidence, investigation of and cross-examination in relation to the list of streets, the assertions made by Messrs Davies, Wood and Welch and, assuming the Defendant/Interested Party contest it, the new evidence from Mrs Toomer and Mr Walton needed to be tested at a public inquiry in my judgement.

Summary

75. (1) Ground 1 fails.

(2) Ground 2 fails.

(3) Ground 3 succeeds.

(4) Ground 4 succeeds.

76. Therefore the decision of the Defendant on 16 March 2015 is quashed.

¹ *DPP v Jones* [1999] 2AC 240

² There had been emails in the intervening period. On 25 February 2015 Mr Jones of the Defendant emailed Mr Bell inviting representations on Mr Marwick’s report to be received by no later than 4 March 2015. On 2 March 2015 Mr Bell said that he was on holiday on 16 March and asked for the meeting could be put back so that he could address it. On the same day Mr Jones responded that there was no obligation to postpone the meeting but said that the Committee had a discretion whether or not to receive written representations made after 4 March as part of their decision making process.

³ [2004] EWCA Civ 951; [2005] QB 282

⁴ The *Whitney* case was under the 1969 Regulations but, as above, these were not materially different from the 2007 Regulations.

⁵ Regulation 26 of the 2014 Regulations.

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- ⁶ *R v Bow Street Metropolitan Stipendary Magistrates ex parte Pinochet (No 2)* 2000 1 AC 119 at 132G-133C; 137F-138A; 139H-140B-C; 144A-D; 145E-F.
- ⁷ Paragraph 32
- ⁸ *R (Cheltenham Builders Limited) v South Gloucestershire DC* [2004] JPL 975 at paragraph 36
- ⁹ Regulation 122(2) Community Infrastructure Levy Regulations 2010
- ¹⁰ The Interested Party is to contribute proportionately with other developers to the cost of a relief road. The Claimant submitted that, absent this contribution, the viability of that project may be affected.
- ¹¹ It is suggested that this impression is reinforced by the points made in grounds 3 and 4 below. However I consider that they stand or fall on their merits, though I do not lose sight of the total picture.
- ¹² *R (Persimmon Homes and BDW Trading) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin) para 127
- ¹³ Prior to judgement the case of *Cofely* [2016] EWHC 240 (Comm) was decided. I sent it to the parties and asked if they wished to make submissions. Only the Defendant did so. Since the Claimant was the party who potentially could have relied on the case for assistance, and did not seek to do so, I do not refer to it further.
- ¹⁴ Emails 27 November 2014 (Defendant to Mr Marwick); 28 November 2014 (Mr Marwick's reply); Defendant to Mr Marwick 12 December 2014
- ¹⁵ There was also an omission of the Claimant's objections in the Instructions to Mr Marwick dated 27 November 2014. However this does not touch on Mr Marwick's independence.
- ¹⁶ Mr Marwick in his opinion (paragraph 10) suggested that Mr Bell had objected to the late service of evidence by the Defendant. This was apparently erroneous.
- ¹⁷ ...a matter which in itself is of concern, particularly as there is no note of the conversation.
- ¹⁸ Mr Bell says that he drafted the representations himself because he did not think that the Claimant would spend more money on Mr Chapman's fees in the light of Mr Marwick's report; also the timescales were very short and finally he had lost all confidence in the way in which the Defendant and Mr Marwick were dealing with the application and therefore did not wish to spend the money on further legal fees.
- ¹⁹ Opinion paragraph 11
- ²⁰ It is not to be forgotten that this application relates only to the part of the application land which could not be registered because it was subject to the "trigger event". The Claimant accepts this based on Mr Marwick's reasoning in paragraphs 27-39.
- ²¹ Subsequently section 72(1) of the Highways Act 1980
- ²² See *Secretary of State for the Environment etc v Baylis (Gloucester) Limited* [2002] EGLR 13
- ²³ Section 146 provides "Any urban authority may agree with any person for the making of roads within their district for the public use through the lands and at the expense of such person, and may agree that such roads shall become and the same shall accordingly become on completion highways maintainable and repairable by the inhabitants at large within their district..." (my underlining). Section 154 provided "Any urban authority may purchase any premises for the purpose of widening, opening, enlarging or otherwise improving any street, or ...for the purpose of making any new street."
- ²⁴ Paragraphs 44 and 45 of Mr Marwick's opinion

25 Opinion paragraph 44

26 Paul Davies, Investment Manager, Highways Services Contract, Cheshire East Council Highways. The
email was sent in January 2015. See below.

27 Opinion paragraph 45

28 Opinion paragraph 44

29 Team Leader, Traffic and Road Safety Team, Cheshire East Highways

30 Opinion paragraph 11

31 Paragraph 17

32 Paragraph 18

33 See *Fortune v Wiltshire Council* [2013] 1 WLR 808; [2012] EWCA Civ 334, paragraphs 164-167.

34 Opinion paragraph 43

35 The rest of Black Firs Lane and the A54 are not shown on the ordinance survey map.

36 See judgement paragraph 59 above.

37 See judgement paragraph 61(iii) above: I have set out in full the Claimant's submissions.

38 Paragraph 46

39 See the *Baylis* case above.

40 [2015] AC 195, paragraph 61

41 [2003] EWHC 1578 (Admin), paragraph 102

42 [2004] Ch 253

43 ...albeit in relation to the *DPP v Jones* point which is no longer pursued

44 This is in the context that Mr Marwick had said that he considered the untested evidence in support of the
application at its highest and that the evidence in support of the application had been prepared with greater
detail than is often seen in support of such application. Opinion paragraphs 8 and 54.

45 This is particularly so in respect of the evidence of Mrs Toomer and Mr Walton, though this was not
relevant qualifying use, being more than 20 years ago.

46 Paragraph 66; see also paragraph 29. *cf R v Suffolk County Council Ex parte Steed* [1998] 70 P&CR 487 at
500-501.