Neutral Citation Number: [2018] EWHC 1022 (Admin)

Case No: CO/1208/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 May 2018

Before:

SIR WYN WILLIAMS
(Sitting as a Judge of the High Court)

- -

Between:

THE QUEEN on the application of COTHAM SCHOOL	**Claimant**
- and -	
BRISTOL CITY COUNCIL	**Defendant**
- and -	
(1) DAVID MAYER	**Interested Parties**
(2) BRISTOL UNIVERSITY	
(3) ROCKLEAZE RANGERS FOOTBALL CLUB	

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The Claimant was represented by **Richard Ground QC and Dr Ashley Bowes** (instructed by **Harrison Grant Solicitors**)
The Defendant was represented by S**tephen Morgan** (instructed by **The Defendant's Legal Services Department**)
The First Interested Party was represented by **Andrew Sharland QC** (instructed by **DAC Beachcroft**)
The Second and Third Interested Parties did not appear and were not represented

Hearing dates: 21 and 22 November 2017
Further written submissions on behalf of the Claimant dated 20 April 2018, the First Interested Party dated 22 April 2018 and the Defendant dated 23 April 2018

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Approved Judgment

Sir Wyn Williams:

Introduction

1. The Defendant is the registered owner of the freehold interest in an area of land known as Stoke Lodge Playing Fields, Shirehampton Road, Stoke Bishop, in the city of Bristol (hereinafter referred to as "the land"). It is also the Commons Registration Authority empowered to register land as a town or village green pursuant to section 15 Commons Act 2006 ("the 2006 Act"). In the remainder of this judgment I will refer to the Defendant either as "Bristol City Council", "the landowner" or the "registration authority" as the context dictates.

2. On 7 March 2011 the First Interested Party, Mr Mayer, made an application to the registration authority to register the land as a town or village green. He was acting on behalf of an unincorporated association known as "Save Stoke Lodge Parkland". Objections to the application were received from the landowner, the Second and Third Interested Parties and the Claimant. In the face of conflicting views about whether the land should be registered the registration authority decided that it would appoint Mr Philip Petchey (hereinafter referred to as "the Inspector") to make a recommendation about whether the land should be registered. At the time of his appointment in 2011, the Inspector was a barrister in private practice with considerable relevant expertise and experience.

3. On 22 May 2013, the Inspector issued a report in which he recommended that the land should be registered as a green. However, that recommendation was not implemented. In the years immediately following the publication of the Inspector's report there were a number of cases proceeding through the courts which were relevant to the issues raised in this case. Ultimately a decision was taken that before a decision was made as to whether the land should be registered the Inspector should conduct a non-statutory public inquiry at which oral evidence would be given before him by all those who wished to attend the Inquiry and give such evidence.

4. Over 9 days during June and July 2016 the Inspector conducted such an inquiry. Mr Mayer represented Save Stoke Lodge Parkland; Leslie Blohm QC represented the landowner; Richard Ground QC and Ashley Bowes represented the Claimant. They each called a number of witnesses although most of the witnesses were called by Mr Mayer on behalf of Save Stoke Lodge Parkland. On 14 October 2016 the Inspector produced a comprehensive written report. In it, he recommended that the land should not be registered as a green. He expressed the view that one aspect of the statutory test for registration had not been satisfied – as to which see below.

5. The Inspector's report was considered at the Public Rights of Way and Greens Committee of Bristol City Council ("the committee") at a meeting which took place on 12 December 2016. In advance of the meeting a large number of representations were sent to the committee by local inhabitants. A substantial number urged the committee to reject the Inspector's recommendation and grant the application for registration. Members of the committee were provided with a written report prepared by officers of Bristol City Council in which it was suggested that the committee should accept the Inspector's recommendation. At the meeting oral submissions were made by a number of persons. In the event the committee resolved (on the Chair's

casting vote) to reject the Inspector's recommendation and to grant the application for registration.

6. Currently, the land is occupied by the Claimant. It has been occupied since 31 August 2011 pursuant to a lease granted by the landowner for a term of 125 years commencing 1 September 2011. It is common ground that the creation of the lease was and is no bar to the registration of the land as a green.

7. In these proceedings, issued on 9 March 2017, the Claimant seeks an order quashing the decision of the committee. It alleges that the decision of the committee is vitiated by legal errors and five grounds are advanced which, it is submitted, justify the making of a quashing order.

8. The application for a quashing order is resisted, strenuously, by the registration authority and Mr Mayer. The primary contention of both is that none of the five grounds advanced by the Claimant is made out. However, with varying degrees of enthusiasm, it is also submitted that even if one or more of the grounds are made out, no relief should be granted to the Claimant. At the conclusion of the oral hearing before me it was agreed that this judgment should focus upon whether any of the grounds of challenge were made out. In the event that I found that one or more of the grounds were made out, the issue of withholding relief would be dealt with discretely either at or following the handing down of judgment.

9. During the course of the hearing I was informed that two first instance decisions relevant to the resolution of ground 5 had been the subject of appeals to the Court of Appeal. In that court the appeals were heard together and they are now reported as *R (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs* and *R (NHS Property Services Ltd) v Surrey CC* [2018] EWCA Civ 721. At the hearing it was not known when judgment would be given by the Court of Appeal. I expressed the view that my own consideration of ground 5 would be assisted by waiting for the Court of Appeal to hand down judgment. In the event judgment was handed down in the appeals on 16 April 2018.

The nature of the land, its history and the relevant physical features upon it.

10. The Inspector's report of 14 October 2016 contains a detailed account of all these matters which is accepted by the parties to be accurate or, at least, not challenged in these proceedings. In consequence this section of my judgment is a short summary of the Inspector's findings so far as they are relevant to the issues which I must determine.

11. The land has an area of approximately 22 acres. It is mostly grassland which "wraps around" a large Victorian house called Stoke Lodge. The area which is the subject of the application for registration was, originally, the grounds of the house. The house itself and its immediate surroundings are not part of the application. Shortly after the end of the Second World War the then landowner sold to Bristol City Council, as it was then constituted, approximately 5.5 acres of the land for the purpose of temporary housing. The house and the remainder of the land were sold to the Council in 1947 for educational purposes. Shortly after this transaction the 5.5 acres originally sold for temporary housing were appropriated for educational purposes.

12. Within a comparatively short time of the disposals to the Council, large parts of the land were laid out as playing fields. There have been football and rugby pitches on the land in the winter and a cricket field and an athletics track in the summer for many years. Until about 2000 these pitches were used as school playing fields for Fairfield School; thereafter Cotham School became the user of the pitches. Over many years the pitches were also used by local sports clubs under arrangements made with the schools and/or the local education authority.

13. Following the coming into force of the Academies Act 2010, Cotham School became an academy. The Claimant, which is a company limited by guarantee, operates and manages the academy.

14. The land is not entirely typical of playing fields. There are a number of trees upon it – not all confined to the perimeter. Further it is not entirely flat. It has a slightly rolling character which has the effect of enhancing its generally attractive appearance.

15. Following the sale of the land in the 1940s until 1974 the land was owned by Bristol City Council. Upon re-organisation of local government in 1974, Avon County Council became the landowner. Following further local government re-organisation the county council ceased to exist in 1996 whereupon the land was again vested in Bristol City Council.

16. There are a number of access points to the land which have existed for many years. These are shown numbered 1 to 12 upon a plan within the Trial Bundle (page 195). Some of the 12 access points depicted upon the plan are, on the ground, more than one point of access albeit in close proximity to each other. The same plan and a photograph at page 194 show the relationship between the land and the residential areas nearby.

17. As at the time of the Inspector's inspection there was a sign measuring about 4 feet 6 inches x 2 feet 6 inches (about 1.37m x 0.76m) situated in close proximity to access point 3. It had upon it in bold the following words:-

> ***"MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THE PLAYING FIELD"***

It went on to prohibit named activities which caused nuisances and threatened that persons committing any such nuisances would be liable to prosecution. Any person wishing to be authorised to use the playing field was advised to make a request to the Director of Education. The words "County of Avon" appeared beneath the words I have just summarised. This sign was clearly visible at the times Inspector inspected the land.

18. The Inspector also saw that there was an identical sign in the vicinity of access point 2. He also found a sign under the logo of Bristol City Council near access point 12. This sign was headed "Private Grounds" and was in similar although not identical terms to the signs I have just described. The Inspector concluded that this sign was erected by the City Council in 2009 but at or near the site of a similar sign which had been erected by Avon County Council. He concluded that Avon County Council had erected at least three signs upon the land having words identical to those set out and

paraphrased at paragraph 15 above. The Inspector also concluded that these signs had first appeared on the land in the mid 1980s.

19. There is no dispute that the land has been used as playing fields by educational establishments and sports clubs since the late 1940s. The Inspector found that the land had also been used over many years by local inhabitants for informal recreational purposes. After a very detailed review of the oral and written evidence the Inspector expressed his conclusions thus:-

> "334. The core facts of this case are not in dispute. The land has been used for use by schools for games and athletics. It has been used by sports clubs for football, rugby and cricket. It has been used by local people for dog walking and informal recreation. Access for that dog walking and informal recreation has been freely available. At all relevant times two Avon County Council signs were positioned on the land and still are. There was a third sign Avon County Council sign on the land which must be contemporaneous with the other Avon County Council signs and survived down from the mid 1980s until at least 18 June 2007. Cotham school have a lease of the land and could fence it off, subject to it not having become a town or village green by virtue of long use by local people. However, the existence of these core facts has not precluded extensive argument."
>
> …..

Statutory Framework

20. Section 15 of the Commons Act 2006, so far as is relevant, is in the following terms:-

> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (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.
>
> (3) This subsection applies where—
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality,

> indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the time of the application but after the commencement of this section; and
>
> (c) the application is made within the relevant period.
>
> [(3A) In subsection (3), "the relevant period" means—
>
> (a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b); …"

21. Later in this judgment (when dealing with Ground 5) it will be necessary to consider other statutory provisions. So far as is necessary, however, I will set out those provisions in the section of this judgment which deals with that Ground.

The Inspector's conclusions in relation to section 15 of the 2006 Act.

22. The Inspector found that a significant number of the inhabitants of the locality in which the land is situated had used it for recreational purposes (i.e. lawful sports and pastimes) for the requisite 20 year period i.e. between March 1991 and March 2011. He also found that over that same period the recreational use of the land undertaken by the local inhabitants co-existed with the use made of the land by educational establishments and sports clubs. He further concluded, however, upon one discrete basis, that the user undertaken by the local inhabitants over the requisite period had not been "as of right". It is this finding which led him to recommend that the land should not be registered. The Inspector's analysis of the meaning of the phrase "as of right" is long and detailed. In summary, however, the Inspector was of the view that in order that the use of the land by the local inhabitants could be categorised as being "as of right" during the requisite period it had to satisfy the Latin maxim *nec vi, nec clam, nec precario* (not by force, not secretly and not by permission). The first limb, *nec vi,* would not be satisfied if the use relied upon had been made contentious by appropriate action on the part of the landowner. The Inspector considered himself bound by decided cases to conclude that the erection of signs on the land in the mid 1980s might make the use contentious and, on the facts as he found them to be, he concluded that the 3 signs erected by Avon County Council had been sufficient to render the use made of the land by the local inhabitants contentious. At paragraph 389 of his report he set out his views as follows:-

> "I consider that the 3 Avon County Council signs were at the time of their erection as a matter of fact sufficient to make the use of the land contentious. … many people would necessarily have walked passed the signs … and, of course, quite a few did. Moreover I have accepted that local people have gone all over the land. The corollary of this is that they would have seen one of the signs. I appreciate that not everyone may have "registered" the signs but given that they are of reasonable size and in prominent positions on the land that is not the fault of

> Avon County Council …. Thus I think that the reasonable landowner would have considered that he had done enough to render use contentious i.e. by posting notices at what he perceived to be the principal entrances to the site. There was a suggestion that they may from time to time have been obscured by vegetation but as of my site visits they were clearly visible and there is no reason to think that they were not clearly visible at all times throughout the relevant period."

In reaching this conclusion there is no doubt that the Inspector was influenced by a number of decisions of the higher courts but especially the decision of the Court of Appeal in *Winterburn and another v Bennett* [2017] 1WLR 646.

The committee's decision and the events preceding it

23. Following the receipt of the Inspector's report, the registration authority decided that it should be considered at a meeting of the committee on 12 December 2016. In the weeks leading to that date, Mr Mayer engaged in a campaign to persuade the committee that it should not accept the Inspector's recommendation. He contacted his local councillors. He sought to galvanise public support for the view that the land should be registered. At least one public meeting was held and local inhabitants were encouraged to write to the registration authority registering their support for the registration of the land. He also contemplated seeking to challenge the decision in *Winterburn* and, to that end, made a request to the committee that it should adjourn consideration of the application. Ultimately, Mr Mayer did not seek to challenge the decision in *Winterburn* and the adjournment application to the committee was not pursued.

24. Mr Mayer's campaign generated a lot of local support. Hundreds of people sent emails supporting the registration of the land. Many of these emails were sent to a dedicated email address provided by Bristol City Council so as to permit local inhabitants to make representations about decisions to be made by the Council. Many of the representations were copied to local councillors, Mr Mayer and Councillor Abrahams who was the chair of the committee. It is clear, too, that some emails were sent directly to Councillor Abrahams. He replied to the emails sent to him; to the extent that it is necessary to do so the emails and replies are considered in this section of the judgment which considers Ground 2.

25. On or about 2 December 2016 officers of Bristol City Council produced a report for consideration by the committee. That report recommended that the land should not be registered for the reasons articulated by the Inspector. In the view of the officers the Inspector's report contained "detailed justification for his recommendation". However, the officers' report also advised the committee that if it considered that despite the recommendation of the Inspector the land should be registered it should provide reasons for that decision.

26. Councillor Abrahams chaired the meeting of the committee on 12 December 2016. Six committee members were present. Notes of the debate were taken by an officer of the Council. A number of persons spoke and there were interventions from members of the committee. At the conclusion of the debate a vote was taken and the committee

was equally split. Councillor Abrahams exercised his casting vote in favour of registering the land.

27. The record of what occurred at the meeting is contained in what are described as the "draft minutes". No one suggested before me that, although in draft, the minutes are not an accurate account of what occurred and what was decided at the meeting. Accordingly, henceforth, I will refer to the record as "the minutes". The following points which emerge from the minutes are worth noting. First, the committee was made aware, expressly, that the Inspector had recommended that the land should not be registered. Second, it was advised that its task was to apply the statutory test in section 15 of the 2006 Act. The members were advised orally that the Inspector had concluded that "the erection of the signs and the location of the signs in prominent positions on the land, at principal entrances would have been considered reasonable enough by a landowner to render the use of the land contentious". Third, the committee was advised that it should be "careful not to consider the Councillors' comments as evidence". Fourth, it was clear to the committee that the only basis upon which the Inspector had recommended as he did was on account of his view of the significance of the signs which had been erected on the land by Avon County Council. Fifth, a wide ranging discussion occurred about the significance of those signs. The minutes record that in that discussion, "Members agreed that in 1985 Avon County Council signage had made the position sufficiently clear that use of the site was contentious and not "as of right" but "Some members considered that this had changed over time and due to the size of the site, circa 22 acres, there was not sufficient number or sufficiently clear … signage to affect public perception that use of the site was contentious and not 'as of right' and this had been exacerbated by Avon County Council ceasing to exist." In response to the point made by some members that Avon County Council had ceased to exist officers advised:-

> "In respect of Avon County Council becoming defunct the inspector concluded irrespective of whether or not the Council became defunct that the signs which were sufficient to render the use of land contentious were in place at the beginning of the 20 year period in 1991 and that such use was contentious until at least 1996."

28. As it had been advised to do, the committee formulated reasons for its decision (no doubt with the assistance of officers). They were as follows:-

> "(i) Other than the "as of right" element the Committee accepted the inspector's findings that all the elements of the statutory test were proven on the balance of probabilities.
>
> (ii) That between 1991 and 1996 there were three Avon County Council signs attempting to make the use of the land contentious.
>
> (iii) In Winterburn the Court of Appeal found that landowners can prevent rights being acquired by third parties by displaying clear visible warning signs that the land is private.

> (iv) Three members of the Committee considered that the facts of Winterburn…. were not the same as the facts in this case. Unlike the car park in that case Stoke Lodge Playing Fields is a large piece of land (about 22 acres) and there were only three signs. The small numbers of signs on such a large site was not sufficient to make the use of the land contentious."

The grounds

Grounds 1 and 3

29. It is convenient to take these grounds together. The Claimant alleges that the registration authority erred in law when it concluded that the use of the land by the local inhabitants between 1991 and 2011 was "as of right" (Ground 1). It also alleges that the registration authority failed to provide adequate and sufficient reasons for reaching that conclusion thus rendering its decision unlawful (Ground 3).

30. In summary, Mr Ground QC submits that the Inspector's analysis of the law relating to the meaning of the phrase "as of right" in the context of signs erected by a landowner aimed at preventing unauthorised use of land was correct – see paragraphs 361 and 373 to 387 of his report. Further, he submits that the Inspector's application of the law to the facts, as he found them to be in this case, was also correct. Mr Ground QC points out that the minutes of the meeting of the committee on 12 December 2016 expressly record that the members of the committee accepted the finding of the Inspector that between 1991 and 1996 there were three signs on the land erected by Avon County and, further, that the erection of those signs in the 1980s made the use of the land contentious. Despite the view of the majority of the committee that this state of affairs had changed over time there was no evidence to support a conclusion that this change had occurred before March 1991 and accordingly, as at the date of the application for registration, it could not be established that the use made of the land between 1991 and 2011 was "as of right" over that whole period of time. It necessarily followed, says Mr Ground QC, that it was not open to the registration authority to conclude that that the local inhabitants had used the land for recreational use "as of right" for the necessary period of 20 years immediately prior to the date of the application for registration.

31. Mr Morgan, for the registration authority, accepts that the Inspector's analysis of the law relating to the phrase "as of right" is accurate. He submits, however, that the issue of whether the signs erected by Avon County Council were ever sufficient to render the use of the land contentious is factual. It was open to the committee to take a different view of the facts relevant to that issue than that formed by the Inspector. He submits that this is precisely what the committee did and, accordingly, there was nothing unlawful about its decision. Inherent in Mr Morgan's submission is the contention that the committee did not agree that at the date of the erection of the signs in the mid 1980s they rendered contentious the use of the land by local inhabitants.

32. Mr Sharland QC, for Mr Mayer, supports the stance taken by Mr Morgan. Additionally, however, he invites me to conclude that the Inspector's legal analysis of the concept of "as of right" was erroneous. He submits that the Inspector's reliance upon *Winterburn* was misplaced because that decision was concerned with the law relating to the acquisition of private easements and, accordingly, it did not apply

directly when the statutory provisions governing whether an area of land is to be registered as a green were being considered. As a fall-back position, Mr Sharland QC submits that *Winterburn* was wrongly decided and he invites me so to conclude.

33. So far as the reasons challenge is concerned, Mr Ground QC submits that reason (iv) (set out at paragraph 28 above) is wholly inconsistent with the finding by the Inspector that many users of the land saw the signs. Further, he submits that the committee did not explain the basis upon which it was proper to depart from the Inspector's factual conclusions particularly given that he heard all the evidence as to where people walked upon the land and what they saw when they were upon it. Mr Morgan does not dispute that the committee was obliged to provide reasons for its decision. However, he advances a robust defence of the committee's reasoning process. Essentially, Mr Sharland QC aligns himself with Mr Morgan on this issue although he is less inclined to accept, unequivocally, that the committee was obliged to give reasons for its decision.

34. I was referred to a number of authorities which have considered the expression "as of right" both in the context of registration of town and village greens and in the context of the acquisition of other public and private rights. In my judgment, it suffices to confine my own discussion of the authorities to those which have considered that phrase in the context of the registration of land as a town or village green, together, of course, with the decision in *Winterburn* given that it featured so prominently in the argument before the Inspector and the committee.

35. The starting point is the decision of the House of Lords in *R v Oxfordshire County Council & Anor ex parte Sunningwell Parish Council* [2000] 1 AC 335. In this case the parish council applied to the registration authority (Oxfordshire CC) to register glebe land as a village green pursuant to section 22(1) of the Commons Registration Act 1965 (the predecessor section to s15 of the 2006 Act). The relevant part of that section permitted registration if "the inhabitants of any locality [had] indulged in sports and pastimes as of right for not less than 20 years". Having identified the principal issue in the case as being the meaning of the words "as of right", Lord Hoffmann considered that:-

> "The language is plainly derived from judicial pronouncements and earlier legislation on the acquisition of rights by prescription. To put the words in their context, it is therefore necessary to say something about the historical background".

There followed an exposition of the historical evolution of the doctrine of prescription and statutory provisions closely connected with that doctrine including the Prescription Act 1832. Thereafter Lord Hoffmann concluded succinctly:

> "There is in my view an unbroken line of descent from the common law concept of nec vi, nec clam, nec precario to the term "as of right" in the Acts of 1832 ……and 1965."

All the other Law Lords agreed with the speech of Lord Hoffmann thereby confirming that the words "as of right" in the 1965 Act were to be equated with the meaning given to the Latin phrase "nec vi, nec clam, nec precario".

36. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 a new town development corporation created a town plan which identified an area of land as "park land/open space/playing field". More than 20 years later the applicant, Mrs Beresford, applied to the registration authority for the registration of that land as a green. The authority refused registration. Mrs Beresford's application for judicial review was refused by the High Court and the Court of Appeal but upheld in the House of Lords.

37. The principal issue to be determined by the House of Lords was whether the land had been used by local inhabitants for the requisite period of 20 years "as of right". Accordingly, their Lordships revisited how that phrase was to be interpreted in the context of the case before them.

38. The approach adopted by Lords Bingham, Hutton, Rodger and Walker was, essentially, the same as that adopted by Lord Hoffmann in the *Oxfordshire County Council* case. Lord Scott, however, approached matters somewhat differently. He was of the view that although the phrase "as of right" was derived from the maxim *nec vi, nec clam, nec precario,* that did not mean, necessarily, that the phrase ought to be given the same meaning and effect in statutes concerned with the acquisition of public and private rights. At paragraph 34 of his speech he said:

> "It is a natural inclination to assume that these expressions "claiming right thereto" (the 1832 Act) "as of right" (the 1932 and 1980 Act) and "as of right" in the 1965 Act all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous".

39. In the paragraphs that followed Lord Scott explained some of the differences he had in mind especially insofar as differences existed in relation to how the various public and private rights might be acquired. That said, he did not spell out in any detail, if at all, how he anticipated that the phrase "as of right" in the 1965 Act might be interpreted or applied differently from the same words used in other statutory provisions or under the principles of the common law. Further, the difference of approach between Lord Scott and the other Law Lords made no difference to the result in the *Beresford* case. All their Lordships concurred in concluding that Mrs Beresford's claim was well founded because the use of the land in question in that case had subsisted for the requisite 20 year period and it had occurred with the permission of the landowner as the courts below had concluded.

40. The next important decision (in time) concerning the phrase "as of right" in the context of registration is *R (Lewis) v Redcar and Cleveland Borough Council (No. 2)* [2010] 2 AC 70 – a decision concerning section 15 of the 2006 Act. During the course of his judgment, with which all the other Supreme Court Justices agreed, Lord

Walker provided yet another authoritative exposition of the phrase "as of right" – see paragraphs 17-20 of his judgment. Paragraph 20 is worth quoting in full:-

> "The proposition that "as of right" is sufficiently described by the tripartite test nec vi, nec clam, nec precario (not by force, nor stealth, nor the licence of the owner) is established by high authority. The decision of the House of Lords in *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229 is one of the clearest: see Lord Davey, at p 238, and Lord Lindley, at p 239. Other citations are collected in *Gale on Easements*, 18th ed (2008), paras 4-80 and 4-81. The proposition was described as "clear law" by Lord Bingham of Cornhill in *Beresford* [2004] 1 AC 889, para 3. The opinion of Lord Rodger of Earlsferry, at para 55, is to the same effect. So is that of Lord Scott of Foscote, at para 34, though with a cautionary note as to the difference between the acquisition of public and private rights."

It is worth noting that the Supreme Court considered that authorities which had considered the phrase "as of right" in the context of the 1965 Act were equally applicable when interpreting or applying that phrase in the Act of 2006.

41. I turn next to the decision of the Court of Appeal in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P&CR. 3. This case is important not just for the principles formulated by the Court but also because the court was concerned to resolve a debate about the efficacy of signs to render contentious use of the land in question. Let me begin with the facts in summary. In 2001 Dorset County Council registered 46 acres of former grazing land as a green under the 1965 Act. The land had been owned for many decades by the Curtis family who had opposed the registration. One of the grounds of opposition had been that the user by local inhabitants had not been "as of right" because until approximately 1984 the Curtis family had repeatedly erected and re-erected clearly visible signs stating that the land was "private" or that the public were to "keep out" or that the public's presence would be a "trespass". There had, from time to time, been a need for signs to be re-erected on account of acts of vandalism towards the signage. Following registration, the Curtis family sold the land. However, the new owner applied to remove the land from the register by way of an application for rectification to the High Court. One of the grounds for the application was that there had not been user "as of right" for at least 20 years prior to the application to register. Morgan J granted the application for rectification of the register. He held that there had not been user "as of right" of the land for at least 20 years prior to the application for registration because the use by local inhabitants had been contentious during the period that the Curtis family were erecting and re-erecting the signs described above. An appeal against the judgment of Morgan J by a local inhabitant was dismissed by the Court of Appeal.

42. The lead judgment in the Court of Appeal was delivered by Patten LJ. At paragraphs 27 to 64 he dealt at some length with the principles which had been formulated in the cases concerning the interpretation the phrase "as of right" and the application of those principles to the facts with which the court was concerned in that case. He identified the principal issue as being whether the Curtis family had taken sufficient steps so as to effectively indicate that they were not acquiescing in any use of the land

by local inhabitants. At paragraphs 36 to 38 he set out the principles by which that issue was to be determined. Paragraph 36 reads:-

> "It is common ground on this appeal that, following the decision of the House of Lords in *Sunningwell*, registration of a town or village green on the basis of twenty or more years' user as of right depends upon showing that such user was *nec vi, nec clam, nec precario*. This test is traceable back to the common law and to the Prescription Act 1832. It has subsequently been applied in *R (on the application of Beresford) v Sunderland City Council* [2004] 1 AC 889 and, most recently, by the Supreme Court in *R (on the application of Lewis) v Redcar and Cleveland BC (No 2)* [2010] 2 AC 70."

At paragraph 37 he set out what he regarded as "the most informative explanation of the content of this principle" quoting extensively from the judgment of Lord Rodger in *Lewis* – see paragraphs 87 to 90 of that judgment – before continuing at paragraph 38:-

> "If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable."

In the paragraphs that followed Patten LJ considered how these principles were to be applied given findings of fact by Morgan J to the effect that the Curtis family had erected signs which had been vandalised and/or torn down but also that a number of local inhabitants using the land had never seen any signs. His conclusions on these issues are to be found at paragraphs 59, 60, 63 and 64. The salient parts are as follows:-

> "59. … The issue between the parties is therefore a relatively narrow one which is whether the Curtis family had, in the circumstances, done enough by putting up and from time to time replacing the signs or whether they should have taken other steps such as the notices in the local papers or the leaflets suggested by [a local inhabitant].
>
> 60. It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?

> …..
>
> 63. It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger in *Redcar (No. 2)*) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor [a local inhabitant] is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious.
>
> 64. It follows from this that the Curtis family were not required to take other steps such as advertising their opposition in order to rebut any presumption of acquiescence. In my view, the judge was correct to hold that there was not user as of right for the requisite twenty years."

43. It should be noted that other issues arose in *Taylor* upon which there was something of a divergence of view in the Court of Appeal. Upon the issue relating to the application of the phrase "as of right", however, Sullivan and Carnwath LJJ expressly agreed with the analysis and conclusion of Patten LJ as set out above.

44. I am bound by the decision in *Taylor* unless it has been overruled by a decision of the Supreme Court. As far as I am aware, the only decision of the Supreme Court subsequent to *Taylor* which has any potential bearing upon it is *R (Barkas) v North Yorkshire County Council* [2015] AC 195.

45. The facts in *Barkas* are sufficiently stated in the headnote. A local authority acquired land under section 80 of the Housing Act 1936 as a site for the erection of houses. It laid out and maintained a field lying within the land as a recreation ground for the benefit of those living in the houses as it was entitled to do pursuant to the same section and its successor, section 12(1) of the Housing Act 1985. A local resident applied to the registration authority to register the field as a green pursuant to section 15 of the 2006 Act. The registration authority refused the application finding that although the local inhabitants' use of the field met all the other requirements under section 15, user had been by right and so not "as of right", within section 15(2). The consequent application for judicial review of the registration authority's decision was dismissed and appeals to the Court of Appeal and Supreme Court failed.

46. *Taylor* is not referred to in any of the judgments of the Justices of the Supreme Court. There is nothing within the judgments of their Lordships to suggest that they considered that *Taylor* was wrongly decided and/or should be overruled. The only real significance of *Barkas* to the arguments before me is the references in the judgments of Lords Neuberger and Carnwath to the suggestion made in the speech of Lord Scott in *Beresford* to the effect that the phrase "as of right" might have a

different meaning and/or may be applied differently in different statutory contexts. Lord Carnwath was prepared to accept the validity of this approach – see paragraphs 58 to 68. Lord Neuberger (with whom Baroness Hale, Lord Reed and Lord Hughes agreed) was prepared to accept that it might be possible (exceptionally) that cases involving claims relating to the registration of greens might arise in which a straightforward application of the tripartite test (*nec vi, nec clam, nec precario*) would not be sufficient to determine the question of whether user had been "as of right", but he "was doubtful about that" – see paragraph 60 of his judgment.

47. So far, all the cases discussed are cases in which registration under the Acts of 1965 or 2006 was under consideration. The case which has caused so much debate in this case was not. The *Winterburn* case was about the acquisition of a private right – an easement. The facts were these. For a period of more than 20 years the claimants had operated a fish and chip shop that was adjacent to a car park which formed part of club premises. Throughout that period the claimants' suppliers would park their vehicles in the car park up to nine times a day while making their deliveries and the claimants' customers would park there while buying their fish and chips. This was despite the fact that, for most of that period, two signs erected by the club owners, one attached to a wall at the entrance to the car park, the other in the window of the club premises, stated that the car park was private and for the use of club patrons only. Following a dispute with the occupiers of the club, the claimants applied for registration of a right of easement for themselves and their customers to park in a particular part of the car park on the ground that they had acquired such right as a result of 20 years' continuous user "as of right". The First-Tier Tribunal upheld the claim. However, on appeal to the Upper Tribunal, the decision of the First-Tier Tribunal was reversed and the claimants' subsequent appeal to the Court of Appeal was dismissed.

48. Before the Court of Appeal the issue to be decided was formulated by David Richards LJ as follows:-

> "8. The issue on this appeal is whether the signs were sufficient to prevent the claimants acquiring a right to use the disputed land as a car park for themselves and their suppliers and customers or whether the owners of the car park had acquiesced in such use so as to entitle the claimants to such a right, notwithstanding the presence of the signs."

He went on to describe that the claimants based their claim to such a right upon the doctrine of prescription by "lost modern grant". In the words of David Richards LJ, this required the claimants to show "20 years' uninterrupted user 'as of right' that is to say without force, without secrecy and without permission (nec vi, nec clam, nec precario)". In his view, with which Sharp LJ and Moylan J (as he then was) agreed, the existence of the signs were sufficient to prevent the claimants in that case from acquiring the rights in question.

49. For much of his judgment David Richards LJ considered and analysed a number of authorities including *Sunningwell*, *Lewis* and *Taylor*. A significant part of his judgment was devoted to an analysis of the judgment of Patten LJ in *Taylor*. At paragraph 31 David Richards LJ noted that although *Taylor* was a commons

registration case "it is common ground that the same principles apply to the law of prescription".

50. In my judgment there can be no doubt that *Taylor* and *Winterburn* constitute authority for the proposition that where an owner of land has made his position about its use clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right" – see the paragraphs from *Taylor* quoted at paragraph 40 above and paragraph 40 in *Winterburn* itself. That is so, in my judgment, whether the claim relates to registration of a town or village green or the acquisition of a private right.

51. The judgment of the Court of Appeal in the appeals mentioned in paragraph 9 above, namely, *R (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs* and *R(NHS Property Services Ltd) v Surrey CC* [2018] EWCA Civ 721, are significant, principally, by reason of the issues raised in relation to ground 5. It is worth noting at this stage, however, that one of the issues for determination in the *Lancashire CC* case was whether the user of the land in question by local inhabitants had been "as of right". In his judgment (with which Jackson and Thirlwall LJJ agreed) Lindblom LJ considered this issue at paragraphs 81 to 86. It is clear that he equated the phrase "as of right" in the 2006 Act with the phrase nec vi, nec clam, nec precario and that he considered that the issue of whether user had occurred "as of right" under the 2006 Act was to be determined by applying the Latin phrase to the facts of the particular case. In my judgment, nothing contained in paragraphs 81 to 86 of *Lancashire* casts any doubt upon the principles formulated by Patten LJ in *Taylor* or David Richards LJ in *Winterburn*.

52. In the light of the authorities to which I have referred I have reached the clear conclusion that the decision in *Taylor* is binding upon me. There is no basis for concluding the speeches of Lord Scott in *Beresford* or Lord Carnwath in *Barkas* somehow overrule the ratio in *Taylor*. Such a conclusion would drive a coach and horses through the doctrine of precedent. The debate in those cases, such as it was, about whether the phrase "as of right" might be open to differing interpretations depending upon the context in which the phrase was being applied, interesting as it may be, cannot deflect me from my obligation to apply authorities which are clearly binding upon me. To repeat, the principles formulated in *Taylor* are directly applicable in this case and its ratio is binding upon me. *Winterburn* applies *Taylor* in the context of private easements and at the level of the High Court and Court of Appeal, at least, it is perfectly clear that those decisions sit side by side, consistent with each other, and binding upon me.

53. When writing his report the Inspector was obliged to ascertain the legal principles relevant to the interpretation of the phrase "as of right" and then apply that phrase in accordance with those principles. I have reached the clear conclusion that the Inspector's analysis of the law relating to the phrase "as of right" was correct. He was also correct, in my judgment, when he concluded that the use of land by local inhabitants would be made contentious by the erection of sufficient and suitably placed signs which were visible to users of the land and which had been seen by a significant number of persons using the land. That was the clear and concise legal basis upon which he approached the evidence as to whether the local inhabitants' use of the land was "as of right".

54. I have set out the Inspector's conclusions about the sufficiency and location of the signs from the mid 1980s at paragraph 22 above. In summary, he considered that the signs erected by Avon County Council were sufficient to render the inhabitants' use of the land contentious. Further, and very importantly, his view was that at the time of his inspection of the land 2 of the 3 signs were still in situ and still obviously visible. A close scrutiny of the Inspector's reasoning demonstrates that he did not consider that there had been any material change of circumstances following the erection of the signs (so far as their visibility was concerned or the significance of their location) save of course that one of the signs had been removed in or about 1996/7.

55. Was the committee entitled to reach a different view from that of the Inspector upon the legal significance of the 3 Avon County Council signs? In my judgment it was not given the clear record in the minutes that the committee accepted that when the signs were erected "the Avon County Council signage had made the position sufficiently clear that use of the site was contentious and not 'as of right'." I appreciate that some members of the committee went on to conclude that this state of affairs had changed "over time". From the evidence available, however, (including the witness statement of Councillor Abraham dated 9 November 2017) there is no basis upon which it would be proper to conclude that the committee ever considered whether this change had taken place by March 1991 i.e. by the beginning of the requisite 20 year period. The Inspector's view was clear, namely, that between 1991 and 1996 the signage which existed on the land was sufficient to make the use of the land by the local inhabitants contentious. I simply do not accept that the committee addressed its mind to this part of the Inspector's findings which were central to the issue of whether 20 years' user "as of right" had been established.

56. In my judgment, this is not a case in which the Committee took a decision to depart from the conclusion of an inspector on the basis of a justified difference in view about the relevant facts. Rather, this is a case in which the Committee, having accepted a crucial finding by the Inspector as to the legal significance of the signs when they were first erected, failed, erroneously and unlawfully, to analyse the evidence and the further findings of the Inspector as to when, if at all, the situation "on the ground" had changed materially so as to permit of a conclusion that the signs were no longer sufficient to make contentious the use of the land by the local inhabitants. Once the Committee had adopted the findings of fact made by the Inspector as to the extent and visibility of the signage as at the date the signs were erected it was necessary for the committee to consider in detail whether the state of affairs existing at the date of the erection of the signs had changed, materially, at the commencement of the 20 year period. That was especially so given the clear findings of the Inspector that the signs were in existence between 1991 and 1996 and, further, his findings that a significant number of local inhabitants had actually seen the signs during that period. The committee did not undertake that analysis. In reality what the committee decided was that the case before them was very different on the facts from the facts in *Winterburn*. That, so far as it goes, is not controversial. However, that was no basis upon which to depart from the Inspector's conclusions given that both the Inspector and the committee were at one as to the legal significance of the signs when Avon County Council first erected them.

57. In my judgment ground 1 is made out.

58. I can deal with ground 3 much more succinctly. I am satisfied that the committee was under a duty to provide reasons for its decision to depart from the recommendation of the Inspector. That is conceded on behalf of the registration authority but, in any event, in my judgment, it would be unthinkable that it would be permissible for the registration authority to depart from the recommendation of an Inspector who had produced a closely reasoned and detailed decision letter after hearing oral evidence over many days without providing its own reasons for that departure.

59. The obligation of the committee was to provide sufficient reasons to enable the parties to understand why it had departed from the recommendation of the Inspector and reached a different conclusion as to the legal significance of the existence of the Avon County Council signs. The only reason provided which, potentially, fell into that category was reason (iv) (paragraph 28 above). Reduced to its essentials, the majority of the Committee was of the view that the number and nature of the signs erected by Avon County Council did not make the use of the land contentious given the size of the area of land in issue. That reasoning, however, did not begin to explain how such a conclusion was justified given that the committee had expressly concluded that, upon erection, the signs had been sufficient to make the use of the land contentious. Further, it was necessarily central to the committee's decision that sometime after the erection of the signs but before March 1991 there had been material changes of circumstances which meant that the signs were no longer sufficient. No attempt was made by the committee to identify the material change of circumstances and/or to explain the reasons why the members were satisfied that the changes had occurred by March 1991.

60. I should say that I am satisfied, too, that the Committee failed to explain the basis upon which it felt able to reject the Inspector's conclusion upon the sufficiency of the signs based, as it was, upon a minute examination of the oral and written evidence and visits to the site. In my judgment, it was not sufficient simply to assert that the facts in *Winterburn* were very different from the facts in the instant case (although I accept that to be correct, so far as it goes) and to point out that the area of land in the instant case was so large that 3 signs were not sufficient. There was no attempt by the Committee to explain the significance or lack of it of the finding by the Inspector that a substantial number of persons using the site had seen the signs. As is clear from his report that finding was crucial to the Inspector's reasoning and yet, apparently, it was ignored by the Committee.

61. I have taken account of the written and oral submissions of Mr Morgan who has sought to defend, robustly, the reasoning process of the Committee. In essence, however, he has proceeded on the basis that the Committee was entitled to depart from the Inspector's recommendation by virtue of its view, said to be justified, as to the sufficiency of the signs erected by the County Council given the area of the land in question. The difficulty is that Mr Morgan was unable to advance any argument which suggested that the Committee had grappled with let alone given reasons for the inconsistency between its "ultimate" view about the sufficiency of the signs and its finding that the signs, as erected, were sufficient to make the use of the land contentious.

62. In my judgment, ground 3 is also made out.

Ground 2

63. There are two aspects to this ground of challenge. First, it is submitted that the committee took account of irrelevant matters in that, during the course of the proceedings on 12 December 2016, Councillor Abraham, in particular, raised matters which were irrelevant. Second, the Claimant complains that it was given no indication, prior to the committee's decision, that it had received a substantial number of representations to the effect that the Inspector's reliance upon *Winterburn* was wrong and/or that the decision in *Winterburn* was distinguishable on the facts. That is said to constitute a breach of a duty upon the committee to act fairly in its consideration of the application for registration.

64. I can deal with the first aspect very shortly. I have no doubt that during the course of a public hearing such as took place on 12 December 2016 lay members of a decision-making committee may, from time to time, raise points which, strictly, are not relevant to the issue under consideration. No doubt, too, some of the persons who were invited to speak at such a meeting are likely to raise matters which are of limited relevance or no relevance at all. That does not mean that a court should conclude that irrelevant matters have been taken into consideration. In my judgment, in the absence of specific evidence pointing to a contrary conclusion, the normal inference to be drawn is that the decision-making body will, through a process of discussion and debate, establish what is relevant and what is not and base its decision on relevant material only. In my judgment that was very likely to be the case, when, as here, the committee was advised expressly not to take account of comments by councillors – see paragraph 27 above.

65. In my judgment there is a dearth of any reliable evidence which suggests that any member of the committee took account of irrelevant material. In reaching that conclusion I appreciate, of course, that Councillor Abrahams acknowledges in his witness statement that he did raise points about which complaint is now made. By way of example only the Councillor frankly acknowledges that during the course of the meeting he raised the issue of dog fouling in the context of why it was that Avon County Council had erected the signs.

66. I am far from convinced that the so called extraneous matters raised by Councillor Abrahams were wholly irrelevant. In my judgment it was not impermissible for him to provide the committee with his recollection as to the circumstances in which the signs had been erected and the purpose for which they were erected – to combat dog fouling. That said, there is no indication that this issue or any other matter about which complaint is made played any real part in the decision reached either by the committee as a whole or by Councillor Abrahams in particular. He is unequivocal in his witness statement that the basis for the decision reached by those in favour of a registration was that the signs erected by Avon County Council were not and had never been sufficient to make the use of the land contentious. I am disposed to accept that evidence notwithstanding that it is evidence of a type about which a court is naturally cautious given that it is an "after the event" explanation of a reasoning process.

67. I am not prepared to hold that the committee took account of irrelevant matters in reaching its conclusion about registration.

68. I turn to the issue of whether the Claimant was treated fairly.

69. There can be no doubt that Councillor Abrahams received email correspondence following the Inspector's report which was directed to him personally. Without exception, the correspondence was from those who favoured the land being registered. Councillor Abrahams responded to some, if not all, of those emails by informing the correspondent that his/her views would be taken into account by the committee in its decision-making process.

70. It is also the case that a very substantial number of emails were sent to Bristol City Council via an email address which was dedicated for the purpose of receiving representations about decisions to be made by the Council.

71. It is common ground that no steps were taken by the registration authority to disclose any of these representations to the Claimant prior to the meeting on 12 December 2016.

72. I would accept that a registration authority faced with competing views upon an application to register land as a town or village green should consider whether the views expressed by those on one side of the debate should be disclosed to those expressing a contrary view before a decision is taken. However, whether a duty of disclosure arises in any particular case in order to satisfy the requirements of fairness must, inevitably, depend upon the nature and quality of the representations which have been made. I am certainly not persuaded (if it is being suggested) that the duty of fairness in all cases of this type demands that every piece of paper received by a decision-making authority must be disclosed to every person having an interest in the outcome under consideration.

73. The representations received by Councillor Abrahams personally and by the registration authority via the dedicated email address were either general expressions of support for registration or an expression of view to the effect that the factual circumstances pertaining in *Winterburn* were wholly different from those pertaining in this case. I am satisfied that the duty to act fairly did not mean that it was necessary for the registration authority to disclose to the Claimant general expressions of support. Was it necessary for the authority to disclose specific representations about the effect of the decision in *Winterburn* i.e. send all the representations on this issue to the Claimant? In my judgment, it was not. It was plain and obvious from the time of the public inquiry that Mr Mayer and those in favour of registration would seek to persuade the Committee that *Winterburn* was distinguishable on the facts. That is what he had done before the Inspector. This was not a novel point despite the suggestion to the contrary in the submissions by Mr Ground QC. Indeed, far from being novel, the effect of the decision in *Winterburn* was one of the main battles which were fought at the inquiry. In my judgment, it was obvious that Mr Mayer and/or any other person who supported registration who was permitted to speak at the Committee meeting would argue that the Committee should not consider itself bound to follow *Winterburn* because its facts were so very different. In substance the representations received in advance of the meeting on 12 December 2016 said nothing more than that.

74. It is perhaps more debateable as to whether the duty to act fairly required the registration authority to have at least alerted the Claimant to the fact it had received a

large number of representations suggesting that *Winterburn* was distinguishable on its facts and that the committee should take a different view from the Inspector about the significance of that case. On balance, however, I am not persuaded that was necessary on the facts of this case. After all, the Claimant was represented by a formidable legal team who could have been under no illusions as to what was going to be said by Mr Mayer and others about *Winterburn*; the claimant was well able to anticipate what would be said about *Winterburn* and deal with those submissions appropriately.

75. I would not uphold ground 2. If contrary, to my view, ground 2 was made out I could envisage a lively debate, at the very least, about whether any relief should be afforded but that does not arise given my conclusion.

Ground 4

76. During the course of the inquiry evidence was adduced to the effect that when organised sports were being played upon those parts of the land upon which pitches were laid out (as they were throughout the relevant period) local inhabitants did not have access to the areas upon which the sports were being played. Further, evidence was presented to the Inspector that from time to time "sports days" took place on the land and that when these events occurred much of the land was in use and, in consequence, local inhabitants had no access to it. In the light of this evidence, the Claimant sought to argue before the Inspector that the proper inference to be drawn from these "exclusions" was that the use of the land by local inhabitants on other occasions was with the permission of the landowner and in consequence the use of the land by the local inhabitants was not "as of right". Central to the argument on this issue was the decision of HHJ Robert Owen QC in *R (Mann) v Somerset County Council* [2017] 4 WLR 170.

77. In *Mann* the application for registration related to a field which was in the same ownership as an adjoining hotel and car park. The field was used by local inhabitants for recreational purposes but the landowner occasionally used part of the field for a beer festival and funfair. A charge was made for entrance to the field when the festival was taking place. Following an inquiry the Inspector concluded that the occasional exclusive use of part of the field by the landowner implied that the use of the entirety of the field by local inhabitants on other occasions was with the permission of the landowner. HHJ Owen QC (quite correctly) described the issue before him as being whether the Inspector was entitled to come to that conclusion in the light of the evidence before him. He concluded that he was. It is to be noted that it had been argued before the Inspector on behalf of the applicant for registration that the facts in *Mann* where such that it was indistinguishable from the case of *Lewis* – as to which see below. The Inspector had concluded otherwise and HHJ Owen QC was of the same view.

78. Ground 4 as formulated in the statement of facts and grounds is an allegation that the committee fell into legal error in that it failed to give reasons for rejecting the Claimant's submissions based upon *Mann*.

79. As is already apparent the reasons given by the committee for acceding to the application for registration were very short. However, that is not altogether surprising since on all aspects of the case, save for the sufficiency of the signs on the land, the

committee accepted the reasoning and recommendations of the Inspector and said so in terms in reason (i) (see paragraph 28 above).

80. Somewhat surprisingly, although *Mann* was cited to the Inspector he does not mention it in his report. In his earlier report of 22 May 2013 a whole section had been devoted to the arguments which had been presented on the basis of *Mann* but there was no such section in the Inspector's report of 14 October 2016.

81. Following the publication of the report of 14 October 2016 the landowner made representations to the registration authority to the effect that if it was going to depart from the Inspector's recommendation and accede to the application for registration the committee should provide reasons for rejecting the submissions that had been made on the basis of *Mann*. As is I have pointed out already the committee gave no reasons other than to say it accepted the Inspector's findings except for those relating to signs.

82. It is tempting to uphold this ground on the narrow basis that neither the Inspector not the committee grappled with the decision in *Mann*. It is not mentioned in the Inspector's report of 14 October 2016; nor is it referred to by the committee either in the minutes or in its reasons. However, such an approach would be over simplistic. In my judgment the real issue is not whether the Inspector/committee should have made specific reference to the decision in *Mann* but rather whether the Inspector grappled with the argument which I have set out at paragraph 76 above and gave sufficient reasons for concluding that the use of the land by local inhabitants had not been permissive i.e. with the permission of the landowner.

83. At paragraph 19 above I have set out the Inspector's summary of the "core facts". He concluded that there had been a number of uses upon the land over many years. Between paragraphs 343 and 360 the Inspector analysed the evidence relating to these uses under the heading "Co-existence of the significant use for lawful sports and pastimes with the use of the land by schools and sports clubs". At paragraph 354 he concluded that "as a matter of fact …school and sports club use co-existed with use by local inhabitants throughout the relevant twenty year period". It was upon that basis that the Inspector concluded that it was not appropriate to infer that the use of the land by local inhabitants had been permissive as suggested by the Claimant and the landowner.

84. In so concluding it is clear that the Inspector was following the approach of the Supreme Court in *Lewis*. In this case the land which was the subject of the application for registration had been used within the relevant 20 year period as part of a golf course which was regularly used by members of a private golf club. During the same period local inhabitants had used the land for informal recreation without interfering with or interrupting play by the golfers. The Inspector found that the local inhabitants' use of the land was not "as of right" because the local inhabitants had "overwhelmingly deferred" to the extensive use of the land by the golfers and recommended against registration of the land. The registration authority accepted his recommendation and a claim for judicial review of that decision was rejected at first instance and in the Court of Appeal. In the Supreme Court the appeal by the applicant for registration succeeded. The Court held that it was possible for the rights of the local inhabitants and landowner to co-exist, depending, always, upon the precise factual circumstances. Upon the facts as found by the Inspector the court concluded

that the correct inference was not that the use of the land by the local inhabitants was permissive but rather that both the landowner and the local inhabitants had rights over the land.

85. In substance that is what the Inspector concluded in the instant case. That conclusion is not challenged. In my judgment there can be no doubt that the Inspector gave appropriate reasons for reaching that conclusion both in the paragraphs which I have referred at paragraph 83 above and at paragraph 364 of his report in which he considered whether the landowner ever permitted the use of the land by local inhabitants.

86. In making a judgment about whether it is proper to infer that the use of land by local inhabitants has taken place with the permission of the landowner the facts are all important. I accept Mr Morgan's submissions to that effect. In my judgment the Inspector was entitled to conclude on the facts as he found them to be that the rights of the landowner and the rights of the local inhabitants were capable of co-existing and that it was not appropriate to infer that the inhabitants' use had been with the permission of the landowner. Ultimately, of course, the Inspector found that the local inhabitants had not established that they had used the land "as of right" on account of signs erected upon the land in order to prohibit use by local inhabitants. Upon the assumption that legal effect of the signs had not been as found by the Inspector he was entitled to conclude that the local inhabitants had not used the land with the permission of the landowner. Further, I do not consider that the decision in *Mann* compelled the contrary conclusion. *Mann* is a case which turns very much on the facts found by the Inspector and the inferences drawn by him.

87. I consider that adequate reasons were given by the Inspector (which were adopted by the committee) for concluding that the use of the land by the local inhabitants was not permissive and accordingly I do not consider that this ground of challenge is made out.

Ground 5

88. I turn to the issue of statutory incompatibility. In *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 the Supreme Court held that section 15 of the 2006 Act did not apply to land which had been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which was held for statutory purposes that were inconsistent with its registration as a town or village green. That conclusion was reached in the context of an area of land within a port and over which the port authority exercised statutory functions and powers. In the instant case the Claimant argued before the Inspector that the land was held for statutory purposes and that these purposes were inconsistent with its registration under section 15 of the 2006 Act. Following a detailed analysis of the points for and against the Claimant's contention, the Inspector concluded that registration under the 2006 Act was not incompatible with the various statutory provisions which had been relied upon by the Claimant to support its argument – see paragraphs 413-452 of the Inspector's Report.

89. By the time of the hearing before me there were two first instance decisions which had applied the principles formulated in *Newhaven*. They were the decision of Ouseley J in *R (Lancashire County Council) v The Secretary of State for the*

Environment, Food and Rural Affairs [2016] EWHC 1238 (Admin) and the decision of Gilbart J in *R (NHS Property Services Ltd) v Surrey County Council* [2016] 4 WLR 130. Notwithstanding that both Ouseley J and Gilbart J were applying principles formulated in *Newhaven*, I found it difficult to reconcile aspects of their respective reasoning. I was told that each of their judgments was under appeal and that both judgments were being considered by the same constitution of the Court of Appeal. As I have said, I determined that I should await the judgment of the Court of Appeal before determining ground 5 – see paragraph 9 above.

90. Following the handing down of the decision in these appeals (henceforth referred to as "*Lancashire*") the legal representatives of the parties provided me with written representations upon the effect of the decision upon the issues in this case. I am very grateful to the lawyers for producing their submissions so promptly. That enabled me to complete my judgment relatively swiftly.

91. As I would expect from such experienced lawyers there is no material difference between the parties as to the approach which I must follow. The judgment of Lindblom LJ in *Lancashire* makes it clear that the overarching principles to be applied are those formulated by Lord Neuberger in *Newhaven*. The task of the Court in every case in which statutory incompatibility is said to arise is to apply those overarching principles to the relationship between the provisions of the 2006 Act concerning registration and the statutory powers and duties said to relate to the land in question. Statutory incompatibility will be made out so as to defeat registration as a green only if the land in question is held for a defined statutory purpose and the registration of the land would allow local inhabitants to acquire rights which were incompatible with the continuing use of the land for those statutory purposes. In each case the relevant statutory provisions must be interpreted with care so as to permit of an analysis as to whether the statutory purposes for which the land in question is held would be defeated by registration.

92. It is also worth emphasising that Lindblom LJ specifically approved the approach which Ouseley J had adopted in the *Lancashire* case. That has some importance given the way in which the Inspector reached his conclusions on the issue of statutory incompatibility. It is important, too, because the somewhat different approach adopted by Gilbart J had been relied upon to a significant extent in the original submissions advanced by Dr Bowes on behalf of the Claimant.

93. Let me begin with the approach of the Inspector. He began the section of his Report dealing with statutory incompatibility by setting out what he considered to be the relevant statutory powers and duties of the landowner, education authority and occupier of the land. It is as well to identify the statutory provisions referred to by the Inspector. First, he referred to the duty under sections 507A and 507B of the Education Act 1996 whereby a local authority must secure that facilities for primary and secondary education include adequate facilities for recreation and social and physical training for children and young persons. Second, he referred to the powers conferred upon local authorities under sections 120 to 122 of the Local Government Act 1972 to acquire land, either by agreement or compulsorily, and to appropriate land within its ownership from one purpose to another. Third, the Inspector identified provisions specific to academies. At paragraph 418 he wrote:

> "As regards the statutory duty of an Academy to provide outdoor space, by section 94 of the Education and Skills Act 2008, the Secretary of State may by regulations prescribe standards for independent educational institutions, of which Academies (specific provision for which is contained in the Academies Act 2010) are one. By regulation 3 of the Education (Independent Schools Standards) Regulations 2014, the relevant standard is provided by paragraph 29 to Schedule 1 of the Regulations:-
>
> "(1) The standard in this paragraph is met if the proprietor ensures that suitable outdoor space is provided in order to enable—
>
> (a) physical education to be provided to pupils in accordance with the school curriculum; and
>
> (b) pupils to play outside."

Earlier in his Report (paragraph 256) the Inspector had referred to evidence given by the Head Teacher of the academy, Ms Joanne Butler, to the effect that the academy had a duty under the same Regulations to keep its pupils safe. The fourth statutory provision referred to by the Inspector was the provision within the Academies Act 2010 which precludes an academy from "disposing" of a playing field without the consent of the Secretary of State.

94. It has not been suggested by the Claimant, nor could it be, that the Inspector failed to identify the statutory provisions which were relevant to the determination of the issue of statutory incompatibility.

95. Before setting out my conclusions upon this aspect of the case I should also identify one other matter which has exercised the parties. The Inspector found that the issue of whether registration should be refused on the grounds of statutory incompatibility should be determined by reference to the circumstances prevailing at the date of the application for registration. Mr Morgan and Mr Sharland QC submit that the Inspector was correct so to conclude. Mr Ground QC submits, however, that the Inspector fell into error in this conclusion. He submits that this issue should properly be addressed as at the date when the decision upon registration is being made. For reasons which will become apparent, it is unnecessary for me to reach a conclusion upon this discrete point. That being so, I decline to do so. The point is not without difficulty and, in my judgment, the point would be much better decided, definitively, when it matters and unencumbered by an *obiter dictum* of a retired judge.

96. With the exception of those provisions of the Academies Act 2010 which relate to the disposal of playing fields, none of the statutory provisions relied upon by the Claimant specifically relate to the land. There is no doubt that the land is and has been, at all material times, held by the landowner for educational purposes, but none of the specific statutory provisions either in the Education Act 1996 or in the relevant Regulations relate to the land itself. That is, in my judgment, obvious. Upon a fair reading of paragraphs 413 to 445 of the Inspector's Report he has concluded that the duties and functions of the landowner (as education authority in respect of educational

provision) can be carried out – albeit with difficulty (including financial difficulty) in some instances – even if registration takes place. I accept the submissions of Mr Morgan and Mr Sharland QC to that effect.

97. These conclusions of the Inspector are unimpeachable. They are based on a careful appraisal of the relevant statutory provisions and the evidence adduced before him. In my judgment, they are valid, equally, whether the assessment of alleged incompatibility is made as at the date of the application, October 2016, December 2016 or now.

98. I turn to the statutory provisions governing disposal of playing fields within the Academies Act 2010. This point arises, of course, upon the assumption that the date for assessing statutory incompatibility is the date of the decision upon registration. As at the date of the application the academy did not exist.

99. The relevant provisions are to be found in Schedule 1. Part 3 is headed "*Land held for the purposes of an academy*". Paragraph 17 is in the following terms:

> "(1) This paragraph applies to a disposal of publicly funded land that is held by a person ("P") for the purposes of an Academy.
>
> (2) P must give the Secretary of State notice of P's intention to dispose of the land.
>
> (3) In determining whether, and how, to give notice to the Secretary of State under sub-paragraph (2), P must have regard to any guidance given from time to time by the Secretary of State.
>
> (4) On receipt of the notice, the Secretary of State must—
>
> (a) decide whether to make a direction under sub-paragraph (7) in respect of the land specified in the notice, and
>
> (b) notify P of that decision.
>
> (5) P may not dispose of the land until P has been notified of the Secretary of State's decision.
>
> (6) If the Secretary of State decides to make a direction in respect of the land, P may not dispose of the land except in accordance with the direction.
>
> (7) The Secretary of State may make one or more of the following directions—
>
> (a) a direction that the land or any part of the land be transferred to such local authority as the Secretary of State may specify, subject to the payment by that local authority of such sum by way of consideration

(if any) as the Secretary of State determines to be appropriate;

(b) a direction that P pay, either to the Secretary of State or to such local authority as the Secretary of State may specify, the whole or any part of the value, as at the date of the direction, of the whole or any part of the land;

(c) a direction that the land or any part of the land be transferred to a person concerned with the running of an Academy, subject to the payment by that person or the Secretary of State of such sum by way of consideration (if any) as the Secretary of State determines to be appropriate;

(d) in the case of playing field land, a direction that the disposal is not to be made.

(8) In this paragraph—

(a) "playing field land" means land in the open air which is provided for the purposes of physical education or recreation, other than any land falling within a description prescribed under section 77(7) of SSFA 1998;

(b) references to a disposal of land include references to a change of use of the land in cases where the land is no longer to be used for the purposes of an Academy."

100. The Claimant submits that the acquisition of rights over the land by local inhabitants as a consequence of the registration of the land as a green would constitute a disposal of the land by the Claimant. It follows, submits Dr Bowes, that paragraph 17 of Schedule 1 applies and the acquisition of such rights consequent upon registration of the land would, inevitably, be incompatible with the Secretary of State's right, in appropriate circumstances, to refuse a disposal of the land.

101. The Inspector was disposed to doubt whether the registration of the land constituted a "disposal" within paragraph 17. Having given the matter some thought I would go further. In my judgment, the words "dispose" or "disposal" which are used in the legislation convey a state of affairs whereby the person making a disposal is voluntarily making a transfer of the land or rights over it or voluntarily changing the use of the land as the case may be. I do not accept that the words are apt to encompass circumstances in which transfers of land and/or rights over land and or changes of use of land occur against the will of the landowner or occupier and as a consequence of unrelated statutory provisions under which local inhabitants can acquire public rights through long and continuous user.

102. *Newhaven* and *Lancashire* make it clear that issues of statutory incompatibility are to be determined by reference to the appropriate interpretation of the statutes in question. I do not consider that the legislative provisions relating to the disposal of playing field land held for the purposes of an academy preclude the registration of such land as a town or village green.

103. I should also say that I agree with the Inspector that even if registration is to be regarded as a disposal, statutory incompatibility is still not made out. If registration constitutes a disposal, paragraph 17 provides a mechanism for seeking the consent of the Secretary of State for the disposal in question which must be obtained for the disposal to be lawful. In my judgment it must follow that he might intervene to argue that in a particular case registration would fall foul of the principle of statutory incompatibility. I stress, however, that I determine the issue of whether there is statutory incompatibility between Part 3 of Schedule 1 of the Academies Act 2010 and the 2006 Act in favour of the Defendant on the basis that there would be no disposal of the land in question.

104. In my judgment, ground 5 is not made out.

Conclusion

105. The Claimant has established grounds 1 and 3. It is, of course, open to the Defendant and or Mr Mayer to seek to persuade me that notwithstanding that conclusion no relief should be granted. I am sure that Mr Morgan and Mr Sharland QC will appreciate that this is likely to be a very difficult task given my reasons for finding that the committee acted unlawfully. However, I make it clear that I will receive and evaluate any submissions which they wish to make on that issue either at the handing down of the judgment or following receipt of written submissions. If the parties can agree an order consequent upon this judgment there need be no attendance at the handing down. If there are matters outstanding I will deal with them either at the handing down of this judgment or following the receipt of written submissions as the parties prefer.