"As of right": Where Are We Now?

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In three major cases over the last two years the senior courts have once again considered the meaning of the phrase "as of right".[1] All three cases concerned the application of the test in the context of the Commons Act 2006 s.15 and, in particular, examined whether the claimed use was *precarious*. This article examines these three cases and attempts to distil a set of clear principles to apply when considering whether claimed use of land is as of right.

The context

Any person may apply to register any land as a town or village green provided the criteria at the Commons Act 2006 s.15 are met. Those are that a significant number of the inhabitants of either a locality, or a neighbourhood within a locality have indulged, as of right, in lawful sports and pastimes for a period of at least 20 years. Lord Hoffmann held in *R. v Oxfordshire CC Ex p. Sunningwell Parish Council*[2] that the phrase "as of right" in the Commons Registration Act 1965 (the predecessor to the 2006 Act) had the same meaning as it did under the Prescription Act 1832 and the Rights of Way Act 1932. That is to say, use that is *nec vi, nec clam* and *nec precario* (peaceable, open and without permission). As such, "as of right" should be read to mean as *if* of right, but not actually by permission of the owner.

In *R. (on the application of Beresford) v Sunderland CC*[3] the House of Lords examined in particular whether the claimed use of a publicly owned space, Princess Anne Park in Washington, was use *precario* or as of right. The Council had identified the land as "parkland/open space/playing field", and it had been laid out as such with benches and was regularly maintained by the Council. The formulated issue on appeal before the House of Lords was whether the maintenance of the land had amounted to an implied licence to use the land, rendering the use *precario*. However, in the course of argument, the House invited submissions on the broader question of whether the statutory powers under which the Council held the land gave rise to a permission to use the land.

The House allowed the appeal and directed that the land be registered as a new village green. Whilst it was accepted that permission may be communicated by conduct, maintenance alone was not sufficient; rather some positive act would be required to communicate the permission and render the use *precario*.[4] The House acknowledged the powers under which the land was held were "very wide"[5] (wide enough to include dedicating the land for public recreation) and noted that the users were "certainly not trespassers".[6] It was also held, obiter, that where land was held under the provisions of the Open Spaces Act 1906 s.10 or where, there was no "public trust" in the "strict sense" but land had been appropriated for the purpose

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[1] *R. (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31; [2014] 2 W.L.R. 1360; *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2015] UKSC 7; [2013] 3 W.L.R. 1433 and *R. (on the application of Naylor) v Essex CC* [2014] EWHC 2560 (Admin); [2015] J.P.L. 217.

[2] *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 at 354; [2000] J.P.L. 384.

[3] *R. (on the application of Beresford) v Sunderland CC* [2003] UKHL 60; [2003] 2 W.L.R. 1306.

[4] *R. (on the application of Beresford) v Sunderland CC* [2003] UKHL 60 per Lord Rodger at [59].

[5] *R. (on the application of Beresford) v Sunderland CC* [2003] UKHL 60 per Lord Walker at [89(a)].

[6] *R. (on the application of Beresford) v Sunderland CC* [2003] UKHL 60 per Lord Scott at [48].

of public recreation use would not be as of right.[7] However, ultimately, the House of Lords held that the land had not been appropriated to recreational open space and therefore the use was not rendered *precario*.

Whilst Sullivan LJ appeared to suggest in *Barkas*[8] that use pursuant to a statutory right was a separate conceptual category to use *precario*, which he termed "by right", it would now appear that such use is to be accommodated within *precario* use.[9] That accommodation is to be welcomed as the Supreme Court had previously held in *R. (on the application of Lewis) v Redcar and Cleveland BC*[10] that there is a closed list of three "vitiating factors" preventing otherwise qualifying recreational use maturing into a legal right.[11] It was also the view of commentators that use pursuant to a statutory right should be accommodated within the *precario* limb of the as of right test rather than a fourth vitiating factor.[12] However, as we shall see, the *precario* test would now appear to operate differently depending on the identity of the landowner.

R. (on the application of Barkas) v North Yorkshire CC[13]

Helredale Fields in Whitby, North Yorkshire was a recreational open space laid out as part of a housing scheme. It was held under the provisions of the Housing Acts. Unlike the Open Spaces Act 1906, land held under the Housing Act 1985 s.12(1)[14] could be put to a number of different uses besides just "recreation grounds" (notably for buildings to be used as such as shops or community centres) without the need for formal appropriation. It was therefore argued that, following *Beresford*, where the land is held under powers which allow it to be put to a number of different uses besides recreation, without the need formal appropriation, use of the land could not said to be *precario*. Further, by analogy to *Beresford*, use is still as of right even where the Council lay out the land as a recreational open space and encouraged use by maintaining it and providing seating. The Supreme Court unanimously dismissed the appeal, holding that the Council had been correct to refuse to register the land because the local inhabitants' use of the land had been *precario*. In dismissing the appeal, the Supreme Court resolved to expressly overrule a number of sections within *Beresford*.

Lord Neuberger explained the reasoning of the court:

> "... where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land 'as of right', simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."[15]

[7] *R. (on the application of Beresford) v Sunderland CC* [2003] UKHL 60 per Lord Walker at [87].

[8] *R. (on the application of Barkas) v North Yorkshire CC* [2013] EWCA Civ 1373 at [38]. See also Richards LJ in *R. (on the application of Newhaven Port & Properties Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWCA Civ 673 at [86].

[9] *R. (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31 per Lord Neuberger at [20] and Lord Carnwath at [51].

[10] *R. (on the application of Lewis) v Redcar and Cleveland BC* [2010] UKSC 11 per Lord Walker at [20].

[11] Being use which is *vi, clam* or *precario* i.e. not peaceable, open and without permission.

[12] On which most recently see, N. Pratt, "The 'by right' defence in village green registration" (2015) 7(2) *International Journal of Law and the Built Environment* 96.

[13] *R. (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31.

[14] And Housing Act 1936 s.80(1).

[15] *R. (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31 at [24].

Lord Carnwath, in a concurring judgment, maintained the principle that public authorities were not exempt from the Commons Act 2006 scheme per se. The distinction was illustrated by reference to *Oxford CC v Oxfordshire CC*[16] because:

> "... although the land was in public ownership, it had not been laid out or identified in any way for public recreational use."[17]

The rule in *Barkas* therefore would appear to be stated as follows: where the public law powers under which a public authority hold land permit it to dedicate that land for public recreation amongst other things, and the public authority then lay out the land for recreation, the subsequent use of the land will be use *precario* and not as of right. Where the powers under which the local authority hold the land only permits recreational use (such as the Open Spaces Act 1906 s.9) the use will not be use as of right.[18]

However, such a rule is arguably undesirable because of its uncertainty. It will be recalled that rules must be clear and certain, enabling citizens to identify what laws prohibit, permit or require.[19] Whereas "appropriation" has a clear statutory meaning,[20] "lawful allocation" does not. It is submitted that the distinction drawn by Lord Carnwath between permitting recreation on public land, and lawfully allocating land for public recreation is unconvincing and unclear. Whilst it may have been clear on the facts of *Barkas* that the land was lawfully allocated for public recreation because of capital expenditure and maintenance of the land for public recreation, the situation is less clear in the case of natural woodland such as the Trap Grounds in *Oxfordshire*.[21] In such a situation one would not expect a great deal of maintenance or capital expenditure, although one might expect some in the form of lighting, litter bits and made-up tracks for example. Although, in such a situation, how can it be clear what the law requires of a public authority landowner to demonstrate "lawful allocation". To the extent that a bright-line can be identified, it might be said that it is positive conduct on the part of the landowner that demonstrates the "lawful allocation" arising from a "formal decision".[22] The lack of such positive conduct arising from the exercise of the City Council's public law powers over the Trap Grounds allowed the inference to be drawn that it had not allocated the land for recreational purposes and the use was therefore as of right. The distinction is however very fine and the issue would appear set for future litigation.

Another uncertainty in the system has recently been resolved. It had been thought by some and had been the conclusion of a number of inspectors, that appropriation of land between statutory uses could be inferred by the manner with which a local authority had dealt with and managed the land. Much needed clarity was distilled by Dove J in the recent case of *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs*.[23] The case related to Eastern Fields, a large area of open land owned by Exeter City Council. In 1989 the Council, pursuant to its powers in the Local Government Act 1972 ss.122 and 123, formally appropriated the land from recreational use to be held for development purposes, and then disposed of for industrial use. It was not explored within the judgment whether that latter statutory holding power allowed public recreation as well as industrial use (as under the Housing Acts) although it is unlikely that was the case. The application to register the land as a village green was received on September 1, 2011 and, as Devon CC was a pilot authority under the Commons Act 2006, referred the determination of the application to the planning inspectorate. The Inspector concluded that the land had been "re-appropriated" to recreational use some time after 1989, around 2006/7. The Inspector

[16] *Oxford CC v Oxfordshire CC* [2006] UKHL 25; [2006] 2 A.C. 674; [2006] 2 W.L.R. 1235.
[17] *Oxford CC v Oxfordshire CC* [2006] UKHL 25; [2006] 2 A.C. 674; [2006] 2 W.L.R. 1235 at [66].
[18] cf. Austin-Baker and Mayfield, "Uncommon confusion: parallel jurisprudence in town and village green applications" (2012) 1 Conveyancer & Property Lawyer 55.
[19] L. Fuller, *Morality of Law* (New Haven, 1969), p.39.
[20] Local Government Act 1972 s.122.
[21] *Oxford CC v Oxfordshire CC* [2006] UKHL 25; [2006] 2 A.C. 674; [2006] 2 W.L.R. 1235.
[22] *R. (on the application of Barkas) v North Yorkshire CC* [2013] EWCA Civ 1373 at [42].
[23] *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin).

reached that view on the basis that the land had continued to have been managed by the Parks and Open Spaces Committee of the City Council, capital was spent upon it in connection with managing it as an open space, in 2006/2007 the City Council spent a sizable sum planting trees and maintaining trees on the land, and in 2009 a metaled cycle path was constructed.

Dove J held that neither the decision of the Court of Appeal and Supreme Court in *Barkas* had approved of a doctrine of implied appropriation, arising from the mere "manner of dealing or management of the land".[24] Accepting, as the Deputy Judge had in the frequently cited *Oxy-Electric Ltd v Zainuddin*,[25] that there is no prescribed requirement in the legislation to formally record an appropriation, Dove J held that such a finding did not give life to a doctrine that "by conduct alone appropriation can be inferred".[26] Rather, a local authority holding land for one purpose, cannot lawfully appropriate it for another purpose without "some conscious deliberative process",[27] from which it can conclude that the land is no longer required for the purpose for which it is held.[28] In constructing the legislation in that way, Dove J expressly endorsed the decision of HH Judge Kaye sitting as a Deputy Judge in *R. (on the application of Malpass) v Durham CC*,[29] and has delivered important clarity to a situation where the holding powers under which land is held do not permit public recreation. In such a situation, clear evidence will be required to demonstrate that appropriation has occurred, before it will be permissible to conclude that the land has been appropriated to power which permits public recreational use.

R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC[30]

The tidal beach in Newhaven was owned by a Port Authority, which exercised statutory functions in relation to the port as a whole. In pursuance of those statutory powers, the Port Authority's predecessors in title, the Southern Railway Company made bylaws in February 1931. The Court of Appeal found, on their objective construction, that those bylaws impliedly permitted recreational use of the beach.[31] However, as they had not been communicated to the users of the land the bylaws could not be said to render use *precario*.

However, the Supreme Court in allowing the appeal, held that where a right to use the land was derived from the public law, derived from statute, there it no need to communicate that permission to the user.[32] The public had a "public law right" to use the land for recreation.[33] As such, because the byelaws were made under statute and because, on an implied construction of their provisions, a right could be defined to use the land, the use was *precario* irrespective of whether those bylaws were communicated to the users.

Whilst the Court of Appeal's majority judgment was based on the decision in *Beresford*, which at that time had yet to be overruled, the Supreme Court on appeal re-stated the basic rule of implied permissions as follows:

> "The majority of the Court of Appeal, in agreement with Ouseley J, considered that it was essential that any licence be communicated to the inhabitants of the locality before it could be said that their

[24] *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin) at [31].
[25] *Oxy-Electric Ltd v Zainuddin* [1991] 1 W.L.R. 115; [1990] 2 All E.R. 902.
[26] *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin) at [21].
[27] *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin) at [22].
[28] Being the requirement at Local Government Act 1972 s.122(1).
[29] *R. (on the application of Malpass) v Durham CC* [2012] EWHC 1934 (Admin).
[30] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2015] UKSC 7.
[31] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 per Richards LJ at [86].
[32] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 per Lord Neuberger at [68]-[71].
[33] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 per Lord Neuberger at [71].

> usage of land was 'by right'. That is certainly the normal rule where one is concerned with a private land-owner."[34]

Lord Neuberger thus explained that:

> "... silence and inactivity on the part of a private landowner cannot, without more, amount to consent."[35]

However, the Supreme Court qualified that general rule by reference to a situation where:

> "... it is possible or appropriate to infer a consent or licence from the surrounding circumstances, even though there is no communication of a consent."[36]

Express reference is made in support of that contention to the decision of the Court of Appeal in *Alfred F Beckett Ltd v Lyons*.[37] In *Beckett*, it was held, obiter that no prescriptive right could be obtained to gather coal on the foreshore because it was "notorious that in many and indeed most places the use of the foreshore by the public for purposes of recreation and bathing is tolerated".[38] *Beckett* however, should be approached with extreme caution in contemplation of a village green application. First, as Lord Neuberger himself accepts it is of "limited assistance"[39] because of its own factual matrix, and that a central plank of the reasoning, that subjective belief of users is relevant, was dispelled in *Sunningwell*.[40] Secondly, *Beckett* was expressly disapproved of by the Court of Appeal in *Mills v Silver*,[41] Dillon LJ held that "there cannot be [a] principle of law" that "no prescriptive right can be acquired if the user ... has been tolerated without objection by the servient owner" as it would be "fundamentally inconsistent with the whole notion of acquisition of rights by prescription".[42] That passage in *Mills* has been approved three times by the House of Lords and Supreme Court.[43] Given that context Lord Neuberger concedes the principle in *Beckett* may therefore require "reconsideration"[44] and did not decide the issue. It would therefore have been preferable to explain that rule is that permission must be communicated by a private landowner to render the use *precario* and that such permission may be communicated by conduct, rather than leaving open a suggestion of yet another vitiating factor.

The rule can therefore be stated as follows: where a permission to use land for recreational purposes arises pursuant to the exercise of a public law power (such as the power to allocate land for recreation or to make by laws which impliedly permit recreational use) the subsequent use will be use *precario* and not as of right irrespective of whether that permission was communicated to the users. That we can say is public law permission. The rule for private landowners remains that a permission to use land must be communicated and that communication may be by conduct. That we can say is private law permission.

[34] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 per Lord Neuberger at [68]. It is well established of course that permission may be communicated by conduct. A good example of such communication by conduct is illustrated in *R. (on the application of Mann) v Somerset CC* [2012] EWHC B14 (Admin).

[35] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 at [55].

[36] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 per Lord Neuberger at [68].

[37] *Alfred F Beckett Ltd v Lyons* [1967] Ch. 449 CA.

[38] *Alfred F Beckett Ltd v Lyons* [1967] Ch. 449 CA per Harman LJ at 469A.

[39] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 at [44].

[40] *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 per Lord Hoffmann at 358H.

[41] *Mills v Silver* [1991] 1 Ch. 271.

[42] *Mills v Silver* [1991] 1 Ch. 271 per Dillon LJ at 279G-280B.

[43] *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 at 358F, in *R. (on the application of Beresford) v Sunderland CC* [2003] 3 W.L.R. 1306 at [5] and [6] and [79]–[82], and in *R. (on the application of Barkas) v North Yorkshire CC* [2014] 2 W.L.R. 1360 at [28].

[44] *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2013] EWCA Civ 276 at [68].

Naylor v Essex CC[45]

The resulting question from *Barkas* and *Newhaven* is what is the rule where local authority exercises its public law powers to maintain private land for recreational open space. The question was addressed by the High Court in *Naylor*. A triangle of land by the sea wall at Mill Lane Green, Walton-on-the-Naze was owned by private entity. The land had however been routinely managed by the local authority which had also erected a dog-waste bin on the land. The inspector (and in turn the Registration Authority) acceded to a submission that the local authority had maintained the land pursuant to the Open Spaces Act 1906 s.9. Where that is the case, the local authority is under a duty, by s.10(a) to:

> "... hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose."

Alternatively, that the land was maintained under the Public Health Act 1875 s.164, with similar duties to manage the land as a recreational open space.

As such, on either construction, the Registration Authority concluded that use of the land was *precario* as the use was pursuant to a statutory right in reliance upon the Court of Appeal's judgment in *Barkas*. That conclusion was however plainly not correct because the local authority had no ability to exercise exclude or acquiesce to use by local inhabitants, as was the case in *Barkas* and *Newhaven*, that power rested solely with the private landowner. That is significant because the proper analysis of use is between the landowner and the user, notably the response of the former in response to the indulgence of lawful sports and pastimes by the latter.[46] As Lord Neuberger held in *Barkas*:

> "It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so."[47]

On judicial review of the Registration Authority's decision not to register the land, John Howell QC (sitting as a Deputy Judge) appeared to implicitly accept the basis upon which the decision had been made was flawed, but justifiable on an alternative basis. Principally, that the landowner has impliedly permitted the use of the land by its (presumed[48]) agreement with the local authority to maintain its land as a public open space. The grass cutting and erection of a dog-waste bin by the local authority on the landowner's behalf was sufficient communication of that permission.[49]

In coming to that conclusion in those terms, the court has now delineated the limits of the new two sub-sets of *precario* use, private and public law permission. The first sub-set applies to a private landowner and requires communication of permission. That communication may be by conduct. The second sub-set, which applies to a public landowner following an exercise of its public law powers, does not need permission to be communicated in any form.[50]

As to the necessary conduct required of a private landowner, permission to appeal was in *Naylor* was sought on the basis that the permission had not been sufficiently communicated to the users. Permission to appeal was however dismissed both on paper and at an oral hearing on the basis that the Deputy Judge was correct to find that the implied permission had been sufficiently communicated by the grass cutting and erection of a dog waste bin. In *Beresford* however Lord Roger held that:

[45] *Naylor v Essex CC* [2014] EWHC 2560 (Admin); [2015] J.P.L. 217. The author declares his interest as counsel for the Claimant in this case.

[46] *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 per Lord Hoffmann at 352H–353A. *R. (on the application of Barkas) v North Yorkshire CC* [2014] 2 W.L.R. 1360 per Lord Neuberger at [21].

[47] *R. (on the application of Barkas) v North Yorkshire CC* [2014] 2 W.L.R. 1360 at [24] and [29]–[31].

[48] There was no evidence of such an agreement, rather the court, applying the presumption of regularity, presumed such an agreement must lawfully have subsisted per John Howell QC in *Naylor v Essex CC* [2014] EWHC 2560 (Admin) at [27].

[49] *Naylor v Essex CC* [2014] EWHC 2560 (Admin) at [59]. That conclusion was upheld on appeal by the Court of Appeal Lewison LJ on the papers, and by Blake J at an oral renewal hearing on March 25, 2015.

[50] See Lord Neuberger in *R. (on the application of Newhaven Port & Properties Ltd) v East Sussex CC* [2015] 2 W.L.R. 601 at [69].

> "In brief, neither cutting the grass nor constructing and leaving the seating in place justifies an inference that the owners of the Sports Arena positively granted a licence to local residents and others, who were then to be regarded as using the land by virtue of that licence, which the owners could withdraw at any time."[51]

As such, Lord Roger (in common with all other members of the Appellate Committee) found that there had not been any overt act such that an implied permission could be drawn.

However, the High Court's decision stands, endorsed by the Court of Appeal. *Naylor* therefore appears to lay down a more limited obligation upon private landowners to communicate their permission to users than that suggested in *Beresford*. Perhaps, as Richard Harwood QC observed in his case note, *Naylor* demonstrates a more cautious judicial approach to the creation of village greens since *Beresford*[52] (and arguably since *Oxfordshire* and *Lewis* as well).

Justification for two different sub-sets of precario (public permission and private permission)

Lord Walker first recognised the differences presented by public and private landowners in *Beresford*.[53] However, it was the Supreme Court in *Barkas* which gave effect to that distinction. Lord Neuberger held that:

> "It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."[54]

Lord Carnwath, in a concurring judgment, held that Smith J's first instance judgment in *Beresford* was "unimpeachable in common sense and in law". Smith J had held that:

> "In my judgment, the fact that land is in public ownership is plainly a relevant matter when one is considering what conclusion a reasonable person would draw from the circumstances of user. It is well known that local authorities do, as part of their normal functions, provide facilities for the use of the public and maintain them also at public expense. It is not part of the normal function of a private landowner to provide facilities for the public on the land. Public ownership of the land is plainly a relevant consideration."[55]

When considering the response of a public landowner to recreational use by inhabitants therefore, the question whether they have acquiesced in their use is more complex than in the case of a private landowner where there is "no room for ambiguity" and "no question of an alternative public use".[56] Silence and inaction might be explained not as toleration but as a result of a public law decision which gives rise to permission for the public to use the land. That might be a decision to allocate the land for public recreation as in *Barkas*, or to exercise public law powers to make bylaws which impliedly permit recreational use of the land as in *Newhaven*. As such the structure of the enquiry includes an extra step in the case of a public landowner.[57]

[51] *R. (on the application of Beresford) v Sunderland CC* [2003] 3 W.L.R. 1306 at [60].
[52] *Naylor v Essex CC* [2015] 2 J.P.L. 217 at [237].
[53] *R. (on the application of Beresford) v Sunderland CC* [2003] 3 W.L.R. 1306 at [86].
[54] *R. (on the application of Beresford) v Sunderland CC* [2003] 3 W.L.R. 1306 per Lord Neuberger at [24].
[55] *R. (on the application of Beresford) v Sunderland CC* [2001] 1 W.L.R. 1327 per Smith J at [45].
[56] *R. (on the application of Barkas) v North Yorkshire CC* [2014] 2 W.L.R. 1360 per Lord Carnwath at [62].
[57] cf. *Powell v Secretary of State for Environment, Food and Rural Affairs* [2014] EWHC 4009 (Admin) per Dove J at [31].

The removal of the need to communicate permission which is derived from the exercise of public law powers also removes the principal objection to accommodating "by right" within *precario* raised in the insightful article by Leslie Blohm QC.[58]

Conclusion

We can therefore say that to be use as of right, use must be peaceable, non-contentious and without permission. As to whether use is by permission, a decision-taker must first ascertain whether the landowner is a public authority or a private entity. If it is a private entity, to be permissive use, permission must be communicated. Communication may be inferred from conduct. If the landowner is a public authority, permission need not be communicated if it arises pursuant to the exercise of its public law powers.

[58] L. Blohm, "The 'by right' doctrine and village green applications—a response" (2014) 1 Conveyancer & Property Lawyer 40 at 47.