

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

CLAIM NO: *CO/6298/2009*

Between

REGINA (ON THE APPLICATION OF
OXFORDSHIRE & BUCKINGHAMSHIRE MENTAL HEALTH NHS FOUNDATION TRUST
and
OXFORD RADCLIFFE HOSPITALS NHS TRUST)

Claimants

and

OXFORDSHIRE COUNTY COUNCIL

Defendant

and

PAUL DELUCE
CHRISTOPHER WHITMEY
ROSIE BOOTH

Interested parties

GROUNDS RELIED UPON BY DEFENDANT
FOR RESISTING APPLICATION FOR PERMISSION

1. The Defendant was the registration authority under the Commons Registration Act 1965, and is now the registration authority under the Commons Act 2006. It received an application dated 19 December 2006 made by the First Interested Party

for the registration as a town or village green of certain land in Oxford known as Warneford Meadow ("the Land"). It appointed Mr Chapman QC ("the Inspector"), a barrister experienced in this area of the law, to hold a public inquiry and to make recommendations to it as to the manner in which it should determine the application. The Claimants and the Interested Parties attended and made representations at the inquiry, which lasted fifteen days. The Claimants and the First Interested Party were represented at the inquiry by counsel also experienced in this area.

2. The application was determined under the provisions of the 1965 Act, since the Commons Act 2006 did not start being brought into force until 20 February 2007. The relevant procedural regulations were accordingly the Commons Registration (New Land) Regulations 1969.
3. The Inspector, and the Registration Authority in adopting his recommendation, was well aware of the correct legal test applicable in relation to applications for registration under the 1965 Act and the 1969 Regulations; and they applied the correct legal test to the facts as he found them. The conclusions that they reached were in essence conclusions of fact; those conclusions were not perverse, but were matters of judgment to which they were entitled to come, having regard to the correct legal test that they applied.
4. The Defendant thus maintains that neither of the two matters relied on by the Claimant in the Detailed Statement of Grounds constitute errors of law or grounds for the grant of permission to seek judicial review.

“As of right”

5. The evidence shows that, at the point where access to the Land can be gained from Hill Top Road, a sign was erected in or around January 1989 saying “no public right of way” (see Inspector’s Report (“IR”), para [369]). The first ground of claim is that, viewed objectively, rendering “footpath” use contentious was also rendering “lawful sports and pastimes” use contentious, as a matter of law.

6. There were and are at this point a number of paths heading out across the Land. This sign must have referred to one or more of those paths – since nothing can become a right of way other than a route from one point to another. One of the paths from that point was a long-established public right of way; one was at the time being claimed as a right of way; and one was not so claimed. Clearly the sign could not have referred to the first; so it must have referred to one or both of the other paths. However, equally clearly the sign could not have been referring to the general recreational use of the Land, since such use could not establish a right of way.

7. Further, if the landowner had been attempting to prevent general recreational use of the Land, it would have been possible for it to erect signs saying “no trespassing”, or “keep to the path”, or “no recreational use” – or any one of a variety of similar legends to the same effect, such as the conventional, if inaccurate, wording “trespassers will be prosecuted”.

8. Thus, for example, *Oxfordshire v Oxford City Council* (“the Trap Grounds case”) concerned land on which the owner had erected a notice which was worded in the following terms:

"Oxford City Council. Trap Grounds and Reed Beds.
Private Property.

Access prohibited except with the express consent of Oxford City Council."

In the Court of Appeal,¹ Carnwath LJ said that the purpose of such a sign was "to put an end to the period of qualifying use by ensuring that it could no longer be as of right". This aspect of the Court of Appeal's decision was not considered by the House of Lords. And in *R (Lewis) v Redcar and Cleveland BC*,² Sullivan J noted that

"if the defendant [landowner] was not acquiescing in the continued use of its land by local people for recreational purposes, it would have been very easy to erect notices saying, for example, 'Cleveland Golf Club. Private property. Keep out' or 'Do not trespass'."

9. So too in the present case it would have been possible to erect suitable notices to prevent or at least seek to discourage recreational use of the Land, worded as above.
10. Sullivan J in *Lewis* also accepted that the wording of notices should not be considered in the abstract.

"The surrounding context, including any evidence as to their effect upon those to whom they were directed, should also be considered. The response to a notice may well be an indication as to how it was understood by the recipient. Moreover, notices should be construed in a common sense rather than a legalistic way because they were addressed not to lawyers but to local users of the land."³

Sullivan J's judgment in *Lewis* on the issue of signs was not challenged in the Court of Appeal.

¹ *Oxfordshire CC v Oxford City Council* [2006] Chancery 43, [2005] EWCA Civ 175, at

² [2008] EWHC 1813 (Admin) per Sullivan J at para 22.

³ Para 21.

11. In this case, it is clear from the Inspector's report that the surrounding context was that the sign in question was erected against the background of an exchange of correspondence in November and December 1988 in which the landowner was concerned as to the coming into existence of a number of unofficial footpaths over the Land (see IR, paras [71] – [73]), and the making of an application in November 1988 for a modification order under the Wildlife and Countryside Act 1981 in relation to such paths (para [70]).

12. Just after the erection of the sign, in May 1990, the landowner stated in a draft letter [see IR, para [81]] that

“the Health Authority has never had a policy to discourage the use of the site as open space by members of the public, but it has never intended to dedicate any particular route through or around the perimeter of the site as a public footpath. Many ... use the site as a recreational area for walking of dogs, or simply to enjoy the more peaceful atmosphere of the site. Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as open space.”

And the landowner was advised by its legal advisers in November 1990 that the proposed modification order should be opposed on the basis that public use of the Land was not use for passage on defined routes but general use for recreation.

13. This makes it abundantly plain that the landowner and its advisers were making a clear distinction between

- the use of the Land as open space, and
- the dedication of public rights of way across or around it.

It follows that the erection of the sign was in relation to rights of way, and not to general recreational use.

14. Against that background, it does not matter whether the sign in question is considered
- from the viewpoint of the landowner – which was clearly not seeking to prevent general recreational use; or
 - from the viewpoint of the local people – who clearly did not consider that it prevented such use; or
 - in the light of its meaning, considered objectively – since it referred to “a right of way”, which could not come into existence as a result of such use, whatever may have been the intention of either the landowner or the local people.
15. On any basis, the sign could not have had the effect of rendering contentious the use of the Application Land for lawful sports and pastimes; it was not intended to have that effect; and it did not have that effect. The Inspector was thus correct in his conclusions in this regard, and finding the recreational use of the Land to be as of right. And the Defendant Registration Authority correct to accept his recommendation.

Neighbourhood

16. The application for the registration of the Land was framed by reference to its use by inhabitants of an area that was referred to as “the Divinity Road neighbourhood”. The Inspector considered that that area was not a neighbourhood for the purposes of the Act. However, he found as a fact that Hill Top Road was such a neighbourhood, and that a significant number of residents from that neighbourhood had used the Land for lawful sports and pastimes as of right over the relevant 20-year period.

17. The Claimants firstly draw attention to the following points:

- the first Interested Party (Mr Deluce), who was the applicant for registration of the Land, did not and does not live within the Hill Top Road “neighbourhood”;
- the Hill Top Road “neighbourhood” had not been identified in the application for registration; and
- there were no relevant facilities referential to Hill Top Road such as to justify it being considered as a neighbourhood for the purposes of the Act.

18. The first point is of no substance, since any person may seek to have registered any land as a town or village green, regardless of whether he or she lives in or anywhere near the land in question. Regulation 3 of the 1969 Regulations thus provide simply that:

“where, after 2 January 1970, any land becomes ... a town or village green, application may be made subject to and in accordance with the provisions of these Regulations for the inclusion of that land in the appropriate register

19. The second point was dealt with by Sullivan J in *R (Laing Homes) v Buckinghamshire CC*:

“The purpose of giving notification of an application to the owner and occupier and to the public ... is to elicit further evidence and information, in addition to that contained in the application. Form 30 [the application form] is not to be treated as though it is a pleading in private litigation, A right under section 22(1) is being claimed on behalf of a section of the public. The registration authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the

extent of the locality within which inhabitants are entitled to exercise the right on the light of all the available evidence.”⁴

20. This makes it clear that, whilst an applicant should make a reasonable stab at selecting the neighbourhood or (exceptionally) the locality whose inhabitants may be entitled to indulge in lawful sports and pastimes on the land in question, the authority must then make up its own mind, having considered the evidence. That was what the Claimant Authority did in this case.
21. The third point was considered by Sullivan J in *R (Cheltenham Builders) v South Gloucestershire Council*, who held that a neighbourhood cannot be any area drawn on a map; it must have some degree of cohesiveness.⁵ On the other hand, Lord Hoffmann pointed out in *Oxfordshire* that the phrase “any neighbourhood within a locality” in the 1965 Act, as amended in 2000, was “obviously drafted with a deliberate imprecision”.⁶ The Inspector in the present case was well aware of these dicta; he quotes both at IR, para [25].
22. Against that background, it was therefore perfectly reasonable for him to find (at IR, para [375]):

“Nor ... do I have any difficulty in regarding Hill Top Road as a neighbourhood. It has its own name, its own geographical integrity, and its own residents association (the HTRRA).”

It was clear from this passage in the Inspector’s report that, just as he did not regard the claimed “Divinity Road neighbourhood” to be a neighbourhood for the purposes of the Act, equally he did regard Hill Top Road as having sufficient geographical

⁴ [2003] 3 PLR, at para 143.

⁵ [2004] 1 EGLR 85 at para 85.

⁶ *Oxfordshire CC v Oxford CC* [2006] 2 AC 674, HL, per Lord Hoffmann at para 27.

integrity. And in his second report (at para [11]), he reiterates that conclusion. He had heard the evidence; it was for him to decide.

23. Secondly, it is argued by the claimants that there has to be a “fit” between the area from which the users of the claimed town or village green come and the neighbourhood which is capable of founding such a claim. However, the 1965 Act imposes no such requirement; section 22 merely states that:

“ ‘town or village green’ means ... land on which for not less than twenty years a significant number of the **inhabitants** of any locality, or **of any neighbourhood** within a locality, have indulged in lawful sports and pastimes as of right, and ... continue to do so.”

24. Nor does it require that qualifying users of a claimed green come predominantly from a single locality or from a single neighbourhood. It simply requires that a significant number of the inhabitants of any identifiable locality or neighbourhood can be proved to have used the land in question for lawful sports and pastimes. It may be that the inhabitants of another locality or neighbourhood can also be proved to have used it for that purpose, but that does not preclude the land being eligible to be registered.
25. It may be argued that there is no way in which it is possible to know which one or more localities or neighbourhoods are those whose inhabitants have the benefit of the right to use the land for recreation once it has been registered. However, that omission from the statutory scheme (deliberate or otherwise) cannot be allowed to detract from the clear meaning of the words of the section; which is that land can be registered once it can be shown that the inhabitants of at least one locality or neighbourhood have used it in the prescribed way; but once it has been registered, rights to use it for recreation then enure for the benefit of the inhabitants of any locality or neighbourhood who can establish that a significant number of them have

used the land in that way. That is the conclusion of the Inspector (at IR, para [380]; repeated at second report, para [12]), which exactly fits with the words of the Act.

26. It follows that, once it has been established that Hill Top Road is a qualifying neighbourhood for the purposes of the Act, and that a significant number of residents of that neighbourhood have used the Land in the prescribed manner, the land is eligible to be registered under the Act as a town or village green (IR, para [376]). The fact that, as found by the Inspector, it may well be that the inhabitants of other neighbourhoods have also used the Land is nothing to the point (para [380]).

27. For the above reasons, both of the grounds of claim are ill-founded; and permission should be refused for an application to be made for judicial review of the Defendant Authority's decision.

CHARLES MYNORS

Francis Taylor Building

13 July 2009

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GROUNDS RELIED UPON BY DEFENDANT
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