Extract from High Court Judgement- Lewis v Redcar and Cleveland Borough Council – Paragraphs 9 - 23

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CO/563/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 18th July 2008

B e f o r e:

MR JUSTICE SULLIVAN

Between:
THE QUEEN ON THE APPLICATION OF LEWIS

Claimant

v

REDCAR AND CLEVELAND BOROUGH COUNCIL

Defendant

PERSIMMON HOMES PLC

Interested Party

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(Official Shorthand Writers to the Court)

Mr George QC and Mr Pike (instructed by Irwin Mitchell) appeared on behalf of the Claimant
Mr G Lawrence QC (instructed by Redcar & Cleveland BC) appeared on behalf of the Defendant
Miss R Crail (instructed by Ward Hadaway) appeared on behalf of the Interested Party

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JUDGMENT

The Grounds of Challenge

9. The claimant challenged the lawfulness of the defendant's decision to reject the second application on those two grounds. In respect of the signs that were erected in 1998, the claimant submitted that even on the assumption that the hitherto notices could prevent subsequent user being "as of right", the particular notices erected on the land in 1998 did not have that effect. They were simply warning notices not prohibitory notices.

10. So far as deference was concerned, the question was not whether there was conduct which could be described as deference, but what was the inference reasonably to be drawn by the defendant from such conduct by the local inhabitants who were using the land for recreation. Were they deferring to the right of the golf course to use the land for its own purposes, so that there was no reason why the defendant should have been aware that they were exercising a public right, or were those who used the land for recreational purposes simply co-existing in a spirit of give and take with the users of the golf course and giving way to golfers when they were taking individual shots as a matter of elementary prudence (to avoid being struck by a golf ball) and mutual

courtesy? In a nutshell, it was not sufficient to describe their conduct as 'deference' without considering whether that deference meant that it would have appeared to the reasonably vigilant landowner that no rights were being asserted by those who were using the land for recreational purposes. I will deal with these two arguments in turn.

Ground 1: The Notices

11. The relevant finding of fact in the report is contained in paragraph 176:

> " . . . I find that signs were erected on the Report Land in 1998 stating --
>
> *'Cleveland Golf Club*
> *Warning*
> *It is dangerous*
> *to trespass on*
> *the golf course'*
>
> Although these were vandalised several times after which the golf club gave up trying to maintain them, I am satisfied that they were in place long enough for regular users of the Report Land to know of them. Indeed, it seems that they caused a stir locally because of the implication that local people using Coatham Common were trespassers. They also received publicity in the local newspaper . . . "

12. Unlike the Highways Act 1980 (see section 31), the 2006 Act is silent as to the effect, if any, of the erection by a landowner of notices on his land. A proposal in the consultation document *Greater Protection and Better Management of Common Land in England and Wales*, published by the Department for the Environment, Transport and the Regions in February 2000, that there would be a similar provision to that under section 31 of the Highways Act 1980 was not carried forward in the 2006 Act. Absent any deeming provision in an enactment, the argument for the effectiveness of prohibitory notices presumes that subsequent use is a form of forceful use ("*vi*").

13. In **R (Cheltenham Builders Ltd) v South Gloucestershire District Council** [2003] 4 PLR 95 at paragraph 64, I expressed the view (in a case where one of the issues was the efficacy of correspondence from the landowner's solicitors objecting to an application for registration under the 1965 Act) that:

> "The landowner does not have to meet force with force. He can achieve the same effect by making non-forcible objection or protests directed towards the users of his land. In **Newnham v Willison** (1988) 56 P&CR 8 there was a dispute as to the existence of a right of way. Kerr LJ referred to Megarry and Wade's *The Law of Real Property* (5th ed):
>
> 'Then the authors deal with forcible user, saying that it extends not only to user by violence, as where a claimant to a right of way breaks open a locked gate, but also to user which is contentious or allowed only under protest . . .

> If there is to be a state of 'perpetual warfare' between the parties, there can obviously be no user as of right; and if the servient owner chooses to resist not by physical but by legal force . . . the claimant's user will not help a claim by prescription . . . "

Having analysed the authorities, Kerr LJ said at page 19:

> "In my view what these authorities show is that there may be *vi* -- a forceful exercise of the user -- in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious."

14. In the circumstances of that case where the letters of objection from the landowner's solicitors had caused the applicants for registration to withdraw their application, I concluded that the letters had "seen off the applicant's contention that its land was a village green", and added that they had:

> " . . . made it sufficiently clear that the claimant was not acquiescing in the applicants' user of its land. It follows that the applicants' user of the site did not continue to be 'as of right' after the withdrawal of their first application on 8th June 2001."

However, it should be noted that the landowner's 'opening shots' in that particular war with the applicants for registration had apparently been wholly successful (see paragraph 71). What is the legal consequence if the 'opening shots', whether by correspondence or by the erection of notices, are not successful is less clear. In **R (Beresford) v Sunderland City Council** [2004] 1 AC 889 Lord Walker referred (*obiter*) to the:

> " . . . paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely, a landowner who puts up a notice stating 'Private Land -- Keep Out' is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: 'The public have permission to enter this on foot for recreation, but this permission may be withdrawn at any time'."

15. There is no binding authority which is directly on point. In the **Oxfordshire** case in the Court of Appeal [2006] Chancery 43, [2005] EWCA Civ 175, Carnwath LJ said that the purpose of 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" 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.

16. While reserving the right to argue on appeal that disregarded prohibitory notices do not have the effect of rendering subsequent use forceful and not as of right, Mr George QC, on behalf of the claimant, realistically accepted that this court, while not strictly bound by what was said by Carnwath LJ in the **Oxfordshire** case, was likely to be guided by his approach. However, he submitted that the notices erected on the land in 1998 in the present case (see paragraph 11 above) were not prohibitory notices. He referred to a passage in paragraph 12 of the judgment of Pumfrey J in **Smith v Brudenell Bruce** [2002] 2 P&CR 51:

> "It seems to me a user ceases to be user 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when the servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."

That case was concerned with a right of way, not a village green, and was not concerned with the effects of erecting a notice. While I would not question the general proposition, it is of limited relevance in the present case because the key question is whether, given their wording, the notices erected on the land were prohibitory notices, ie, whether they made sufficiently clear to local users that the defendant was not acquiescing in their use of its land for recreational purposes.

17. Although Mr George submitted that the Inspector had not made any findings as to where the notices were erected, how many of them there were or how long they had remained in place, these criticisms of the report are of no consequence because Mr Chapman concluded that the notices:

> " . . . were in place long enough for regular users of the Report Land to know of them. Indeed, it seems that they caused a stir locally because of the implication that local people using Coatham Common were trespassers. They also received publicity in the local newspaper [176]."

Thus, whatever the message that was being conveyed by the notices, it was sufficiently brought to the attention of those who were using the land for recreational purposes.

18. The argument that the message was simply a warning that those who continued to trespass on the land did so at their own risk was put to the defendant by the claimant in writing before 19th October 2007 and the point was made in oral submissions to the Committee on 19th October 2007 by Mr Davis, one of the applicants for registration in the second application. However, neither Mr Chapman nor the defendant expressly considered the wording of the notices and whether they were more properly described as warning notices.

19. In paragraph 193 of the report, Mr Chapman said:

> "'Force' does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates, if it involves ignoring notices prohibiting entry, or if it is under protest. There is a *dictum* in the **Beresford** case that assumes that user can be as of right notwithstanding that it involves ignoring the prohibitory notice. There was no argument on that point in the House of Lords and, in my view, the assumption is contrary to principle. It was held by the Court of Appeal in the **Trap Grounds case** that a prohibitory notice prevented user as of right."

But there is no analysis of the wording of the notices beyond the statement in paragraph 217 of the report that they "made it clear that the club was asserting that the local users were trespassers". I accept that a notice may combine both functions: prohibition and warning. However, in my judgment, a notice which told the local users that they were trespassers but did not tell them to stop trespassing, and instead warned them that it was dangerous to continue to trespass (because they might be struck by golf balls), would not be sufficient to make it clear to them that the defendant was not acquiescing in their recreational user of the land. Rather it would be an indication that since the defendant was acquiescing in their trespassory use of the land for recreational purposes, it was thought prudent to warn them that if they continued so to use the land then they did so at their own risk, and the defendant could not be liable if they were hit by a golf ball.

20. Mr Lawrence QC on behalf of the defendant and Miss Crail on behalf of the interested party submitted that the notices served a dual purpose. They were not simply warning notices, they made it clear to local users of the land that they were not allowed to use the land (because they were trespassers) and that such trespass was dangerous. Hence the stir caused locally by the description of the local users as trespassers in the notices.

21. I accept that the wording of the 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, the 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.

22. If the defendant 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", followed by a warning "It is dangerous to trespass on the golf course". The fact that local users took umbrage at being described in the notices erected in 1998 as trespassers does not mean that those notices told them to stop trespassing, as opposed to warning them that if they continued to trespass it would be dangerous. The contrast between the reactions of those to whom the notices/letters were directed in the present case and the **Cheltenham** case (see above) is very marked. In the latter case, from the landowner's perspective, since the correspondence from its solicitors "had seen off the applicant's contention that its land was a village green, why did it need to do any more to make it plain that it was not acquiescing in the acquisition of village green rights over its land?"

23. In the present case there was no evidence before Mr Chapman that the erection of the notices in 1998 had any practical effect whatsoever, much less that it had, even temporarily, 'seen off' the use of the land by local people for recreational purposes. The witness who gave evidence about the notices, Mr Fletcher, said that they had been painted out on the night that they were erected. They were re-painted and re-erected three times and then the club gave up [138]. In these circumstances, given the ambiguity and the wording of the notices (to put their possible meaning at its highest from the point of view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting those notices in 1998 it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users. For these reasons, the claimant's first ground of challenge succeeds.