## FURTHER DIRECTIONS

### Introduction

1. These directions are further to my directions dated 6 March 2015.

### My position

2. In my directions dated 6 March 2015, I pointed out that I had been junior counsel for the landowner in the *Newhaven* case. If any party wished to object by reference to this fact, this was their opportunity to do so. Cotham School did not wish to object and neither did the Applicant. The Applicant pointed out that additional costs would be incurred if a new Inspector were appointed at this stage. The response by Bristol City Council in its capacity as landowner was more nuanced:

   *Whilst the Council welcomes the inspector's expertise, and consider that the role of advocate and judge can be properly adopted by an advocate in respect of the same issue at different times, that is not always the perception; and as regards the merits and outcome of this application, feelings may run high. it would be of concern that if the Inspector and consequently the registration authority were to accede to the Objectors' submissions the applicants were to consider that they had not been fairly treated; and equally it would be inappropriate for the Inspector to lean towards the applicants position in order to avoid such a perception. The prudent course would be for the Inspector to advise the authority to instruct alternative counsel to continue with the inquiry.*

3. I should begin by saying that it is obviously inappropriate for an Inspector to lean to one party or the other; I would be failing in my duty if I did. Any recommendation I make to the City Council in its capacity must be supported by reasons. It seems to me that there is a point of principle here. In the present case none of the parties suggests that there is a conflict of interest and, for my part, I do not think that there is any conflict of interest. This being so, I do not see why any perception of bias should arise. If the Applicant or the Objectors consider that I have erred in law, they will be able to challenge in the courts a decision of the registration authority that has been founded based upon my advice[1]. I hope of course that my recommendation will be accepted, but if it were challenged, it seems to me that it would be irrelevant that I had been counsel in the *Newhaven* case.

4. On the practical side, I take the Applicant's point that to instruct a new Inspector would increase the costs of disposing of this matter.

5. In these circumstances I do not intend to recuse myself.

### Statutory incompatibility

6. An inquiry in this matter was deferred pending consideration by the Supreme Court of the *Newhaven* case. In that case, the landowner, which was a statutory port authority, argued that registration of its land as a town or village green was incompatible with its statutory powers. Similarly, in the present case, Bristol City Council as landowner argue that registration of Stoke Lodge Playing Field is incompatible with its statutory powers. If this argument is correct then it is a potentially a "knock out blow" to the application and it would not be necessary to hold a non-statutory public inquiry. Accordingly what I need to do at this stage is to consider, in the light of

[1] There is a complication in that Bristol City Council are both registration authority and objector, so a challenge by the City Council as objector is not straightforward. This however is a complication which has nothing to do with the issue that I am considering.

the representations on the point that I have received from all the parties, whether such a knock out blow arises.

7. I should say at once that I have formed the view that it does not, for reasons which I shall set out. I consider further below the implications of such a determination for the future consideration of the present application. I have been assisted in reaching my conclusions by the representations I have received. I have not however considered it necessary or appropriate at this stage to address those representations in detail.

**The judgment of Lord Neuberger and Lord Reed in *Newhaven*[2]**

8. In paragraphs 75 – 78 of their judgment, Lords Neuberger and Reed introduce the topic of statutory incompatibility.

9. At paragraph 76 they explain that there is nothing express in the Commons Act 2006 that restricts the operation of section 15 in respect of the land of a statutory undertaker.

10. At paragraphs 78 to 80 they consider the English law of dedication and prescription. In English law, for a public highway or private easement to be established by long user, the general law is that the owner needs to have capacity to create such a right. If the owner of land which others wish to register as a town or village green does not have to have capacity to create such a right, it cannot come into being. It is within this context that the question of statutory incompatibility has been addressed in the English law of public highways and easements. Thus it was not of direct assistance in seeking to ascertain whether statutory incompatibility might arise as an issue in circumstances where, as with section 15, the establishment of the rights did not depend upon the capacity of the relevant landowner to create those rights.

11. At paragraphs 81 to 90, they consider the position as to the creation of highways and easements in Scots law. Here it was arguable that the true position was that although capacity was not generally relevant, nonetheless a highway or easement could not come into being by reference to long user if it was over the land of a statutory authority and incompatible with the powers of that statutory authority.

12. At paragraph 91, they reach a conclusion. The law relating to the English and Scottish law of highways is only of relevance by analogy. They go on to say: *It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded upon would be incompatible with those purposes*. There was an Irish case to similar effect (*McEvoy v Great Northern Railway*[3]).

13. Against this background, they found that there was an incompatibility between registration of a town or village green under the 2006 Act and the statutory regime which conferred harbour powers on the landowner to operate a working port. The heart of the judgment on this aspect of the case is set out at paragraphs 92 to 96:

*92 In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based on incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which*

[2] Lady Hale and Lord Sumption agreed with Lord Neuberger and Lord Reed.
[3] [1900] 2 IR 325.

*Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.*

*93 The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not.* ***Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes …***

*94 There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates: section 33 of the 1847 Clauses Act. NPP is obliged to maintain and support the Harbour and its connected works ( section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act , and articles 10 and 11 of the 1991 Newhaven Order …*

*96 In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence* (emphasis supplied[4]).

14. It is clear that what Lord Neuberger and Lord Reed are doing in their judgment is determining the position of a statutory undertaker. The first question that arises for me is whether in the present case, Bristol City Council in its capacity as landowner is a statutory undertaker.

15. This point is addressed in the written submissions of Mr Blohm on behalf of Bristol City Council as landowner. He accepts that the phrase statutory undertaker is used as a term of art to denote a transport or harbour undertaking[5]. He asserts nonetheless that the principle established by the Supreme Court applies to the City Council in this case.

16. In order to consider this further, it is helpful to set out paragraphs 98 to 101 of the judgment of Lord Neuberger and Lord Reed. In this passage they considered three cases which the County Council had referred to as being ones where the land of public authorities had been registered as town or village greens. It is as follows:

*98 The County Council referred to several cases which supported the view that land held by public bodies could be registered as town or village greens. In our view they can readily be distinguished from this case. In* New Windsor Corpn v Mellor *[1975] Ch 380, the Court of Appeal was concerned with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the Commons Registration Act 1965. The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, it was not acquired*

[4] Mr Blohm in his written submissions on behalf of Bristol City Council as landowner says that this is the ratio of the case on the statutory incompatibility point. I agree with him.
[5] As defined in section 262 (1) of the Town and Country Planning Act 1990.

*and held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.*

*99 The* Oxfordshire[6] *case concerned the Trap Grounds, which were nine acres of undeveloped land in north Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) "not idyllic". More significantly, while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility.*

*100 Thirdly, the County Council referred to* R (Lewis) v Redcar and Cleveland Borough Council (No 2) *[2010] 2 AC 70 , which concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green.*

*101 In our view, therefore, these cases do not assist the respondents.* ***The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility****. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour* (emphasis supplied).

17. In considering this passage, it is helpful to begin with the passage that I have emphasised. Clearly Lord Neuberger and Lord Reed envisage that there is some land of a local authority which could properly be registrable as a town or village green. Potentially some help is afforded in understanding what land may be registrable by looking at the three cases that they considered.

18. The key passage in their consideration of *New Windsor Corporation v Mellor* is as follows:

*While the land had long been in the ownership of the local council and its predecessors, it was not acquired and held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.*

19. New Windsor Corporation was an historic local authority which did not owe its creation to statute. As Lord Denning put it *From time immemorial it has belonged to the Mayor, Bailiffs and Burgesses*[7]. As Lord Neuberger explained, it had been used for archery and was subject to recreational rights. It seems clear that as well as no question of statutory incompatibility arising, no question of statutory incompatibility was capable of arising.

20. As regards the Trap Grounds case, although many points were argued there was indeed, as Lord Neuberger and Lord Reed put it *no suggestion that [the City Council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility*. Obviously

[6] I.e. *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674.
[7] An examination of the decision in the case of the Chief Commons Commissioner shows that they derived title from a nineteenth century enclosure award (see p5) but they had originally owned it long before that.

if the suggestion was not made, there was no possibility of the Courts considering it. Nonetheless Lord Neuberger and Lord Reed were aware that the City Council wanted to develop a significant part of the land for housing purposes and they do not flag the possibility that this might properly found an argument based on statutory incompatibility which one might have expected them to do had they thought that such a possibility might have arisen. One cannot know but one suspects that why they felt able to deal with the case so comparatively is the absence of suggestion that it had been acquired for a specific statutory purpose that might give rise to statutory incompatibility. As far as I am aware there is nothing in the reports of the judgments in the Trap Grounds case at first instance, in the Court of Appeal and in the Supreme Court which make it clear on what basis the land was acquired. It is nonetheless clear from the Inspector's Report that the land was acquired for housing. It seems to me that, on the face of it, if the principle of statutory incompatibility is to have application in relation to land held by local authorities, it should have applied in that case.

21. *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* is potentially more helpful in identifying a category of land held by a local authority that may properly be registrable. The land in question was a local authority golf course. It was not argued that local people had been permitted to go on the golf course[8]. The Supreme Court held that golf course use was compatible with the non-permitted use by local people in the sense that the registration was able to proceed on the basis that the golfers would be able to continue playing golf. In fact by the time the case was considered the local authority wanted to develop it for housing, as Lords Neuberger and Reed were aware. So the Supreme Court evidently did not regard this subsequently arising statutory incompatibility as preventing registration.

**The judgment of Lord Carnwath in *Newhaven***

22. In his judgment, Lord Carnwath suggests that statutory incompatibility should not operate as a bar to registration but as a limitation upon the nineteenth century legislation protecting town and village greens. It seems that he would not have held that the concept of statutory incompatibility could operate as a bar to registration. Lord Caarnwath's view, however, was a minority one.

**Conclusion on Statutory Incompatibility**

23. In the light of the above it seems to me that is possible to argue that the concept of statutory incompatibility applies to all land of local authorities. This would be because in all cases it might be the case that future use and development could be incompatible with the current use. Even where land was held for the purposes of public open space, it might become appropriate in the future to build on part of it[9]. Nonetheless this analysis does not seem to me to be plausible in the light of what Lords Neuberger and Lord Reed said in *Newhaven.* I think that the argument could only work on the basis that all that they were saying about the three cases that they considered was that statutory incompatibility was not argued in those cases and that for that reason they could not provide any precedent. However if they had thought that the concept of statutory incompatibility had a very general application to the land of local authorities one would have expected them to say so.

24. A contrasting view would be that the concept of statutory incompatibility had no application to the land of local authorities, being limited to the land of statutory undertakers. It seems to me that this view is also implausible since I cannot see why it should be so limited.

25. In this connection I think it is useful to have regard to paragraph 94 (and the following paragraphs) of the *Newhaven* decision set out above. As I read it, Lords Neuberger and Lord Reed are not saying that, where one is considering the land of a statutory undertaker, the concept of

[8] Mr Blohm makes this point in his Submissions: see p7.
[9] Land held as public open space might be an exception to the principle. It would not in any event be registrable because use by the public would be *by right* and not *as of right*.

statutory incompatibility **necessarily** applies (ie as matter of law) but that, where one is considering an entity such as a port or harbour it obvious that it applies. If this is the correct interpretation then it is obvious that the concept is not limited to statutory undertakers but might apply to other statutory bodies, such as local authorities. Further, whether it does apply or nor depends on the facts (supplied in the *Newhaven* case by an examination of the statutory powers). The position may not be as obvious in the case of a local authority as it is in the case of a statutory undertaker (or the particular statutory undertaker considered in *Newhaven*). I am confident that this nuanced view (as opposed to the "extreme" positions articulated in paragraphs 23 and 24 above) is the correct one.

**The way forward**

26. The difficulty to which my view as to the scope of the concept of statutory incompatibility gives rise is to understand what is the appropriate test to apply in considering whether or not the concept of statutory incompatibility applies. In *Newhaven* at first instance, Ouseley J suggested a "reasonably foreseeability" test, namely whether at any time within the relevant 20 years it was reasonably foreseeable that the land would be required for purposes inconsistent with registration of the land as a town or village green. Lord Neuberger and Lord Reed did not address whether this was the correct test.

27. It do not think that it would be appropriate for me to decide what the appropriate test is without receiving argument (ie by way of written submissions), and I think it will be appropriate for me to hear argument (at an oral hearing). I think that the stage has been reached where it is necessary for there to be a public hearing.

28. This is in part because I think that whether the concept of statutory incompatibility applies or not (whatever the correct scope of that concept), its application will depend on the actual facts. It is in part because, as I have indicated, I will be assisted by oral argument as to what is the scope of the concept (in the light of evidence). It is also because there are other matters of fact arising which may be argued to be determinative of the application, irrespective of whether the concept of statutory incompatibility applies. In particular, there is the question of whether, on the facts and in the light of *Barkas*, it could be argued that use of the land has been by implied permission. There is a question as to signage; and also as to the extent of usage of the land for sporting activities by the school and others.

29. I propose that there should be a pre-hearing meeting. This would address the usual matters considered at such a meeting (including representation) but in particular I hope that it would also serve to clarify the issues to be considered at the hearing, with a consequent saving of costs. I have identified what I see as at least some of the issues at paragraph 28 above and in my Directions dated 30 January 2014. I would not wish to constrain the discussion at the pre-hearing meeting, but it would be helpful if written submissions as to what the parties see as the issues could be received 7 days before the meeting, and exchanged by the parties among themselves.

PHILIP PETCHEY
5 November 2015