A LOCAL HABITATION: NEIGHBOURHOOD AND LOCALITY IN THE LAW OF TOWN AND VILLAGE GREENS

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> *...the lawyer's question, Who is my neighbour, receives a restricted reply...*[1]
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> *Neighbourhood Watch schemes can be large, covering, for example, most of the households on an estate or they might involve just half a dozen houses. It depends on the area and what people living there want.*[2]

1. As many, or perhaps most of you will know, the requirement of demonstrating use by the inhabitants of a *locality* to establish a town or village green by reference to the definition of *town or village green* in the 1965 Act as originally enacted provided landowners with a powerful tool in objecting to the registration of new town or village greens. Use may have been by *local people*, yes; but it was not use by the inhabitants of a *locality*.

2. The decision in *Sunningwell*[3] was on 24 June 1999. There was only a short period between the full implications of that decision sinking in and the law on locality being changed: the Countryside and Rights of Way Act 2000 was enacted on 30 November 2000 and took effect on 30 January 2001.[4] From then on we were looking at *neighbourhood*. Obviously arguments could and did arise about the meaning of *neighbourhood* and landowners secured an

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1 Per Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at p580.
2 See the Crime Reduction Website: crimereduction@gov.uk.
3 I.e *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335.
4 The opportunity to amend the law was fortuitous, in that it just happened that the Countryside and Rights of Way Bill was then before parliament. It is interesting to speculate what might have happened if applicants had remained encumbered with the original requirement. My guess is that in due course Lord Hoffmann would have given *locality* a liberal interpretation.

important victory in the *Cheltenham Builders*[5] case, this gain was lost in the *Trap Grounds*[6] case. It now rather looks – one might think – as though arguments about *neighbourhood* and *locality* as ways of defeating applications are not going to be successful, being viewed by the Courts as unmeritorious devices to defeat applications.

3. This may be where we end up. However the arguments on locality and neighbourhood are not going to go away because as an objector it must be sensible to run every argument that is going – you never know how it might turn out. And it is difficult if not impossible to advice a client not to run an argument which may have at least legal merit, even though we may guess that Lord Hoffmann might not embrace it with enthusiasm.

4. This was all brought home to me in a classic village green case I did for an applicant last year. This related to an application for a small urban green in the centre of a large city. If a neighbourhood betokens some degree of cohesiveness there were arguments to be made that the users did not come from such a neighbourhood (as opposed to the area around the site). It was difficult to identify a locality unless it were the City itself, which then gave rise to the objection that it was too big for the purpose.

5. The jury is out on this one – i.e we have not yet had the Inspector's Report. Maybe this will be the next village green case to trouble the Courts, and maybe either from this case or some other case we shall derive some definitive guidance. In the meantime however cases will continue to be fought. This paper may assist you in those battles.

6. Under the 2006 Act, land is registrable as a town or village green if

> *a significant number of the inhabitants* ***of any locality, or of any neighbourhood within a locality,*** *have indulged as of right in*

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5 I.e *R (Cheltenham Builders Limited) v South Gloucestershire Council* [2004] JPL 975.
6 I.e *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674.

> *lawful sports and pastimes on the land for a period of at least 20 years* (emphasis supplied).[7]

What is the meaning of *any locality, or of any neighbourhood within a locality* within that statutory definition?

7. It is necessary to begin by going back to the 1965 Act. As originally enacted, this provided for land to be registered[8] as a town or village green in three circumstances, namely:

> [a] *land which has been allotted by or under any Act for the exercise or recreation of* ***the inhabitants of any locality****;*
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> [b] *land on which* ***the inhabitants of any locality*** *have a customary right to indulge in lawful sports and pastimes; and*
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> [c] *land on which* ***the inhabitants of any locality*** *have indulged in such sports and pastimes as of right for not less than twenty years.*
>
> (emphasis supplied).

8. The three types of green may helpfully be categorised as follows:

[a] recreational allotments under statute;

[b] customary greens; and

[c] 20 year greens.

9. It will be seen that the phrase *the inhabitants of any locality* appears in the definition of all three types of green. However, it seems clear that the phrase has its origin in the law relating to custom. Town and village greens are, of course, but one example of the law of custom. If you go to the volume of *Halsbury's Laws* dealing with Custom[9], you will find the following:

> *A custom is a particular rule which has obtained either actually or presumptively from time immemorial* ***in a particular locality*** *and obtained the force of law* ***in that locality****, although contrary*

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7 See section 15.

8 Following the *Trap Grounds* case (ie *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674) we know, of course, that the 1965 Act was concerned with more than just registration ie substantive consequences flowed from it.

9 Volume 12(1) (1998).

to, or not consistent with the general common law of the realm (emphasis supplied).[10]

10. One paragraph further on, you will find the following:

> *A custom may have the force of law only if it is confined in its sphere of operation to a particular locality which may be defined with precision.*[11]

11. There is further explained as follows:

> *A custom must be certain in respect of the locality where it is alleged to exist; for every custom must be local and cannot be alleged as existing throughout the whole realm. Some definite limit must therefore be assigned to the area in which the custom is said to obtain. This area must be defined by reference to the limits of some legally recognised administrative division, as for instance a county, a hundred, a forest, a region of marshland, a city, a town or borough, a parish, a township within a parish, a vill, a hamlet, a liberty, a barony, an honour, or a manor.*[12]

12. In the context of the pre-1965 Act law, the general law of custom was famously applied by the Courts with reference to village greens in *Edwards Jenkins*[13]. In that case Kekewich J said:

> *I do not therefore, find in any of the cases anything that would justify me in saying that the use of the word "district" means more than the particular division known to the law in which the particular property is situate.* ***It may be situate in a parish or in, a manor, or there might be some other division.*** *But I cannot see how a number of parishes can, without specific evidence, be said to be situated in a particular district so that land in one of the parishes is land in a particular district.* ***I take it that the judges have used the word "district" as meaning***

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10 See paragraph 601. The courts have spent a lot of time holding practices which might have appeared to be customs not to be so see eg *Goodman v Saltash Corporation* (1882) 7 App Cas 633 (no custom right to fish for oysters). An example of a good custom was of fishermen to dry their nets on the beach at Walmer in Kent (*Mercer v Denne* [1905] 2 Ch 538 (CA)); or, in a different area of law, as to the election of churchwardens. Such a custom may still survive: see section 11 of the Churchwardens Measure 2001.

11 See paragraph 602.

12 See paragraph 616.

13 [1896] 1 Ch 308.

> ***some division of the county defined by and known to the law, as a parish is*** *(emphasis supplied).*[14]

13. What Kekewich J was saying was not an aberration but uncontroversial law, and provided a way in which nineteenth century judges could defeat claims to village greens: if a significant number of users came from outside the locality the Court would say that the claimants to the village green "had gone beyond their custom". Proving too much was fatal.[15]

14. This, then, was the meaning of *locality* in the **common law** definition of town or village green that obtained before 1965. On the face of it, that definition was directly transposed into the new **statutory** definition of a common law town or village green i.e of a class [b] town or village green. Further, on the face of it, *locality* had the same meaning in reference to class [c] town or village greens. If this were so, surely it is also clear that *locality* has the same meaning in respect of a recreational allotment created by or under an earlier Act i.e a class [a] town or village green? On this basis, to reiterate, the customary requirement in respect of *locality* had now to be met also by a recreational allotment.

15. However this is not in fact self-evidently correct. Looking at the matter broadly, it can be argued that Parliament can never have intended to carry the old customary law relating to locality into the new definition of town or village green.

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14 *Ibid*, at p.313. Kekewich J used the word *district* rather than *locality* because he was rebutting an argument for the persons asserting the village green that words of Kay J in *Bourke v. Davis* (1889) 44 Ch D 110, which referred to *district* rather than *locality* were extending the concept of locality.

15 See e.g the judgment of Sir George Jessel MR in *Hammerton v Honey* (1876) 24 WR 603. As the quotation from it indicates, the actual judgment in *Edwards v. Jenkins* concerned whether the inhabitants of more than one locality could have a custom to enjoy lawful sports and pastimes over a green situated in one of the localities. Kekewich J held that they could not. Although there is authority to support this view, it seems doubtful in principle, and was doubted by Lord Denning MR in *New Windsor Corporation v. Mellor* [1975] 1 Ch 380 at p387B.

16. More specifically, as regards class [a] town or village greens, it was not the case that before 1965 Parliament had always provided that these were to be enjoyed by the inhabitants of a particular locality. The position was that recreational allotments were allotted for the use of the inhabitants of localities and neighbourhoods indifferently. The use of recreational allotments was not tied in the same way as customary greens to a *locality*. Thus, for example, in the very last inclosure act that was passed (the Inclosure (Elmstone Hardwicke) Provisional Order Confirmation Act 1914 (clxiv)) the following provision was made: *A portion or portions of the common field being not less than ten acres in all ... .should be set out and allotted to the chairman of the parish meeting and the overseers of the parish in trust as a place or places for exercise and recreation* ***for the inhabitants of the said parish and neighbourhood...*** (emphasis supplied).

17. What the draftsman has done is to adopt a 'one size fits all' solution - arguably therefore the old link of *locality* to customary law has been broken, and the word has a new, wider meaning.

18. Of course if this argument be right, and that in the 1965 Act *locality* essentially means *neighbourhood*, one has to grapple with a further issue: how can one define who are to enjoy the rights – because we know from the *Trap Grounds* case that the inhabitants of the relevant locality/neighbourhood do enjoy rights. How can they do this if the relevant *locality* cannot be defined precisely?

19. This raises the question as to the nature of the entitlement. In his commentary on the *New Inclosure Act* (1846), Woolrych considered how those having the benefit of a recreational allotment might seek to enforce their rights. The learned author make the following observation:

> *There seems to be no sufficient remedy suggested for enforcing this clause. Apparently, neither ejectment nor trespass can be maintained, and, therefore, the only remedy seems to be an indictment for disobeying the act of Parliament. Supposing that the allottee should shut up the allotment; it is quite a question*

> *whether the public could vindicate their rights by abatement of the obstruction. Instead of leaving the terms, "exercise and recreation" in a state of uncertainty as here, it might have been better to have specified during what periods of the year the allotment should be open. For while the herbage is growing on the allotment, the allottee will claim to exclude the public. It would have been, perhaps, expedient to have defined the rights of the individual on the one hand, and those of the public on the other.*

If this be correct, it is not necessary that it should be possible to define a *locality* exactly.

20. Certainly, the first person who had to consider the meaning of *locality* in the post-1965 Act world was unsympathetic to giving *locality* a narrow meaning. In what may have been the first recorded class [c] village green case, Mr Gerard Ryan QC held that a couple of streets around a putative village green could be a locality.[16] He referred to *Pain v Patrick*[17] to support his view rather than asserting (as he may have felt) that to use something from the old law of custom to defeat an otherwise meritorious claim made in 1979 was to see *the ghosts of the old forms of action arise, clanking their chains.*

21. *Pain v Patrick* was a case on a ferry and was to be distinguished on this basis by Carnwath J (as he then was) in *Steed*[18]. In fact *Pain v Patrick* does not carry the matter further, but not for that reason. It seems to have been a case where the locality was a *vill*, and no one has ever doubted that a *vill* is (historically) an area of local government known to law.[19]

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16 Referred to in *R v Suffolk County Council, ex parte Steed* (1995) 70 P and CR 487 at p502, a copy of his report is no longer available. A full account is however contained at pp73-74 of Clayden *Our Common Land* (1st edition: 1985).

17 (1690) 3 Mod 289.

18 As to which, see para 19 below.

19 The Doomsday survey in 1086 was organised on the basis of vills and in 1316 the *Nomina Villaram* was a list of vills responsible for sending a man to the Scottish Wars. See *A Thousand Years of the English Parish* (2000) by Anthea Jones. As happens sometimes with old reports, the facts of *Pain v. Patrick* are not altogether clear. It looks at first sight as though it was being argued that only the inhabitants of the ancient houses (ie those existing in 1189) had the right of ferry; and, accordingly, that the inhabitants of those built since did not. However, if this were the basis of the Court's decision, it does not emerge clearly from the statement *in such cases.. the inhabitants of a vill may allege a prescription*(p294).

22. Mr Ryan's view was not going to commend itself to landowners, who of course saw in the requirement of locality a weapon to defeat village greens claims.

23. Coincidentally, the first two class [c] town or village green cases to reach the Courts did so within days of each other, viz

Ministry of Defence v Wiltshire County Council[20]
3 May 1994 (Chancery Division)

R v Suffolk County Council, ex parte Steed[21]
5 May 1995 (QB).

In both of them, the meaning of *locality* was a live issue; and on that issue Harman J and Carnwath J (as he then was) both took remarkably similar views.

24. In the *Wiltshire* case, the use was as an informal children's play area and the site was at Boscombe Down - i.e the MoD settlement adjoining the well-known experimental base. The locality relied upon was two streets- Cadnan Crescent and Milton Road - in this settlement. Harman J said:

> *The idea that one can have the creation of a village green for the benefit of an unknown area - and when I say unknown I mean unknown to the law, not undefined by a boundary upon a plan, but unknown in the sense of unrecognised by the law - then one has, says Mr Drabble, no precedent for any such claim and no proper basis in theory for making any such assertion. In my belief that also is a correct analysis. I shall not go through the detail of it, but as a secondary reason for my judgment I would assert that it is impossible for the residents of Cadnam Crescent, alternatively of Cadnam Crescent and Milton Road, to be the persons in whose favour there could be created a right for the inhabitants of those two road in perpetuity, and it seems to me that it would be a total departure from any of the authorities that have been cited. The legal impossibility of such a right is supported in the present case by the fact that the so-called village green is wholly undefined. It has no boundaries even on a plan* (emphasis supplied).[22]

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20 [1995] 4 All ER 931.
21 (1995) 70 P and CR 487.
22 See p 937.

25. The claim failed (erroneously, as we now know) on the *as of right* point. However, what Harman J said about locality was, in my judgment, plainly *ratio decidendi.*

26. The status of Carnwath J's comments were probably not *ratio*, but they were certainly to the same effect. He gave what might have seemed a legalistic approach an attractive new twist. He said:

> *To state the obvious, a town or village green, as generally understood, is an adjunct of a town or village or something similar. As such it may be contrasted with open spaces of various kinds, for example recreation grounds maintained by local authorities for the public generally (e.g under the Open Spaces Act 1906): school playing fields; or areas of a more private nature, such as London garden squares, or land set aside under a building scheme for the occupants of a particular private development. None of these categories would naturally be regarded as "town or village greens". The statutory word "locality" should be read with this in mind. Whatever its precise limits, it should connote something more than a place or geographical area - rather, a distinct and identifiable community, such as right reasonably lay claim to a town or village green as of right. In the present case, the "locality" on which the application for judicial review and the supporting affidavit rely is Sudbury itself; I agree that this is the only realistic basis on which to proceed.*
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> *In argument, there was some suggestion that a smaller unit could be taken, perhaps the streets adjoining the land. In support of this, I was referred to the conclusions of Gerard Ryan QC. In a non-statutory report prepared in 1979 for the Sussex County Council, Mr Ryan cited* Pain v Patrick *as showing that a custom might be claimed for the benefit of the inhabitants of only some of the houses in a particular settlement. In the particular case, he advised the Council that the houses in the immediately surrounding streets could qualify as a "locality" under the Act. With respect to his acknowledged expertise in this field, I find this difficult to accept.* Pain v Patrick *was concerned with rights to a ferry, not to a village green. In the present statutory context, I do not think that a piece of land used only by the inhabitants of two or three streets would naturally be regarded as a "town or village green". The word "locality" in the definition of village green should be interpreted with regard to its context.*

> *Such an approach is also consistent with that of Kekewich J in* Edwards v Jenkins, *where the issue was whether a green could exist for the benefit of three parishes. He held that it could not. He referred to the authorities which showed that the use must be that of the inhabitants of a "district", and continued:*
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> > ***I take it that the judges have used the word "district" as meaning some division of the country defined and known to the law, as a parish is;*** *and that I should be extending their meaning if I were to say that a custom of this kind could be claimed as regards several parishes. (emphasis added).*
>
> *Although the actual decision has been doubted (see* New Windsor *case), the words underlined fairly reflect the earlier cases there cited, and indeed the concept of a "local law" as explained in* Hammerton v Honey. *The word "locality" in the Act seems intended to bear the same connotation as the word "district" as used in such cases.*
>
> *On the other hand, I would not go as far as the Chief Commons Commissioner (Mr Squibb), who in one case held, by analogy with customary rights, that a "locality" for the purposes of the definition must be one which has been in existence since the beginning of legal memory (*Re Silverhill Park Estate *Ref 83/D1). Such a restrictive interpretation is not justified by the wording, and would largely negate the third part of the definition.*[23]

27. What this meant in practice is that the only class [c] village greens that were ever going to be registered were "real" village greens that had been missed in 1965 i.e either customary greens or ones which had been used for a very long while, but through oversight had not been registered and therefore had lost their village green status. This was the combined effect of the requirement of locality and - as explained by the Court of Appeal in *Steed*[24] - the requirement that local people had to believe in their right to go on to the land by virtue of being local inhabitants.

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23 See pp 501-2. In the *Cheltenham Builders* case (see paragraphs 30-33 below), I drew attention to *Harrop v. Hirst* (1868) LR 4 Exch 43. Sullivan J's approach was to view this case as a *discordant note* in what was otherwise a consistent line of authority, and in which the point was not argued anyway. However it may be that *the street* relied upon as founding the custom in that case was a Yorkshire word for a *vill* or its equivalent. If so, this usage is not recorded in the OED.

24 See (1996) 75 P and CR 102.

28. *Sunningwell*[25] of course changed the position as to the belief of local people, and led, as we known, to a proliferation of claims. The *locality* argument was going to be very important in the resistance to such claims.

29. Thus in the *Laing*[26] case no plausible locality was suggested before the first day of the inquiry, when the applicants suggested that it might be the ecclesiastical parish of Hazlemere. This then led to an argument that an ecclesiastical parish wouldn't do. Interestingly, Laings submitted that

> *...in the secular world of the late twentieth century Parliament in 1965 could not have envisaged that an ecclesiastical parish would constitute a qualifying locality ...*[27]

30. Well, one sees the point, but of course the whole reason for giving *locality* a **restricted** meaning was because it had the same meaning as it had in the law of custom before 1965. A more subtle version of a similar argument would have said that after the separation of civil and ecclesiastical boundaries (a process completed by the Local Government Act 1894), ecclesiastical boundaries only were good for ecclesiastical purposes. Interestingly Sullivan J rejected Laing's argument on the basis that Parliament was in 1965 making the registration of new town or village greens easier, not more difficult: if he was right about this and it was a point relevant to locality, he too was accepting that the meaning of locality was different pre and post 1965. Reliance on ecclesiastical parishes became the norm - in the *Trap Grounds* case that of St Margaret in north Oxford[28].

31. However ecclesiastical parishes wouldn't always work - the problem for applicants was at its most difficult where the ecclesiastical parish might have

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25 I.e *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2001] 1 AC 335.

26 I.e. *R v Buckinghamshire County Council, ex parte Laing Homes Limited* [2004] 1 P and CR 36 at p 573.

27 *Ibid*, at para 149 (p607).

28 The application was made after the CROWA 2000 amendment, but one of the applicant's arguments was that the land was registrable under the old law. It was therefore important to her to demonstrate use by reference to a locality.

no reference to the claimed village green and, most difficult, the area from which the use came was divided between two or more ecclesiastical parishes.

32. If the jurisdiction to register new town or village greens was to be preserved by Parliament, arguments about the relation of the claimed town or village to ecclesiastical parishes were clearly not creditable to the law.[29] However one may guess that nothing at all would have been done about the position post-*Sunningwell* had it not been for the chance that at that time the Countryside and Rights of Way Bill was before Parliament. A Liberal Democrat peer, Baroness Miller of Chilthorne Domer raised the concern that

> *Villagers and locals who want to register ... land as a green ... must present a map which shows the land in question and the area within which people who use the green live. The map must show that there is a recognisable community living close to the land. However, some greens are now in semi-urban areas. So that can be extremely difficult to achieve.*[30]

33. The Government undertook to look at the position and in due course introduced the amendment which introduced the concept of neighbourhood within a locality:

> *"town or village green" means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes [or which falls within subsection (1A) of this section.*
>
> *(1A) Land falls within this subsection if it is 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 either-*
> *(a) continue to do so, or*

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29 No case ever got to the courts where a polling district was relied upon. This is the smallest unit of civil administration. Electoral wards receive a statutory recognition by being referred to in Note 6 to Form 44 (the application form for a new town or village green). Form 44 is supplied by the *Schedule* to the *Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007* (SI 2007 No 457).

30 See 619 Hansard (Lords) column 865 (16 October 2000).

> *(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions ...*[31]

34. In introducing the amendment, Baroness Farrington of Ribbleton (Lord in Waiting[32]) said

> *... the amendment addresses the problem of applications being accepted only where it can be demonstrated that users come from a discrete area, such as a village or parish. That is not easy in large built-up areas. The amendment introduces the concept of neighbourhood and provides that users should come either from a locality or from a neighbourhood within a locality.*[33]

35. Although Baroness Farrington identified the mischief at which the amendment was aimed, it is not clear what precisely the draftsman thought the effect of introducing the concept of *neighbourhood within a locality* was. My guess is that he was concerned not to **extend** the geographical basis on which a town or village green could be claimed. By making it clear that neighbourhood was a sub-set of locality, he achieved this result.

36. Being within a locality was now a **precondition** for the relevant inhabitants but registration would be achieved if they lived within a neighbourhood.

37. What was the meaning of this elusive term? I had to argue the point from about the worst possible factual base in the *Cheltenham Builders*[34] case. The *kidney shaped* area enclosed by the red line for most of its length appeared to bear no relationship to any man made or natural topographical feature. What it did, in fact, was to enclose the location of the houses where lived those who had submitted evidence forms in support of the application - all of whom lived in the neighbourhood of the site. It also was crossed by the boundaries of two unitary authorities. In most cases, the neighbourhood will at least be within the

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31 See section 22 of the 1965 Act as amended by section 98 of the Countryside and Rights of Way Act 2000.

32 A government whip in the House of Lords.

33 See 619 Hansard (Lords), column 514 (16 November 2000).

34 I.e *R (Cheltenham Builders) v South Gloucestershire Council* [2004] JPL 975.

same county (or unitary authority), but here the problem was that it was within two localities. - *quaere* if a county or unitary authority can be a locality for these purposes.

38. Sullivan J said:

> *I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so.*[35]

39. He also said

> *[Mr Petchey] sought to rely on section 6(c) of the Interpretation Act 1978 and invited me to read section 22(1A) as though "neighbourhood within a locality" meant "neighbourhood within a locality or localities".*
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> *88. In my judgment, a contrary intention appears in s.22. For the reasons set out above, locality in the case of class (a) and (b) village greens means an administrative unit, not one or more administrative units. That "locality" has the same meaning in subs. (1A) is reinforced by the use of the word "within", signifying that a "neighbourhood" must be wholly inside a single locality. In effect, the defendant's case requires subs (1A) to be read as though it referred to a "neighbourhood within, or partly within one and partly within another locality".*[36]

40. On the latter point I would agree with Sullivan J that there is some difficulty in reading a plural for locality after a singular neighbourhood: one may feel that unless **both** are read as plurals (or neither), one is importing into the Act a

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35 See p 996.

36 *Ibid.* Sullivan J said of his interpretation: *When enacting the 2000 Act, Parliament did not intend to create this additional obstacle for applicants such as those[sic] in the present case, but it managed to do so. This is a further example of the urgent need for Parliament to revisit this area of law* (see para 89). His position here contrasts with his approach in rejecting Mr George QC's argument in *Laing* (see para 21 above) where he said: *In 1965, Parliament was trying to make it less, not more difficult, to establish the existence of village green rights* (see para 111).

significantly different concept to that which surely was intended. Moreover if *Edwards v Jenkins* is right you cannot have at common law use by the inhabitants of two localities, and if this be right the meaning of locality must have changed in the 1965 Act if (albeit with the 2000 amendment) it is to be possible for *locality* to be read as a plural.

41. However my sympathy with Sullivan J would be misplaced, because in the *Trap Grounds* case, Lord Hoffmann said:

> *Any neighbourhood within a locality is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in* R (Cheltenham Builders Limited v. South Gloucestershire District Council *[2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities".*[37]

42. Locality was not an issue in the *Trap Grounds* case so what Lord Hoffmann said here was already *obiter*. Nonetheless there is, it seems to me, no realistic prospect of persuading a judge to take a different view as to it being possible to construe *neighbourhood within a locality* or *neighbourhood within localities* in an appropriate case.[38]

43. What of course Lord Hoffmann did not express a view about was Sullivan J's view that a neighbourhood should have some cohesiveness, should not be "just a line drawn on a map". Landowners are undoubtedly going to take this point in the future because in some cases it may be their only point. I shall come back to this in a moment.

44. It is however first necessary to complete the legislative story. Clearly with all that was going on in the law of village greens and, in particular, Parliament's

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37 See paragraph 27.

38 Particularly in view of the legislative history set out below.

intentions as regards the CROWA 2000 amendment thwarted because of the non-introduction of regulations, it was never going to be possible to pass commons legislation without doing something also about village greens. When the legislation was first introduced it retained the concept of use by the inhabitants of a locality or neighbourhood within a locality. However questions were raised by members of the House of Lords about what this meant, and the Government undertook to go away and look at the position.

45. They did and came back with the proposal that use should be by

a significant number of local inhabitants.

46. In introducing the amendment, Lord Bach (Under-Secretary of State, Department of Environment, Food and Rural Affairs) said:

> *The phrase "local inhabitants" has a clear everyday meaning, and we do not attempt to define it in the Bill.*
>
> *What we are seeking to do with these two amendments is to make the position clearer and simpler for all concerned. The current term "locality" that was used in the 1965 Act has been much debated. It has proved too restrictive, because it is taken to refer to a recognised administrative locality, such as a parish. Adding the "neighbourhood" formula in 2000 has not resolved this difficulty. In urban areas in particular, it has proved problematic t show that the use that took place emanated from the right kind of area. The noble Lord, Lord Greaves, spoke of this problem in Grand Committee, and this amendment is the result.*
>
> *Essentially, the convoluted formula used on this front to date has failed to convey the crucial point, which is that whatever type of place people live in - urban, rural, large or small - their recreational use of a local area of land should be capable of justifying its registration as a green, so long as three critical conditions are met. First, that their recreational use takes place as of right - I have already summarised what that means; secondly, that it takes place for at least 20 years; and thirdly, that a significant number of people are involved in the recreational use.*[39]

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39 See 676 Hansard (Lords) column 40 (28 November 2005).

47. Then we had the *Trap Grounds* case and at Third Reading in the Commons, the Government went back to the old wording. Barry Gardiner (Under-Secretary of State, Department of Environment, Food and Rural Affairs) said:

> *Lord Hoffmann's judgment stated that:*
>
> > *"Any neighbourhood within a locality is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries ... The fact that the word 'locality' when it first appears in the current definition must mean a single locality is no reason why the context of 'neighbourhood within a locality' should not lead to the conclusion that it means 'within a locality or localities'"*
>
> *That interpretation accords well with the intention behind clause 15.*
>
> *On Report in the House of Lords, we simplified this wording to refer simply to "local inhabitants", because at that point there were some doubts about the likely interpretation of the original phrasing. Now that the Law Lords have resolved those doubts, we think it best to revert to our original formulation, which will ensure that this criterion for registration is understood.*[40]

48. In the House of Lords, explaining the same point, Lord Rooker (Minister for Sustainable Farming and Food) said:

> *The doubts are now resolved about original formulation, so we need to revert to it to ensure that the intended meaning is clearly understood.*[41]

49. But of course what has not been resolved is Sullivan J's cohesiveness point. Of course it may have been a bad point. Indeed, the easiest way of resolving the debate is to say that Sullivan J was wrong. In this way the meaning of *neighbourhood within a locality* becomes congruent with the way that Lord Bach expounded the law. Moreover it will be congruent with Note 6 to Form 44 (the application form for a new town or village green) which is contained in the *Schedule* to the *Commons (Registration of Town or Village Greens)*

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40 See 448 Hansard (Commons) column 426 (29 June 2006).

41 See 684 Hansard(Lords) column 1005 (17 July 2006).

(Interim Arrangements) (England) Regulations 2007 (SI 2007 No 457). This reads as follows:

> *It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.*

It is fair to say that this does envisage that an area will be defined. On the other hand, what sort of neighbourhood is it that can only be defined by reference to a map? And what cohesiveness has a street? But if there be no requirement of cohesiveness, it would mean that this seemingly complicated phrase – *neighbourhood within a locality* - means no more than *locality* or *neighbourhood* (on the basis that neither are given a technical meaning). What type of local use, on this view, would not justify registration?

50. I do not think in fact recourse to *Hansard* clarifies what Parliament expressly intended as to the cohesiveness point; what one can derive from the legislative history - to which the words of the debate do not add - is that Parliament was content with the pre-existing position, whatever that was.

51. Finally, it is appropriate to note that there is support for a non-technical view in *Northampton Borough Council v. Lovatt*[42]. As will be seen, it is authority from another area where lawyers and Parliament have been dancing a *pas de deux*.

52. Mr and Mrs Lovatt lived, with their children, in a council house – 174 Gladstone Road – on the Spencer Estate in Northampton. Their three eldest children, who were teenagers, *ran wild upon the estate* and the Council sought and obtained a possession order against Mr and Mrs Lovatt on the statutory ground contained in Schedule 2 to the Housing Act 1985, namely:

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42 [1998] 1 EGLR 15.

> *The tenant or a person residing in the dwelling house has been guilty of conduct which is a nuisance or annoyance to the neighbours...*

53. These words were different, although similar, to the comparable provision (applying to private tenancies) contained in the Rent Act 1977. The words there were *nuisance or annoyance to adjoining occupiers.* In *Cobstone Investments Limited v. Maxim*[43], the Court of Appeal rejected an argument in respect of these words that *adjoining* meant *contiguous.* Dunn LJ approved a broader interpretation of the word put forward in Megarry's Rent Acts that *adjoining* meant *neighbouring*.

54. In commenting on the change from adjoining occupier to neighbour, Woodfall on Landlord and Tenant said:

> Neighbours *has been substituted for* adjoining occupiers *to avoid disputes as to proximity.*

All the acts of anti-social behaviour of the Lovatt children had been committed more than 100m away from their house. Hence an argument that it was a nuisance or annoyance to the neighbours.

The Court of Appeal, by a majority, rejected this argument. Most germane to our purposes, Chadwick LJ moved from *neighbours* to *neighbourhood* and said:

> *What, then, are the boundaries of the neighbourhood of which 174 Gladstone Road forms part? I find assistance in the definition of "neighbourhood" contained in the Oxford English Dictionary:*
> *The people living near to a certain place or within a certain range...a community, a certain number of people who live close together. A district or portion of a town...especially considered in reference to the character or circumstances of its inhabitants; a small but relatively self contained sector of a larger urban area.*
> *In my view, there can be no real doubt that in the context of this tenancy agreement, the neighbourhood to which both parties would have expected the tenant's obligations to apply was the Spencer Estate and its immediate surrounds.*

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43 [1985] QB 140.

It seems as though *neighbourhood* is being defined without reference to cohesiveness, eve though the dictionary definition does, among other things refer to community. Surely Chadwick LJ would not have allowed the appeal if the Spencer Estate were insufficiently cohesive?[44]

The irony is that the statutory ground contained in the Housing Act 1985 was repealed and replaced by a new ground. The relevant words are:

> *...nuisance or annoyance to a person residing, visiting or otherwise engaging in lawful activity in the locality...*

I am confident that locality is not used here in the sense that is has in the common law relating to custom![45]

55. And so on the arguments are inevitably going to continue. There is added to the argument this further element. The *Trap Grounds* case decided that registration confers rights. On the face of it, it must therefore be possible to define who it is who has the rights. This point to the necessity of a neighbourhood having a legally defined boundary. So on one view, neighbourhood requires

- cohesiveness; and

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44 *Lovatt* is a splendidly complicated case. Pill LJ dissented. Henry LJ held that *neighbours* was a word of wider import than the phrase *adjoining occupiers* and that the word was *clearly intended to cover all persons sufficiently close to the source of the conduct complained of to be adversely affected by that conduct* (p18). Chadwick LJ, although concurring in the result that the Spencer Estate was part of the neighbourhood, expressed himself rather differently. He said *The conduct at which Ground 2 is aimed is conduct within the neighbourhood which causes nuisance and annoyance to others within the neighbourhood. The neighbourhood, for this purpose, is the area with which the Council are identified, by reason of their status as local housing authority and landlords, as having responsibility for amenities and quality of life; that is to say the area within which persons affected may fairly regard the Council has having some responsibility for those whose conduct is causing the nuisance or annoyance. The persons affected will be neighbours for the purposes of Ground 2. Who those persons are in any particular case will, of course, depend on the circumstances of that case* (p22). It does not sound as though he thought that the whole of Northampton was the neighbourhood (an area which in its entirety includes 7 parish councils as well as a large built up area).

45 Another interesting case on *neighbourhood* is *Legh v. Hewitt* (1803) 4 East 154. Lord Ellenborough held that the phrase *custom of the country* in a lease did not require a defined locality in the sense of customary law – a neighbourhood would suffice. However, the neighbourhood thus defined – which would vary according to the soil, climate and situation of the land in question – would, and presumably must, have been capable of precise definition.

- precise definition.

56. Cohesiveness looks the better argument, this is because no one doubts that local people had a right to use statutory recreational allotments, and, as we have seen, they often were for the benefit of a neighbourhood. As regards rights perhaps the matter could be looked at in this way. Rather than it being necessary that it should be necessary to say with certainty of **every** possible candidate as an inhabitant of a neighbourhood that he is or is not an inhabitant of a neighbourhood, it suffices if one can say with certainty of **some** possible candidates that they are inhabitants of a neighbourhood.[46]

57. Returning to cohesiveness, *neighbourhood* does not normally have in everyday speech the sorts of connotation given to it by Sullivan J. Thus although we speak (planners, at any rate!) of *neighbourhood* shops, it is quite possible to frame the sentence

> *In the neighbourhood where I live there are no facilities at all, and the nearest church is miles away.*

58. Before leaving the topic I should mention one further argument which may or may not have currency once you accept that a neighbourhood is a cohesive and/or defined area. If this is the correct approach, then it may be argued that the usage reported does not match the neighbourhood.

59. Thus the "fit" may be altogether wrong. Usage may certainly come from the neighbourhood or locality in question, but there is no other relation between the area and where the people live. This is not easy to explain without a diagram! Similarly, the usage may all come from the same locality or neighbourhood, but it all comes from a particular part of that neighbourhood or locality. Another point is where the users all come from one locality but the claimed green is in another locality (albeit, necessarily – in some sense – in the same neighbourhood). Virtually nothing in the law of town and village greens can be said to be beyond argument, but the preponderance of common

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46 With the proviso of course that the postulated *neighbourhood* is within a *locality*.

law authority is that there cannot be a custom in one place to do something in another place.[47]

60. Arguments along these lines were beginning to be argued in village green cases before the hiatus caused by the *Trap Grounds* case: they may yet re-emerge to trouble decision makers.

A conclusion as to arguments on locality and neighbourhood

61. In the light of what Lord Hoffmann said in the *Trap Grounds* case (as well as the general approach that his remarks embodies) and in the light of the Government's response to what he said in terms of amendment to the Commons Bill, it seems difficult to envisage a case in which an application will be defeated on straight locality/neighbourhood grounds. Nonetheless, landowners are likely to latch on to the ground of objection – particularly if it is the only plausible ground of objection that they have. Further litigation is, accordingly, not unlikely. If one is a landowner, one ought not to be too optimistic as to its outcome.

What if the boundary of the locality changes in the relevant 20 year period?

62. Localities change. If the boundary of the locality otherwise relied on has changed during the relevant 20 years, does this afford the basis for revisting a claim for registration? Thus it could be said that for, say, five years use was by the inhabitants of locality A, and for fifteen years by the inhabitants of locality B (i.e locality a plus or minus an area, a variation occurring by virtue of a boundary change).

63. The first thing to say is that the Courts are likely to be extremely unenthusiastic about this argument.

64. Second, on the face of it the suggestion, in the example given, that use was first by the inhabitants of locality A and then by the inhabitants of locality B

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47 See *The Local Ambit of a Custom* HE Salt in *Cambridge Legal Essays* (1927) at pp290-2.

looks potentially to be a contrived way of analysing the situation. Surely, it could be said, the true position is that al the time there is use by the inhabitants of locality A - it is just that there has been a (modest) adjustment to its boundary. This leads to the thought that it is all a matter of fact and degree. Thus a wholesale reorganisation of boundaries might be an argument bearing upon whether there had been 20 years' use; a modest boundary change would not be. The problem of course with a fact and degree argument is that it is odd to apply it in the context of lines on a map which at any one time are fixed and clear and where the requirement for fixed and clear lines has come from a requirement for certainty - the seeming activities of fact and degree.

65. Another possible "take" on this is that if the neighbourhood relied upon has remained unchanged and always within a locality of a particular type, the fact that there have been boundary changes to the locality at the periphery is neither here nor there. (This raises in an acute form the question of whether class [c] rights vest in the inhabitants of the relevant neighbourhood or locality).

66. In the context of customary law, there is authority on the point, namely *Bremner and others v. Hull*.[48]

67. The case concerned a dispute which arose in 1863 or 4 as to the correct basis for the elections of churchwardens in the parish of Prestwich in Lancashire. The election of churchwardens was generally to this time a matter regulated by custom.[49] In Parliament - and this was common ground - there were five churchwardens, one for each township. The claimants in *Bremner* had established what would otherwise have been a custom as to the election of these five churchwardens in the parish of Prestwich. However it was objected that in 1848 the township of Whitefield had been severed from the parish; before that the arrangements as regards a sixth churchwarden from the

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48 (1866) LR 1 CP 748.

49 As we have seen, even today the election of churchwardens may be regulated by custom: see section 12 of the Churchwardens Measure 2001.

township of Whitefield had been the same as those in respect of the five unsecured townships. One can see the point of the objection if in support of the claim for a valid custom - i.e use notionally going back to before 1189 - the claimants were relying on the 20 year period down to 1863 or 4. However the approach of the Court was to treat the custom as one pre-existing 1848 and then say that the change effected in 1848 did not affect the position. Thus Erle CJ said:

> *As to the effect f the order in council creating Whitefield a new district, I am unable to see any difficulty. Taking away the care of souls in a portion of a parish or district does not affect the cure of souls in the rest of the parish, or the rights, powers and duties of the ecclesiastical officers appointed thereto.*[50]

68. If my analysis is correct, it does not assist as regards a situation where the focus is on the 20 years immediately before the issue becomes contentious.

69. Another case which holds a changed boundary of a locality to be irrelevant is *R v Hundred of Oswestry (Inhabitants)*[51]. The case concerned the obligation of the inhabitants to maintain the Llanyblodwell bridge over the River Tanah. Originally, the hundred of Oswestry had comprises sixty townships. However, in 1543, a sixty first was added by statute. Abertanah, transferred from the county of Merioneth in Wales. It was argued that Abertanah was not liable to maintain the bridge, but the High Court rejected that argument.[52] It seemed to view the hundred as having a legal existence independent of its precise boundaries:

> *Although the hundred has varied at different times in its component parts, still it may be changed as a hundred immediately.*[53]

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50 At p 761 Keating J and Montague Smith J were to a similar effect.

51 (1817) 6 M and S 361.

52 Formally the argument was that the whole presentment to Quarter Sessions was invalid, but it was accepted that a valid presentment could be framed based on the liability of the original sixty townships.

53 See the judgment of Holroyd J at p365.

70. I would prefer to see this as a case of statutory interpretation, so that 34 and 35 Hen 8 c26 was providing, by adding a district to the hundred, that it should be liable to the customary duties of the (pre-existing) hundred.

71. *Bremner* and *Oswestry* are unhelpful to those who would seek to make something of the point that the boundaries of the locality have changed. Nonetheless, as I have suggested they are distinguishable.

Some conclusions on changes in locality

72. If one is just looking at modest and peripheral boundary changes, it seems unlikely that it will be worth taking a point on the locality having changed in the least 20 years. If it is something more substantial there is more scope for argument – eg where the ecclesiastical authorities have moved a housing estate from one parish to another during the 20 year period and where the only available locality is the district[54]. It is surprising that we even find ourselves in a position to argue about after two amendments to the original law on locality. It is almost as if Parliament wanted to generate work for lawyers.

[54] With the result that they may be "fit" arguments with reference to locality.

(section 41). The Act also creates a new requirement for consent for the working of minerals.

21. Another point to note is that it is not possible under Part 3 to apply for consent for works to be carried out on village greens. With the revocation of s194, there will be no mechanism to permit such works. And the House of Lords held in *Oxfordshire County Council v Oxford City Council & Robinson*[14] that registered greens do benefit from the protection conferred by section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. The result is that the only works allowed on a green will be those which are done with a view to the better enjoyment of the green, and do not injure the land or interrupt the use or enjoyment of the land as a place for exercise or recreation. Otherwise, an exchange of land will be necessary.

[14] [2006] 2 AC 674.