IN THE HIGH COURT OF JUSTICE **Claim No: CO/1208/2017**
QUEEN'S BENCH DIVISION
PLANNING COURT

BETWEEN:

THE QUEEN
(on the application of COTHAM SCHOOL)

Claimant

-and –

BRISTOL CITY COUNCIL

Defendant

(1) DAVID MAYER
(2) BRISTOL UNIVERSITY
(3) ROCKLEAZE RANGERS FOOTBALL CLUB

Interested Parties

SKELETON ARGUMENT ON BEHALF OF THE DEFENDANT

PRELIMINARIES:

Hearing Date:	21st and 22nd November 2017
Time Estimate:	1.5 days (excluding Judgment)
Advance Reading:	As per Claimant's suggested pre-reading and suggested time required (up to 1 day) but in addition the handwritten notes of the Committee Meeting at CB/4/537-550 and the Inspector's earlier Report of 22 May 2013 and in particular paragraphs [57]-[[72] at CB/10/1122-8

Abbreviations:

ASFG:	Amended Statement of Facts and Grounds of the Claimant
C:	Claimant
CB/x/x:	Core Bundle followed by tab and then page number
CRA:	Commons Registration Authority
CSK[x]:	Claimant's Skeleton Argument followed by paragraph number/s
D:	Defendant
DAG[x]:	Defendant's Amended Detailed Grounds for Resisting the Claim followed by paragraph number/s
IN:	Inspector, Mr Philip Petchey of counsel
FIP:	The First Interested Party
IR[x]:	Inspector's Report 14 October 2016 followed by paragraph number/s
SB/x/x:	Supplementary Bundle followed by tab and then page number
TVG:	Town or village green
WS:	Witness Statement

INTRODUCTION

1. The matter relates to a determination by D of an application to register land as a new town or village green ("TVG") in accordance with section 15 of the Commons Act 2006. This is in respect of the CRA's decision taken by D's Public Rights of Way and Green's Committee ("the Committee") on 12 December 2016 ("the Committee Meeting") to register land at Stoke Lodge, Shirehampton Road, Bristol ("the application land" – as identified in aerial photographs together with access points at **CB/2/193-6**).

2. The matter has a lengthy background with the IN having at one stage recommended registration of the land (see DAG[4]-[13] – **CB/1/1/100-100.2**; see also paragraphs 4-39 of the Committee Report **– CB/4/526-532**). In

particular, the IN then considered that use of the land had been as of right; and that an objection based on statutory incompatibility of registration with the statutory purposes for which the land was held fell away in the light of the decision of the Court of Appeal *in R (Newhaven Port and Properties) Limited v East Sussex County Council* [2013] EWCA Civ 276.

3. The Supreme Court handed down its decision on 25 February 2015 on that matter in *R(Newhaven Port & Properties Limited) v East Sussex County Council* [2015] UKSC 7, [2015] AC 1547. Following submissions from the parties, the IN decided that on its proper interpretation it did not require the application to be dismissed. In all the circumstances, the IN decided that it was appropriate for there to be a public inquiry. That was to enable evidence to be led on the statutory incompatibility point, as well as in respect of the use of the land and as to the notices.

4. Following that non-statutory public inquiry held on 9 days in June and July 2016, the IN recommended that the land should not be registered. This was solely on the basis that he considered that to be *as of right* because of signs that were present during part of the relevant qualifying period.

5. The Committee considered the matter and resolved by a majority, with Councillor Abraham exercising a casting vote, not to follow the recommendation of the IN (See Committee Report Minutes - **CB/2/201**, approved by the Committee in July 2017).

6. In so doing, the Committee accepted all of the IN's conclusions on the issues that arose, save in respect of the signs.

7. C relies upon six Grounds. In summary, the Grounds raise the following issues:

   (1) C relies upon the IN's assessment with regard to the signs, whereas D takes a different position as to the sufficiency, and thus the legal effect, of these. This relates to Ground 1 which raises the issue of whether D erred in law in finding the land to have been used *as of right*. It also relates to Ground 3 which raises the issue of whether D provided adequate reasons for departing from the IN's conclusion that the use was contentious.

(2) C alleges, under Ground 2(a) that D has taken into account an irrelevant matter and also acted unfairly in so doing. It further alleges under Ground 2(b) that the D acted in breach of natural justice in not disclosing the emails sent to Councillor Abraham prior to the Committee Meeting.

(3) C also contends that the IN and thus D has failed to give reasons for rejecting the submissions that use was by implied licence and not *as of right* based on *Mann v Somerset CC* [2012] EWHC B14 (Ground 4).

(4) C departs from the IN's conclusion with regard to statutory incompatibility, whereas D relies upon this. This relates to Ground 5 which raises the issue as to whether D has erred in law by finding that the principle of statutory incompatibility was not engaged.

8. The relevant details of the land and its history are included in the IR and are not repeated here (**CB/2/101-108**). They are referred to as necessary when addressing each of the Grounds of Claim.

9. This skeleton argument now refers briefly to the legal principles before responding to the Grounds of Claim.

APPLICABLE LEGAL PRINCIPLES

10. The application has to be determined in accordance with section 15(2) of the CA 2006. This provides (as summarised in paragraph 14 of the Committee Report – **CB/4/527**):

15 Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where–

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application.

11. DAG[14]-[19] (**CB/1100.2-100.4**) refers to the relevant legal principles which are relied upon and accordingly the legal principles are not set out here but referred to as necessary below.

12. With regard to the issue of statutory compatibility, it is acknowledged that there is still a degree of uncertainty with regard to certain aspects of this that were not dealt with, or not dealt with conclusively, by the Supreme Court in *Newhaven.*

13. That uncertainty is particularly so given the Judgments are outstanding in *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 1238 (Admin.) and *R(NHS Property Services Ltd) v Surrey County Council* [2016] EWHC 1715 (Admin.) (see CSK[35] which helpfully updates the position).

RESPONSE TO THE AMENDED GROUNDS OF CLAIM AND CLAIMANT'S SKELETON ARGUMENT

14. D's response to each of the six Grounds of Claim and the CSK is now set out.

Ground 1: Error of law as to whether the use was "as of right"

15. The essence of C's complaint is that the Committee was not entitled to depart from the IN's findings of fact on this issue. D's position is set out in the DAG [22]-[33] (**CB/1/100.5-100.8**) and contends that it was entitled to depart from the IN's conclusion in respect of the legal effect of the signs.

16. There is no dispute that all the requirements within section 15(2) of the Commons Act 2006 must be met and that the use must be "*as of right*" (CSK[54]). D does not dispute that in *Winterburn v Bennet* [2016] EWCA Civ. 482 (which was not a TVG case and applies by analogy only – as acknowledged in CSK[31]) it was held that, even if a sign was not enforced, no further action is required on the part of the landowner to render the use by trespassers contentious use. D did not, and does not, depart from that principle for the purpose of these proceedings. However, it is still necessary that the sign/s are sufficient to make the use contentious, as addressed below.

17. The IN's assessment of this issue in found within IR[361] to [412] (**CB/2/168-178**). His assessment consisted of the following steps:

(1) Under "Introduction", the IN recognises that a qualifying use must be a*s of right* and that the objectors contended that it was not so since the use in the twenty years to the date of the application (7 March 2011) was either permitted or it was contentious (IR[361/2]).

(2) Considering the period prior to the relevant 20-year period up until the date of the application, the only "proper" access out of the 10 accesses was Access point [3] which may have been open and rendered the site freely accessible (see access points at **CB/2/195**). Accordingly, the public were trespassers at the time (IR[365]).

(3) Signs were erected by Avon CC sometime in the 1980s. The IN considered the wording of those signs (IR[368] to [372] – **CB**). He concluded that the County Council was taking action in respect of general trespass regarding the educational premises and it was confirming the pre-existing situation and not for the first time granting a limited consent.

(4) A notice may make use contentious (IR[375]). However, what may be less clear is what is the position if a notice is ignored (IR[376]).

(5) The dicta in *R (Godmanchester Town Council) v Secretary of Ste for the Environment* [2008] 1 AC 221 and *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, which led the IN in his Report dated 22 May 2013 (**SB/10/1126-7** at paragraphs [70] & [71]) to advise D to conclude that, despite the existence of the Avon CC signs, use by local people of the land had been *as of right* (IR[380] to [384]). This was a classic case of acquiescence*,* the IN then said.

(6) However, that was before the decision in *Winterburn v Bennett* [2016] EWCA Civ 482 (IR[385]). In that case it was held that it is not necessary for an owner, <u>having made his protest clear</u>, to take further steps of confronting the wrongdoers known to him orally or in writing. Further, David Richards LJ went on to hold:

"…The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not

to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land."

(7) Thus, the position is that in principle in the present case the signs may render the use of the land by local people contentious and not *as of right* (IR[387]).

(8) The further question arises as to whether the County Council signs were sufficient to render use of the land contentious.

(9) The IN considered that there were signs at entrance points [1], [3] and [7]. No notices were erected at points [4] and [5] (IR[389]).

(10) However, many people would necessarily have walked past the signs at access points [1] and [3], and of course quite a few did.

(11) Moreover, the IN accepted that local people have gone all over the land. The corollary of this, he said, is that they would have seen one of the signs.

(12) IN appreciated that not everyone would have "registered" the signs but given that they are of reasonable size and in prominent positions on the land that is not the fault of Avon County Council.

(13) Half of the evidence questionnaires submitted with the application referred to the existence of signs.

(14) The other half will not be people who generally were not aware of the signs because they never saw them (because for example, they used only access pints [4] and [5]) but people who never "registered" the signs.

(15) Thus, the reasonable landowner would have considered that he had done enough to render the use contentious i.e. by posting notices at what he would perceive to be the principal entrances to the site.

(16) There was no reason to consider that they were not clearly visible at all times throughout the relevant period.

(17) In conclusion, the signs were sufficient to render the use of the land contentious and in place at the beginning of the twenty year period (1991) and that such use was contentious until at least the time when Avon CC ceased to exist 1996 (IR[391] – **CB/2/174**.). As the Applicant had failed to establish that the use was *as of right* throughout the relevant twenty year period, the application must fail.

(18) The IN recognised that that his conclusion might be challenged on the basis that *Winterburn* is wrong (IR[392] – **CB/2/174**). He therefore went on to consider whether other actions of or on behalf of the landowner made the use contentious. He answered that in the negative and the C does not challenge that aspect of the (IR[401]-[412] – **CB/2/176-8**).

18. It is clear that the IN's changed conclusion on this matter was based on the *Winterburn* case which had caused him to alter his view (see IR[384] and [392]). He however concluded that the use was not *as of right* on the basis of a two-stage assessment:

(1) He concluded, based on *Winterburn,* that it was not necessary for the landowner to do other than erect properly worded signs that indicate the use is contentious, even if the signs were ignored (IR[375]-[387] – **CB/2/170-3**).

(2) However, even if there are such signs, the further question arises as to whether the County Council's signs were sufficient to render use of the land contentious (IR[387]–[391] - **CB/2/173-4**).

19. In *Winterburn,* Richards LJ held in part at [40] (CSK[29] with D's emphasis):

"….*In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised us of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers……"*

The approach of Richards LJ is predicated upon the signs being such for it to be concluded that the land owner has made (D's emphasis) "his protest entirely clear". That is that signs have to be sufficient to have the legal effect of rendering the use contentious and not *as of right*.

20. The legal effect of signs depends upon a number of factors as referred to in *Taylor v Betterment Properties (Weymouth) Limited* [2012] EWCA Civ. 250 at paras. [43] – [64], referring to *R (Oxfordshire and Buckinghamshire Mental*

Health NHS Foundation Trust) v Oxfordshire County Council [2010] LGR 631. The importance of there being sufficient signs in the right places is also highlighted by the Court of Appeal in *Taylor v Betterment Properties (Weymouth) Limited* [2013] EWCA Civ 250 at [60].

21. In *Winterburn* the Court quotes with approval the following passage from *Taylor v Betterment Properties (Weymouth) Ltd & Anor* [2012] EWCA Civ 250 at [30] (with D's emphasis):

> "60……*The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious*."

22. The issue of the sufficiency in number and location of signs is therefore an important factor to be taken into account in determining whether or not the notice has been brought to the knowledge of any reasonable user.

23. The Committee's approach was as follows:

(1) It was made clear to Members that the scope of the determination excluded all matters but the statutory test (see paragraph 23 of the Officer's Report - **CB/4/533**; and the Minutes at d – **CB/2/199**).

(2) There was no dispute that, as the IN concluded, the wording on the signs was capable of making the use contentious.

(3) It was not disputed that there were signs in place, as the IN found, up until 1996, the relevant 20 year period being 1991-2011.

(4) It is recorded in the minutes that there was wide ranging discussion over the weight applied to the signage (**CB/2/199**)

(5) It was agreed that the *Winterburn* case "set out the law" applicable to signage (para. j – **CB/2/200**).

(6) However, some members distinguished the size and nature of the site in *Winterburn* and did not consider it to be comparable to Stoke Lodge (para. k – **CB/2/200**).

(7) Some Members considered that the signage between 1991-1996 had been sufficiently clear and obstacles present at some entrances to make the use contentious (para. o – **CB/2/200**).

(8) Officers advised Members not to consider the Councillors' comments as evidence (para. r –**CB/2/200**).)

(9) The officers also pointed out the basis of the IN's conclusion that the use was contentious (para. s – **CB/2/200**).

(10) On being put to the vote, 3 members were in favour of accepting the IN's recommendation and rejecting the Application and three were in favour of registering the land as a TVG (**CB/2/201**). Councillor Abraham exercised his casting vote in accordance with D's constitution, paragraph CMR13.2.

(11) The three members who voted to register the land did so on the basis, as stated in the reasons for the decision (**CB/2/202**), that the facts were not the same as in the *Winterburn* case since unlike the car park in that case Stoke Lodge is a large piece of land (about 22 acres) and there were only three signs. The small number of signs on such a large site was not sufficient to make the use of the land contentious.

24. The CRA had a clear and justified basis for concluding that the signs in the circumstances did not make the user contentious. The conclusion on the sufficiency of the signs, which involves an element of judgment, is one on which the Committee was in the circumstances entitled and justified to differ from the IN on (see Councillor Abraham's WS[11], [20]-[24] **CB/3/321-322 & 324-325**).

25. The CSK does not appear to acknowledge the significance of the two different steps in the assessment. Further, C appears to be considering the issue on the second step to be solely one of fact, with no judgment involved. It appears that leads C to contend that the D's approach reveals "*a straightforward failure to apply the law*". That is not correct. C has overlooked the importance with regard to the number and location of the signs and the element of judgment applicable to that. The size and nature of any site is plainly relevant to that.

26. ASFG[61] (**CB/1/32** and CSK[60]) also relies upon the compulsory purchase case of *Colleen v Minister of Housing* [1971] 1 WLR 433. However, it is not accepted that this is analogous to the determination of a TVG application under section 15 of the Commons Act 2006. This case does not assist C as the

Committee did not take issue with the IN's findings of fact, as CSK[64] correctly suggests.

27. C refers to and relies upon IR[389] (**CB/2/173**). However, this involves elements of judgment. Similarly, C's reliance (e.g. at CSK[18]) on 18 of the Applicant's own witnesses having said they saw the signs does not necessarily mean that a significant number did not.

28. However, the Committee took a different view on whether the signs were sufficient to make the use contentious (i.e. the IN's second step). This was in the context of the three relevant signs being on the 22 acre site with numerous entrances. The facts are completely and obviously different from those in *Winterburn.* The Committee's finding that the use was therefore not contentious is also to be seen in the important context that the IN found that there was no other action on the part of land owner that was sufficient to make the use contentious (IR[401]-[412], **CB/2/176-8**, which, as noted above, is not challenged by C).

29. The role of the IN is of course recognised and his familiarity with the evidence and the site, as C relies upon. However, ultimately the decision is that of the RA and the authorities recognise the element of judgment involved in the assessment whether the criteria in section 15 are met (DAG[16]-19] – **CB1/100.3-100.4**).

30. It is not therefore accepted that this ground discloses any error of law on the part of D.

Ground 2(a): Took into Account Irrelevant Matter /Breach of natural justice

31. In essence C contends that the Committee took into account an irrelevant matter. However, this contention discloses no error of law.

32. D's position is set out in DAG[34] to [39] (**CB/1/100.8-39**).

33. This Ground is misconceived and contrary to the reality of Committee deliberations on such matters, including contentious TVG applications as in this case. Councillor Abraham's "interjections" cannot possibly form any

basis for this Ground and are understandable in the context of the debate, as he indicates (WS[13] – **CB/3/322**).

34. Inevitably other matters, not strictly relevant to the statutory criteria under section 15, will arise during a debate of this nature on such a matter. There is nothing improper in that in itself and is a reflection of proper democratic debate. C (at CSK[67]-[69]) refers to certain matters but fails, however, to take into account the context of the comments and the remainder of the debate.

35. The Committee were correctly advised in the Committee Report as to the matters that were relevant, as noted above, and, were reminded openly at the meeting that the reference of Councillors to others matters was not relevant (CB/2/200 at "r").

36. Moreover, there is nothing in the stated reasons that indicates the Chairman took into account irrelevant matters in applying section 15 (also see Cllr Abraham's WS[25] & [28] – **CB/3/325**). That is also the case when the debate and consideration of the Application are considered in context.

37. The reasons in the minutes show that only relevant matters were taken into account in terms of considering the application against the criteria of section 15 of the Commons Act 2006 and in particular whether the use was "*as of right"* (**CB/2/197-202**). Accordingly, no breach of natural justice arises.

38. The election of Councillor Abraham as Chairman was done in accordance with the Council's constitution. The casting vote by the Chairman was, therefore, authorised by and in accordance with the Council's constitution. Accordingly, there was nothing unlawful in Councillor Abraham's role as Chairman with the casting vote.

39. In any event, it is not accepted that anything relied upon under this contention renders the decision of the D unlawful.

40. In so far as, and which is unclear (CSK[71]), C is relying under this Ground upon the Chairman referring in correspondence to ensuring the writers that their views would be taken into account, that is to misunderstand the role of a local member and to unfairly criticise a perfectly proper courtesy.

Ground 2(b): Breach of Natural Justice

41. C relies upon the email correspondence with Councillor Abraham and matters it says are related to that (e.g. CSK[[12]-[22]). It is contended in essence that it is unfair that the other parties, including C, were not given the opportunity to comment upon the correspondence and in particular deal with what C says was a new point. D's position is that there was no new point and no unfairness.

42. This Ground is based on a misconception of the nature of the email correspondence and the relevance of this (see CSK[74]). It also fails to acknowledge that the sufficiency issue in relation to the signs had clearly been raised by the Applicant at the Inquiry and addressed by the IN. The requirement for it is also clear from the Committee Report (paragraph [28] – **CB/4/530** cf. CSK[83]).

43. With regard to the nature of the emails, Cllr Abraham cannot, as he says (WS[7] – **CB/3/320-1**), prevent people from writing to him or copying him in. It is obvious from the emails that he made clear that he was not able to respond or engage with his constituents on the application (e.g. at page 283 of Exhibit NA1 to the 2nd witness statement of Nathan Allen, **SB/9/1063** and Councillor Abraham's WS[7] – **CB/3/320-1**). He treated this as confidential constituency correspondence and it is clear that it did not preclude him applying the statutory criteria under section 15 of the CA 2006 (WS[9] & [10] - **CB/3/321**).

44. The references to and reliance on particular wording in Councillor Abraham's replies (CSK[76] and [79]) are taken out of context, which is clear from Councillor Abraham's WS (including at [28] – **CB/3/319-26**).

45. Local people had written supporting the application both before and after the IN's "final" report had been submitted to D and made public. C was well aware of these comments.

46. The specific point from the correspondence relied upon by the C relates to references to *Winterburn v Bennett* [2016] EWCA Civ. 482 and the distinction between the facts of that case and Stoke Lodge (see pages 177-8 of Exhibit NA1 and the other references in ASFG[16] – **CB/1/13**). C refers to this as "an

entirely novel point" (ASFG[18] – **CB/1/13**). However, *Winterburn* was referred to and submission made on it at the Inquiry as is clear from the IR. The FIP's Closing Submissions (paragraph 64 – **SB/7/664-5**) specifically distinguish the sign that was in issue in the *Winterburn* case from those for Stoke Lodge (cf. CSK[81]).

47. In its Reply to D's and the FIP's responses to the C's Applications, it is stated (at paragraph 5 – **SB/8/800**) that the FIP made no submission as to the application of *Winterburn* specifically in relation to the combination of the number of signs and the size of the land in question. However, the relevance of that is with regard to the sufficiency/effectiveness of the signs. That clearly was in issue. Hence, C's complaint (CSK[76] & [77] and cf. [82]) is not well founded.

48. The factual differences between Stoke Lodge and *Winterburn* were obvious on the face of the Court of Appeal's Judgment, as Councillor Abraham confirms (WS[11] – **CB/3/321-2**). Members were entitled to take those into account. Moreover, they were entitled to reach their own conclusion on whether the signs were sufficient to make the use contentious as set out under Ground 1 above.

49. The suggestion that the decision was influenced by "behind the back" evidence misinterprets the position (see CSK[77]). Also, the reliance on "new anecdotal factual points" (CSK[72] does not reflect the position. As said in *Broadview* at [26] (CSK[44]), the principle of a decision maker not entertaining representations from one party without finding out what other parties have to say on the matter has to be applied sensibly.

50. The real issue is the sufficiency/effectiveness of the signs in terms of whether the recreational use relied upon was as of right. It is in relation to that D has reached a different conclusion to the IN. That was not novel nor was the reference to the *Winterburn* case.

51. C was aware of the Applicant's approach to *Winterburn* and had responded to the Applicant's application for an adjournment of the Committee meeting in writing (which was included as Appendix 3 to the Report – **CB/**). C would or should have been very well aware that the debate around the *Winterburn* case

continued but in particular that the sufficiency/effectiveness of the signs, given the circumstances for the Stoke Lodge land, was contested by FIP.

52. Therefore, the email correspondence raised no new issue and the C's reliance on *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 562 is not well founded (see paragraph 30 of that Judgment and see CSK[41]-[45]). There was no duty on Councillor Abraham to disclose this (cf. ASFG[40]-[44] – **CB/1/22-3**). There can be no basis in the circumstances for considering that C might have been prejudiced (cf. CSK[45])

53. Further C appears to criticize Councillor Abraham for wishing to ensure he fully understood the position with regard to *Winterburn* (CSK[84]). Councillor Abraham was correct to note that the upholding in *Winterburn* of the sign making the use contentious was in the context of a very much different factual situation. The criticism is therefore unfounded. In fact, this demonstrates a Councillor acting responsibly and diligently.

54. C further asserts that it appears that part of the Councillor's research was "at least done for him in correspondence" (CSK[84]). There is no basis for that assertion. The research was done before the correspondence, as would appear from Councillor Abraham's WS[11] & [22] (**CB/3/321-2 & 324**).

55. The real complaint that C is making appears to be (see CSK[84]), and comes down to, the fact that the Committee took a different view on the sufficiency point than did the IN and it should have been given the opportunity to comment on that. C now contends, on the basis of the correspondence, that it should have been given the opportunity to consider that point. It does not appear to have contended this before (beyond the original Grounds 1, 2 and 3). There was no basis to do so. The email correspondence does not provide any such basis for the reasons set out above. This application had already received very lengthy consideration and the Committee were entitled to determine it in the way they did at its meeting.

56. This Ground therefore discloses no error of law. In any event, this is clearly a situation where the exercise of the Court's discretion not to quash may be applicable (cf. CSK[80]).

Ground 3: Failure to supply adequate reasons for not following the Inspector on contentiousness

57. For the purpose of these proceedings, and subject to any contrary indication from the Court of Appeal in the *NHS* case that C refers to, D does not dispute C's position with regard to the duty to give reasons or the standard of them (CSK[39]-[40]). However, D contends that on that basis adequate reasons have been provided (DAG[51]-[55] – **CB/1/15-6**).

58. C contends that the D has not provided adequate reason for departing from the IN's and Officer's recommendation to reject the application and as a result it does not know why they lost and what the legal justification was for doing so (ASFG[78] –**CB/1/36**). However, the Committee's reasoning is clear. The stated "reasons" have to be read in context (cf. CSK[86]-[87]).

59. The Committee did not consider that the signs were sufficient in number to make the use of the application land by the public contentious in accordance with the statutory test. The Clerk's handwritten notes and the printed minutes demonstrate that this issue was fully debated and explored (**CB/2/197-202** and **CB/4/537-550**).

60. C asserts that the reason given by the Committee goes behind the IN's findings of fact (CSK[86] & [87]). However, as addressed under Ground 1 above, the Committee's departure from the IN's assessment relates to his judgment as to the sufficiency of the signs in making the use contentious.

61. The Minutes show that (**CB/2/199-200**):

    (1) It was noted that the IN stated that his recommendation would have been to register the land, if he had considered the use to be "*as of right"*. Other than in relation to the issue of the signs, the IN therefore considered that the application met the statutory criteria under section 15.

    (2) There was a wide-ranging debate over the signage at the site.

    (3) The members were properly advised on the correct approach to the issue, as noted above.

(4) The Members took into account the *Winterburn* decision but recognised distinctions between the factual circumstances in that case and Stoke Lodge.

(5) Contrary to C's assertion (in paragraphs [13] & [14] of its Reply – **CB/1/88**) regarding the sufficiency of the signs, that is precisely the point that the Committee grappled with. C overlooks the judgments and assumptions made by the IN on this (e.g. at paragraphs [387] and [389] – **CB/2/173-4** and see the Handwritten Clerk's Notes – e.g. at **CB/4/546-547**) which the Committee has not fully accepted. The Committee (by use of the casting vote) did not consider that the signs were sufficient in the circumstances to render the use of the land contentious.

62. The Members therefore grappled with whether the notices that the IN concluded were present were sufficient due to their number, location and the size of the application land. Therefore, C's alternative contention that an immaterial consideration (that there needs to be a *proportionate* number of signs to the size of the land – CSK[88]) is unfounded and fails to acknowledge the importance of the requirement for sufficiency in terms of the number and location of the signs.

63. Therefore, on the basis of the legal principles relied upon by the C, the reasons for the D taking a different view of the effect of the signs are clear and legitimate and this ground does not therefore disclose any error of law.

Ground 4: Failure to give reasons for rejecting the submission based on consideration of Mann v. Somerset [2012] EWHC B14

64. C contends that the IR does not refer to *Mann* or tackle the submission separately (CSK[91]). Although not referred to in his Report of October 2016, the IN did deal with *Mann* in his earlier Report of 23 May 2016 (paragraphs [48]–[51**] - SB/10/1120**). The IN did in any event plainly deal with the substance of the contention and found that the use was not carried out with implied permission (DAG[56]-[62] – **CB/1/100.14-100.16**)

65. The IN considered the co-existence of the significant use for lawful sports and pastimes with the use by the schools and sports clubs (IR[343]-[360] –**CB**). In particular:

(1) The IN assessed the extent of use of the land by schools and sports clubs (IR[343]-[348]).

(2) Against that assessment, the IN considered the argument that the extent of the use by schools and clubs is such that the land cannot properly be registered despite significant use of it by local people (IR[349]).

(3) The IN recognised that whilst a pitch was being used it was not available for use by local people as a TVG and their use was interrupted. (IR[350]).

(4) However, the IN concluded that the uses co-existed (IR[351]-[352] & [354]). There was always space on the land for local people to use.

(5) The fact that local people would have "stepped aside" to allow a pitch to be used, did not defeat the use from qualifying as the concept of deference was rejected by the House of Lords in *R (Lewis) v Redcar BC* (IR[353]).

(6) If the land was registered as a TVG any increase in the pitch use would not prevent the use by local people continuing whatever that increase might be (IR[355]-[356]).

(7) Finally, the IN referred to a passage in Gadsden (2nd edition, 2012) (IR[358]-[360]), as referred to below.

66. With regard to the "implied licence" issue relied upon by C (as seen in *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin) - (ASFG [82] & [83] – **CB/1/33**), the IN has taken into account the exclusion of other users of the land at various times. The IN was clearly aware of the claimed sports day use, as this is included in his record of the evidence (see e.g. paragraphs [36], [52], [54], [69], [129], [152], [284] and [295/6] of his Report at **CB/2/109, 111-2, 114-5, 125-6, 130-1, 152** and **154**).

67. Whether dual uses co-exist or result in an implied licence depends upon the circumstances. That was clearly considered by the IN as indicated by his reference to, and consideration of, paragraph 14-20 of Gadsden on Commons and Greens (2nd Edition 2012) and to *R (on the application of Lewis)*

(Appellant) v Redcar and Cleveland Borough Council and another (Respondents) [2010] UKSC 11 (IR[355]-[360] – **CB/2/166-7**).

68. The passage from Gadsden sought to distinguish use of sports fields from the position in *Lewis* because the users would not be of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. The IN did not agree with that approach and he gave his reasons for that (IR[360], which should be read with the preceding paragraphs – **CB/2/164-168**). He also made clear in his earlier Report that he did not consider that the *Mann* case precluded him from concluding on the circumstances of Stoke Lodge that the use was not permissive (paragraphs [49]-[52] - **SB/10/1120-1**) as permission cannot always be inferred from the exclusion of the public from part of the land. It will depend upon the circumstances which the IN correctly took into account.

69. The IN has concluded that the co-existence of the uses on the application land was within the scope of that found to be consistent with TVG rights in the *Lewis* case. He was entitled to so conclude in the circumstances of this case (see *R (Mann) v Somerset County Council* [2012] EWHC B14 at paragraph [85]) and the CRA was entitled to rely upon that conclusion (cf. CSK[92]).

70. An example of the facts resulting in a different conclusion from that in the *Mann* case is found in *TW Logistics Ltd v Essex CC* [2017] Ch 310 at [102]-[117] and in particular at[106]. Barling J considered (at [106]) whether the commercial use of the land in that case led to an exclusion of the public that was of a kind which sends an unequivocal message to users that the owner is regulating access to and use of his land.

71. Contrary to Cl's assertion (CSK[95]), the IN did therefore address the substance of the issue of implied permission as relied upon by C and did take into account the *Mann* case, as is clear from his earlier Report, and has in any event given adequate reasons for the conclusion that he reached.

72. It is not accepted therefore that this Ground discloses any error of law.

Ground 5: Statutory Incompatibility

73. C relies upon three contentions under this ground (CSK[30]-[38] & [96]-[[102]. D refers to and relies upon DAG[63]-[85] (**CB/1/100.16-100.21**).

74. This issue is addressed in IR[413]-[452] (**CB/2/178-188**):

(1) The IN set out the relevant statutory powers and duties (IR[413]-[418].

(2) He then referred to *R (Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547 (SC) and related cases (IR[419]-[431].

(3) The IN then considered the scope of statutory incompatibility as applicable to local authorities and concluded that it did not have a very general application to all land of local authorities but that it could apply (IR[432]-[433]). It is not limited to just statutory undertakers (IR[434])

(4) Lord Neuberger and Lord Reed at [94] and the following paragraphs of *Newhaven* were not saying that where one considers the land of a statutory undertaker the concept of statutory compatibility necessarily applies (i.e. as a matter of law) but that, where one is considering an entity such as a port or harbour it [obviously] applies.

(5) If there is nothing in practice that is consistent with its statutory purposes that a statutory holder of land can do with that land as a result of it being subject to rights of public recreation, the principle of statutory incompatibility applies. However, the principle will not apply, if there is something that he can do with the land (IR[435]).

(6) In the absence of authority, the IN considered that the test is whether there is any such incompatibility at the date of the application (IR[436]). That is 7 March 2011 in this case.

(7) He referred to the different approaches in *Lancashire CC v Secretary of State* [2016] EWHC 1238 (Admin) and *R (NHS Property Services) v Surrey CC* [2016] 4 WLR 130 (IR[437]-[443]). The IN noted that Gilbart J in the *NHS Property Services* case was saying that land held for educational purposes under section 507A of the Education Act 1996 may be registrable. (see also IR[415]-[416]). He also envisaged

that land held by a local authority under "general" powers would be registrable (IR[422]).

(8) If the principle of statutory incompatibility applies at the date of the application, it does not apply on the approach of either case (IR[444]). The position is less clear if the principle were to apply at the date of consideration of the application by the CRA. The IN acknowledged that "these are difficult matters".

(9) In this case the land vested in the Academy since the Application but the nature of the powers and duties of the Academy are similar to those of Bristol City Council as education authority before it. So, applying the approach of looking at the relevant statutory powers (as per Gilbart J in the *NHS Properties* case) a different conclusion is not reached depending upon whether it is assessed at the time of the application or the date of the determination (IR[445]).

(10) It is difficult to see that the school could not make some alternative arrangement if it became necessary. So, the position now is that there is no statutory incompatibility as envisaged by Ouseley J in the Lancashire case.

(11) It is wrong in principle that future incompatibility might be sufficient to hold that the principle of statutory incompatibility applies in this case (IR[445]).

(12) With regard to C's argument that an Academy cannot dispose of a playing field without the consent of the Secretary of State, the IN doubted that registration of a TVG is a disposal for the purposes of the relevant provision (IR449]).

(13) If there is no statutory incompatibility on the basis of *Newhaven, Lancashire and Surrey*, the position was anyway not changed because of a requirement for the Secretary of State's consent.

(14) Standing back, the correct time to look at the matter is the date of the application. If the correct time to look at the time of the determination of the decision, there is some force in the argument of statutory incompatibility because registration will evidently preclude the School from using the land for physical education (IR[451]).

(15) If the correct time to consider is the date of determination, it may be relevant to have in mind that the land was acquired by Cotham School subject to any TVG rights that there may have been over it. (IR[452]).

75. Against that summary of the IN's assessment of this issue, C's contentions on this are considered in turn.

The correct point at which to assess statutory incompatibility

76. C contends that the IN was wrong to consider the situation at the point of the application rather than at the point the application is determined (CSK[97]. The Committee accepted the IN's view.

77. Given that the School took the lease after the TVG application had been made and that the "dual use" was then being carried on, C was aware of the position and potential implications, as the IN pointed out.

78. It appears that the land has been used for a very long period for recreational purposes by the local community and the importance of the protection of recreational uses that arise from section 15 registration should not be overlooked.

79. C refers to and relies upon (SFG[63] – **CB/1/33**) *Newhaven* at [96]-[97] (**CB/6/1090**), *Lancashire* at [79]-[81] (**CB/6/1119-1120**) and *NHS Property Services* at [137] (**CB/6/1151**). These do not appear to provide conclusive support for the proposition that the position has to be considered at the time of registration, as C contends (CSK[97]), rather than at the point of the application in the usual way, when considering whether the criteria in section 15 have been met.

80. Those paragraphs that C relies upon indicate that what could happen in the future may to some degree be relevant. However, that it not the same as assessing the position at the time of registration, as C contends. Such an approach could lead to uncertainty to an applicant and the local community and to potential "manoeuvring" by an objector contrary to the structure and purposes of the statutory regime.

81. There would be practical difficulties in such an approach. The *Ramblers* case relied upon by C (CSK[38] and [97]) relates to a different statutory provision.

In particular, under section 15 of the Commons Act it is clear that the relevant period for assessing whether the use is *as of right* is that up to the date of the application. C says that up until registration no incompatibility can arise. However, an Applicant can make an application within one year of the use as of right having being ceased (see section 15(3)). So even if a landowner has asserted their rights and evicted trespassers, that does not preclude an Application for registration as a TVG (provided that it is done in accordance with the time limits in section 15. Although section 31 of the Highways Act 1980, which was the relevant provision in the Ramblers' case, allows 20 years use *as of right* up to any point when the right was first brought into question to found presumed dedication, the section 15 provisions are more specific.

82. Further, there is a limit on what the statutory undertaker or authority can rely upon in terms of what could happen in the future. It cannot just rely upon general requirements or what could possibly happen. Ouseley J was of the view (albeit *obiter* as it was not necessary for his decision on this issue) that there had to be a specific requirement for that land for a specified statutory purpose (para. 81 of *Lancashire CC*):

> ……*In Newhaven, the importance of the beach to possible future needs of the harbour was obvious. This highlights the difference between a specific statutory function which requires the use of specific identifiable land, and a general statutory function which can be performed, more or less conveniently without the land in question.*

83. In *Newhaven* [2015] UKSC 7 the evidential aspects were not substantively considered in the Supreme Court, since it was stated that the incompatibility was clear in that case as the land or beach in question could be required for harbour works including dredging and the construction of breakwaters for a working harbour with public obligations to fulfil. Those activities were not compatible with recreational use of the land.

84. On the above basis, therefore, the IN was both entitled and correct in rejecting the C's contention on statutory incompatibility on this basis.

Secretary of State's Consent for Disposal of the Land

85. Secondly, C contends that registration of the land as a TVG would prevent it from complying with the Secretary of State's Directions (CSK[99]-[100]).

86. This argument is that registration of the land would preclude the School from using the land for PE.

87. However, registration would reflect what has been the position on the land for at least the twenty-year period prior to the application, as the IN considered (paragraph 449 – **CB/2/188-9**). It is not accepted therefore that registration would be considered to be a disposal within the meaning of section 17(8)(b) of the Academies Act 2010. Registration would not be considered to be a "change of use of land" as meant by paragraph 17(8)(b) of Schedule 1 of the Academies Act (**CB/6/1005**).

88. The IN was therefore correct not to accept this argument and this contention of the C does not therefore disclose any error of law.

The Inspector was in error to conclude that the Claimant's duties did not conflict with registration

89. Thirdly, the C contends that the IN was in error in finding that the C's duties did not conflict with registration under the Commons Act 2006 (CSK[101]-[102].

90. The IN stated "*I am not discounting that evidence* [from B4] *if I say that although it seems to me that it is possible that the School might not be able to carry on with its current arrangements at Coombe Dingle, it is difficult to see that it would not be able to make some alternative arrangements if it became necessary."* [IR[445]) That was a conclusion the IN was entitled to reach (cf. paragraph [22] of the C's Reply).

91. As noted above, the School took the lease after the TVG application had been made and that the "dual use" was then being carried on, C was or should have been aware of the position in terms of the TVG application and potential implications of registration.

92. Further, C contends that even if it was correct to look at matters at the date of the application assessing statutory incompatibility, the IN was in error (CSK[102]). However:

(1) It is not accepted that there was statutory incompatibility at the date of the application, contrary to the C's assertion to the contrary (ASFG[68[(i)]). The IN's reasons for his conclusion are clear from his Report and are lawful.

(2) C also relies upon the need to consider whether it could be reasonably foreseen at the date of the application whether there would be incompatibility (SFG[68(ii)]. As indicated above, even applying that approach, the IN was entitled to conclude as he did. C contends that it was "perfectly foreseeable" that there was incompatibility. That is not accepted. Further, in *Newhaven* and *NHS* it appears that the Court considered that such conflict was very likely to happen.

93. This contention of C does not disclose any error of law.

CONCLUSION

94. None of the grounds discloses any error of law and the Claim should be dismissed.

95. If the Claim is dismissed, D will seek its costs from the C in accordance with the terms of the consent order on costs.

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