IN THE HIGH COURT OF JUSTICE **CO/1208/2017**

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN

THE QUEEN

on the application

COTHAM SCHOOL

Claimant

-and-

BRISTOL CITY COUNCIL

Defendant

-and-

(1) DAVID MAYER

(2) BRISTOL UNIVERSITY

(3) ROCKLEAZE RANGERS FOOTBALL CLUB

Interested Parties

FIRST INTERESTED PARTY'S SKELETON ARGUMENT

For hearing: 21-22 November 2017

Before Sir Wyn Williams sitting in the Administrative Court in Cardiff

Suggested Pre-reading (in addition to that suggested by the Claimant and Defendant):

i) Mr Mayer's public statement to the Public Rights of Way and Greens Committee [SB/10/1151-1155]
ii) The School's public statements and submissions to the Committee [SB/10/1423, 1555-1557]

Introduction and summary

1. The Claimant, Cotham School seeks to quash the decision of Bristol City Council's Public Rights of Way and Greens Committee ("the Committee") to register Stoke Lodge Parkland, Bristol ("the Site") as a town or village green ("TVG"). The

Committee accepted the majority of the conclusions in the Inspector's report but reached a different conclusion on one issue namely whether the use was "as of right": the Committee concluded that the placement of three signs on the large Site was insufficient to render the local inhabitants' use contentious and therefore, such use "as of right". This was a judgment that the Committee, a democratically elected body empowered by Parliament to decide such issues, was entitled to reach. The Committee's conclusion on this issue cannot be characterised as irrational or otherwise unlawful.

2. The Claimant raises a number of additional arguments concerning the fairness and/or quality of reasoning by the Committee. Such arguments are fundamentally misconceived. The Committee carefully considered the Inspector's report and the representations made to it by, inter alia, the School and Mr Mayer, the First Interested Party. It did not take into account irrelevant considerations or misdirect itself as to the law. The Claimant's application should therefore be dismissed.

Factual Background

The Site

3. The Site comprises over 20 acres of beautiful open green space with many notable specimen trees protected by Tree Preservation Orders. It has been used by the local inhabitants for over 60 years for lawful sports and pastimes. It is a very valuable local amenity used by young and old on a shared basis.[1] There are at least 13 public entrances by which the local inhabitants can access the site. In addition, there are a large number of private entrances which enable residents of houses abutting the Site to access it directly from their gardens.

The Claimant

4. Cotham School is an academy established under the Academies Act 2010. It is located some distance from the Site. The School's Articles of Association provided that it has 2 objects:

[1] See IR 10-12 [CB/2/103] for the Inspector's description of the land.

(a) To advance for the public benefit education in the United Kingdom, in particular but without prejudice to the generality of the foregoing by establishing, maintaining carrying on, managing and developing a school offering a broad and balanced curriculum ("the Academy")
(b) To promote for the benefit of the inhabitants of Bristol and the surrounding area the provision of facilities for recreation or other leisure time occupation of individuals who have need of such facilities by reason of their youth, age, infirmity or disablement, financial hardship or social and economic circumstances or for the public at large in the interests of social welfare and with the object of improving the condition of life of the said inhabitants.[2]

(emphasis added)

5. The School used the Site in 2000 and 2001 for its annual sports day.[3]

6. From 2004, the School used the Site for PE and games. Over the next 10 years the School's use of the Site peacefully coexisted with the lawful sports and pastimes carried out by local inhabitants.

7. On 31 August 2011, some five months after the TVG application had been made, the School entered into a lease with the Council for a term of 125 years. When entering into the lease the School were well aware of the application for registration of the Site as a TVG. This lease was subject to:

> "…all existing rights and use of the Property including use by the community[4]"
>
> (emphasis added)

8. The School's lease thus acknowledges the community's right of use of the Site.

9. The School can terminate the agreement on three months' notice in the event that it finds suitable alternative playing fields.[5] Contrary to the Claimant's skeleton argument

[2] [SB/10/1242].
[3] IR para 284 [CB/2/152].
[4] Para 26 of IR [CB/2/107]
[5] See Clause 7 of the lease [SB/10/1315]. By Clause 10, the Council has a similar right to determine the lease on 3 months written notice.

at paragraph 6, the School has no statutory duty to provide physical education to its pupils.[6]

10. In 2014, the Claimant ceased to use the Site for PE. It asserts that the reason for this was it decided that it was no longer safe for its pupils to use the Site for PE. Instead, it has used the Combe Dingle Sport Complex which is located close to the Site. There is a public right of way running through the centre of this complex. There is also public access to the complex and a free public car park.[7]

The Defendant

11. The Defendant, Bristol City Council is the relevant Commons Registration Authority for the purposes of section 15 Commons Act 2006. Parliament has conferred on the Defendant the duty to decide whether or not land should be registered as a TVG. Under the Council's scheme of delegation, the Committee takes this decision. The Defendant may, if it wishes, obtain assistance in making its decision by asking an individual (usually a barrister) to hold a non-statutory inquiry to examine the various issues that the Committee needs to consider.[8] In the present case, the Council decided to seek the assistance of Mr Petchey who produced two reports in relation to the Site (in 2013[9] and 2016[10]). However, the Council's decision to appoint Mr Petchey does not, in any way, alter the fact that the decision-maker as a matter of law remains the Council.

12. The Council are also the landowner of the Site. It objected to the Interested Party's application to register the Site as a TVG.

Chronology

13. The Inspector sets out the history of the Site in his report, see, in particular paragraphs 16-30 and this history will not be repeated here.[11]

[6] No such statutory duty has ever been identified by the Claimant. The Department for Education have, in the past, set "an unenforceable aspiration" for a certain level of physical activity, see DfE Statement of August 2012 [SB/10/1235]. This document was before the Inspector.
[7] See Mr Mayer's first witness statement [CB/3/306].
[8] There is no statutory requirement on the Council to commission such a non-statutory inquiry.
[9] See [SB/10/1107-1130].
[10] See [CB/2/101-192].
[11] See [CB/2/105-108].

14. On 7 March 2011, Mr David Mayer, the First Interested Party, on behalf of Save Stoke Lodge Parkland, made an application to the Defendant as the relevant Commons Registration Authority under section 15 of the Commons Act 2006 to register the Site as a TVG.

15. The Council appointed Mr Petchey to assist it in deciding whether to register the Site as a TVG. Mr Petchey was initially of the view that he could complete his report on the basis of written submissions without the need for oral evidence at an Inquiry. On 22 May 2013, he issued a report to the Council recommending that the Site be registered as a TVG because he considered that all of the statutory criteria had been met. [12] In particular, the Inspector concluded that the Site had been used as of right because although there were a small number of signs around the large Site, the Council had taken no other steps to render use contentious and that this was a classic case of acquiescence. At paragraph 68 he noted that neither the Council nor the Claimant had contended that the three signs rendered the use contentious and thus not *as of right* no doubt because of the limited number of signs and the Council's acquiescence to use by the local inhabitants for lawful sports and pastimes.[13] At paragraph 70, the Inspector stated:

> "In my judgment the signs have to be seen in context. I think that it is difficult to argue that the use of the application site has been contentious when, apart from the signs, no other steps have been taken to render the use contentious. It seems to me that the present case is a classic one of acquiescence. If local people were not supposed to be on the land, then when it was being used by the school or school's licensees, local people could have been so told. It would have been possible for local people to have been turned away on one day of the year, as envisaged by Lord Bingham."[14]
>
> (emphasis added)

16. The Inspector also concluded that no issue of statutory incompatibility arose.

17. The Council (as landowner) and the Claimant then changed its position and argued that a public inquiry was necessary. The Inspector decided that further consideration of the

[12] See [SB/10/1107-1130].
[13] [SB/10/1125].
[14] [SB/10/1126].

matter should be deferred pending the Supreme Court judgment in *R (Newhaven Port & Properties Ltd) v East Sussex CC*. Judgment in this case was handed down in February 2015 and the Inspector subsequently decided that a public inquiry would be appropriate. He issued various directions on the matter.[15]

18. The non-statutory public inquiry sat for 8 days in June and July 2016. Both the Claimant and the Defendant were represented by leading counsel. The First Interested Party did not have any legal assistance and presented the case himself. The Claimant, Defendant and First Interested Party all made detailed written closing submissions.[16] At paragraph 64 of his closing submissions, the First Interested Party stated:

> "With regard to the ***Winterburn v Bennett*** judgment dated 25 May 2016. I submit that this judgement is neutral with regard to our case. I maintain that this judgment was founded on the fact that the sign at the single vehicle access entrance point to the disputed land used as a car park in Keighley, together with the less effective, sign in the window of the club (distant from the entrance to the disputed land) were found to be effective in denying use of the land to be used as a car park and hence use in that case was *with force* and consequently <u>not</u> *as of right.*
> Conversely I maintain that the three signs at Stoke Lodge Parkland are neither effective nor determinative. Hence use <u>is</u> *as of right* and the Land should be registered as a Town or Village Green as recommended in the Inspector's Report dated 22nd May 2013."[17]
>
> (emphasis in the original)

19. The First Interested Party thus made clear that it was his case that *Winterburn* should be distinguished given the very different factual circumstances.

20. On 14 October 2016, the Inspector issued his report.[18] The report considered the various matters that the First Interested Party needed to establish before the Site was registered as a TVG namely:

    i) A significant number of the inhabitants of a locality, or neighbourhood within a locality, or neighbourhood within a locality;
    ii) Has indulged in lawful sports and pastimes on the land;
    iii) For a period of at least 20 years down to 7 March 2011; and
    iv) Their use was *as of right*.

[15] See [SB/10/1131-1150].
[16] See [SB/7/651-770].
[17] [SB/7/664].
[18] See [CB/2/101-192].

21. The Inspector concluded that the application for registration of the Site as a TVG met all of the various statutory requirements for registration as a TVG other than the requirement that the relevant use of the Site was "as of right".

22. In relation to this issue, the Inspector concluded, based upon the recent Court of Appeal decision in *Winterburn v Bennett*, that the existence of three signs on the large Site between 1991-1996, was sufficient to render the use contentious and not "as of right".[19] He did not depart from his earlier factual conclusion that the landowner had, in fact, acquiesced to such use however, he concluded that such acquiescence was not relevant as the Council had to apply the Court of Appeal's judgment in *Winterburn*. He was of the view that the Court of Appeal's decision in *Winterburn* was binding on the Council in relation to this issue: the Inspector suggested that "the basis does not exist for Bristol City Council to do other than loyally follow the judgement of the Court of Appeal [in *Winterburn*]."[20]

23. Neither the Claimant nor the Defendant contacted the Inspector to suggest that he had failed to address a relevant issue in his report.[21]

24. On 6 December 2016, a public meeting was held relating to the future of the Site. This meeting related to both the TVG application but also a planning application by the Claimant for a sizeable perimeter fence around the site.[22] The meeting resulted in 714 statements being submitted to the Planning Department with 608 objecting to the planning application. None of the Councillors who sat on the Committee attended this meeting.

25. In accordance with established procedure, prior to the Committee meeting in December 2016, members of the public were invited to make written representations on the issue of whether the Site should be registered as a TVG. 821 public statements were submitted to the Council (749 in favour of registration of the Site as at TVG and 72 against). As expected, the First Interested Party made written representations to the

[19] See IR para 361-412 [CB/2/168-178].
[20] See IR para 386 [CB/2/173].
[21] If a party is of the view that an Inspector's report does not address the various relevant issues it is open to them to raise this with the inspector. Such a course of action was adopted in relation to the Inspector's report in *TWL v Essex County Council [2017] Ch 310 [Aut/26]*.
[22] This application was subsequently withdrawn.

Council (which were annexed to his first witness statement).[23] Unsurprisingly, given that it was the only ground upon which the application had failed, the First Interested Party's submissions focussed on the whether the use had been *as of right* issue and, in particular, the applicability of the Court of Appeal's judgment in *Winterburn*. The First Interested Party contended that *Winterburn* should be distinguished because it was not a TVG case and further, the factual circumstances as found by the Inspector were very different to the factual circumstances at issue in the *Winterburn* case.

26. The School (ie governors and staff) also made written representations and thus were well aware of the process.[24] The School's submissions did not suggest that the Inspector had failed to reach conclusions on issues that it had raised or ask the Council to address additional issues.

27. If the School had wished to see the various public written representations made by other members of the public (including the First Interested Party) it could and should have requested them from the Council.[25] At the outset of the Committee meeting, it was made clear that if anyone had not already requested representations, copies were available on request (the minutes of the December 2016 meeting record that "A copy of the public forum statements are held on public records and can be accessed via democratic services)".[26] It appears that, for whatever reason, the Claimant (and/or its officers and legal representatives) failed to request copies of such representations prior to the meeting.

28. The Committee was addressed by representatives of the School and the First Interested Party. The School's representatives made oral representations to the Committee first. The First Interested Party's written representations, including the photographs of the car park in issue in *Winterburn* were displayed on screens in the Committee room so all other attendees, including the School's representatives, could understand the nature of the submissions being made. Thus, the School's failure to request copies of the First Interested Party's written representations did not prevent them from understanding the nature and detail of such submissions. These representations make clear that the size

[23] [SB/10/1151-1155].
[24] [SB/10/1423, 1555-1557].
[25] The Interested Party understands that the Council's standing orders provide that any such representations must be provided to the Council's democratic services by 12 noon the working day before the meeting.
[26] [CB/2/198].

and nature of the small car park that was the subject of the *Winterburn* litigation was fundamentally different, in size and nature, to the over 20 acres of green space at issue in the present case. The School did not, for whatever reason, ask the Committee for an opportunity to address the points made by the First Interested Party.

29. On 12 December 2016, the Committee after carefully considering the Inspector's report and representations from the various parties, reached a different conclusion on the issue of whether use was "as of right". It decided that the limited signage over such a large site was not sufficient to render the use of contentious. The Committee accepted the Inspector's analysis on the other issues in dispute and therefore concluded that the Site should be registered as a TVG. The Committee's reasons for its decision were summarised as follows:

    (i) Other than the "as of right" elements the Committee accepted the inspector's findings that all the elements of the statutory test were proven on a balance of probabilities;
    (ii) That between 1991 and 1996 there were three Avon County Council signs attempting to make the use of the land contentious;
    (iii) In Winterburn the Court of Appeal found that landowners can prevent rights being acquired by third parties by displaying clearly visible warning signs that the land is private;
    (iv) Three members of the Committee considered that the facts in Winterburn v Bennett [2016] EWCA Civ 482 were not the same as the facts of this case. Unlike the car park in that case Stoke Lodge Playing Fields 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.[27]

30. On 9 March 2017, the Claimant issued a claim for judicial review challenging the Council's decision to register the Site as a TVG. The Council and First Interested Party filed summary grounds of resistance however, on 9 May 2017, Holgate J granted the Claimant permission to apply for judicial review on the grounds raised in the Claimant's statement of facts and grounds.[28]

31. On 9 August 2017, the Claimant applied for permission to amend its statement of facts and grounds to add some further grounds of challenge.

[27] [CB/2/202]
[28] [CB/1/93-94].

32. On 12 October 2017, Fraser J granted the Claimant permission amend its grounds and an extension of time.[29] However, Fraser J did not grant permission to advance these grounds at a substantive hearing on the basis that they were arguable. Thus, in relation to the new grounds the Court needs to consider first whether such grounds are arguable and, if they are, whether they rendered the Council's decision unlawful.

Legal Background

33. Section 15 of Commons Act 2006 is entitled "registration of greens" and provides:

> (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.

Submissions

Ground 1: "As of right" and *Winterburn v Bennett*

Introduction

34. The Claimant's argument on ground 1 (use was not "as of right") is flawed for the following two reasons:

    i) The Council was entitled to conclude that use by the inhabitants was "as of right" and not contentious given, inter alia, the limited number of signs and the size of the Site;

    ii) *Winterburn v Bennett* concerned private easements and not public rights. Contrary to the Inspector's conclusion, judgments on the law relating to private easements are not binding authority in the context of public righs concerning TVGs. Alternatively, *Winterburn* was wrongly decided and *per incuriam.*

[29] [CB/1/100.43-44].

The Council was entitled to reach a conclusion that the use was "as of right"

35. The Defendant's skeleton argument at paragraphs 15-30 addresses the Claimant's argument on this ground in detail and clearly articulates why this argument is flawed. There is nothing to be gained by the First Interested Party repeating this argument.

36. However, we wish to make a few brief points in support of the Defendant's argument on this issue. Firstly, it is important to bear in mind the role of the Court in the present claim. Lord Carnwath in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 at para 70 [Aut/17] stated:

> It is important to bear in mind that the proceedings were by way of judicial review of the decision of the county council, as registration authority, not to register the land as a village green. Subject to issues of law or of rationality, the factual issues were for the authority to resolve on the material before it.
>
> (emphasis added)

37. The point was developed by Gilbart J in *R (NHS Property Services Ltd) v Surrey CC* [2016] 4 WLR 130 [Aut/23]. At paragraph 117 the judge stated:

> I do not consider that the Committee's approach to the issue can be criticised. It considered the Inspector's assessment, but then made its own, which it preferred. Even if there can be a heightened duty on a decision maker to give reasons for differing from a planning inspector or planning officer, I do not regard this as a comparable situation. This was a non-statutory inquiry presided over by an inspector who did not come to the inquiry as an expert but as a member of the Bar. His expertise lay in the law and practice relating to village greens, not in their identification, even assuming that such an expertise could exist. He is not a geographer or an anthropologist considering some technical test applied in field studies to the existence of a neighbourhood. This is not a case where the reporting Inspector officer is an expert in the fields of (for example) highway engineering in a debate about the design of a junction, or retail economics in a case where the extent of pent up demand is in issue, or housing need where there is an issue about the levels of projected housebuilding. The question of whether or not this was a neighbourhood in the sense used in the CA 2006 is not the same kind of question. It was very much a matter of impression where elected members could have just as much expertise as the inspector. They were not required to go through all of his reasoning, nor the various events at the inquiry.
>
> (emphasis added)

38. Thus, contrary to the Claimant's case, it is not the role of the Committee to simply "rubber stamp" the Inspector's recommendations. The Committee is required to form its own independent view on the various issues before it.

39. The Committee concluded on the basis of the factual conclusions found by the Inspector, namely that there were 3 signs, that this was not sufficient to render the use contentious. The Committee did not differ as to the factual conclusions, instead they differed from the Inspector in the judgment to be made based on such factual findings. Parliament had entrusted the Committee to make such judgments. The Committee was not in any way bound to follow the Inspector's advice on this particular issue. The Committee's conclusion is clearly not irrational even if *Winterburn* was correctly decided and binding on the Council (which for the reasons set out below at paras 46-50 it was not).

40. In the Inspector's previous report of 22 May 2013, he concluded that there had been use "as of right" for the required 20 year period. At paragraph 70, he stated:

> "In my judgment the signs have to be seen in context. I think that it is difficult to argue that the use of the application site has been contentious when, apart from the signs, no other steps have been taken to render the use contentious. It seems to me that the present case is a classic one of acquiescence. If local people were not supposed to be on the land, then when it was being used by the school or school's licensees, local people could have been so told. It would have been possible for local people to have been turned away on one day of the year, as envisaged by Lord Bingham."[30]
>
> (emphasis added)

41. In his second report, the Inspector reached a different conclusion. The Inspector explained that the sole reason for his different conclusion was the recent Court of Appeal decision in *Winterburn v Bennett* [2017] 1 WLR 646 [Aut/20] which concerned acquiring a private easement to park in a small car park by prescription.

42. The Committee, after considering, inter alia, both the Inspector's 2016 report, the report from officers and various oral and written representations made to it by, inter alia, the Claimant and the First Interested Party, concluded that:

[30] [SB/10/1126].

> "Three members of the Committee considered that the facts in *Winterburn v Bennett* [2016] EWCA Civ 482 were not the same as the facts of this case. Unlike the car park in that case Stoke Lodge Playing Fields 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."[31]

43. When reaching this conclusion, the Committee considered the First Interested Party's submissions distinguishing *Winterburn*. The First Interested Party pointed out that the car park in question in the *Winterburn* case was small (only 7 cars), had one access point and two signs (one at the entrance and one in the front window of the club house). In *Winterburn,* there was thus no question of adequacy of signage. By contrast, the Site is approximately 22 acres in size and has in excess of 20 public access points and an additional 13 private gates onto the Site from the rear gardens of adjoining properties.

44. The Committee was entitled to conclude that the nature of the Site, the number of access points, the limited number of signs (3 up until 1996) and their location was such that the signs were not sufficient to render the use "contentious" and thus not "as of right". It is clear from the case law relied upon by the Claimant (*Winterburn* and *Betterment Properties (No 2)*) that the number of signs and location are relevant when considering whether the use was "as of right". In particular, the Court of Appeal in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3 [Aut/14] emphasised the importance of taking proportionate measures to notify inhabitants and putting up enough signs. Patten LJ stated:

> It seems to me that there is a world of difference between the case where the landowner <u>simply fails to put up enough signs or puts them in the wrong place</u> and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft…"
>
> (emphasis added)

45. In the context of a large area of Parkland that had been used by local inhabitants for over sixty years without interruption, the Committee was entitled to conclude that the Council had not taken the necessary proportionate steps: it had not put up enough signs.

[31] [CB/2/202].

The mere fact that a proportion of the witnesses accepted that they may have seen signage does not undermine the Committee's decision on this issue.[32] The reasonableness of the steps taken by the landowner is a question of judgment for the Committee taking into account all relevant matters. The Inspector concluded that one sign would not be sufficient.[33] The Committee in the exercise of its judgment was entitled to conclude that three signs were not sufficient to render the use contentious given the size of the Site.

Winterburn does not apply to TVGs and/or it was wrongly decided and should not be followed

46. The Inspector had doubts about the correctness of *Winterburn.*[34] The Inspector was correct to have such doubts. Indeed, with respect to the Inspector, he was wrong to conclude that the Court of Appeal's decision in *Winterburn* was binding on the Council in the context of TVGs. *Winterburn* concerned the existence of private rights (easements) and not public rights (as to use as a TVG). The Supreme Court in *Barkas* [Aut/17] at paragraphs 58-60 made it clear that conclusions as to the meaning of certain concepts such as "as of right" in relation to private easements are not directly applicable to TVG rights.

> *The "as of right" test in context*
>
> 58. The "as of right"/"by right" dichotomy is attractively simple. In many cases no doubt it will be right to equate it with the *Sunningwell* tripartite test, as indicated by judicial statements cited by Lord Neuberger (paras 15-16). However, in my view it is not always the whole story. Nor is the story necessarily the same story for all forms of prescriptive right.
> 59. This was a point made by Lord Scott in *Beresford*:
>
> > "It is a natural inclination to assume that these expressions, 'claiming right thereto' (the 1832 Act), 'as of right' (the 1932 Act and the 1980 Act) and 'as of right' in the 1965 Act, all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to

[32] Whilst the Inspector records the evidence of certain witnesses stating they had seen the signs the date on which they noticed the signs is rarely recorded; it may well have been after the application date in 2011.
[33] See IR paragraph 400 [CB/2/176].
[34] See IR para 392 [CB/2/174]

one type of right to another type of right without taking account of their differences is dangerous." (para 34)

60. On the same theme he commented on the differences between public rights of way on the one hand and town or village greens on the other:

> "Public rights of way are created by dedication, express or implied or deemed. Town or village greens on the other hand must owe their existence to one or other of the three origins specified in section 22(1) of the 1965 Act… Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green." (para 40)
>
> While I share Lord Neuberger's reservations on other parts of Lord Scott's speech, his observations on this point appear to me both valid and important.
>
> (emphasis added)

47. There was no consideration by the Inspector as to whether the approach applied by the Court of Appeal to a private easement applied with equal force to a large TVG. It is clear in light of the Supreme Court's comments in *Barkas* that case law on the meaning of "as of right" in relation to private easements is not binding authority in the context of TVG claims. It is, at most, persuasive authority. So to the extent that the Defendant's decision is inconsistent with *Winterburn*[35] this does not disclose an error of law.

48. Further and in the alternative, the Court of Appeal, in its judgment in *Winterburn*, failed to consider the House of Lords' judgements in *R (Godmanchester Town Council) v Secretary of State for the Environment* [2008] 1 AC 221 [Aut/11] and *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 [Aut/8] both of which make clear that where, as is the case here, the public ignore any such signs, use is likely to be as of right.[36] Lord Walker at paragraph 72 of *Beresford* stated:

> It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1043), approving counsel's formulation). *This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription,* whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who

[35] The First Interested Party's primary case is that it is not inconsistent, see above.
[36] It appears from the skeleton arguments in *Winterburn* that neither case was cited by the parties, see [SB/10/1331-1362].

> puts up a notice stating "Private Land - Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time".
>
> (emphasis added)

49. The Claimant, at paragraphs 65-66 of its skeleton argument asserts that *Beresford* should not be relied upon in light of Lord Neuberger's statement in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 [Aut/17] at paragraph 38 that paragraphs 43-50 of Lord Scott's speech in *Beresford* contained erroneous statements of the law. This is a thoroughly bad point. This statement did not relate to what Lord Walker said. Instead, it concerned statements by Lord Scott on a different issue relating to permission. In relation to the consideration of the meaning of "as of right", the Supreme Court does not express any criticism of Lord Walker's judgment on this issue in *Beresford* (see *Barkas* at paras 35-38). Indeed, the Supreme Court in *Barkas* endorsed, at least implicitly, Lord Walker's approach in *Barkas* (cf their adverse comments on Lord Scott's judgment in *Beresford* see para 37).

50. The Court of Appeal's decision in *Winterburn* is thus *per incuriam* and should not be followed.

Ground 2 a): Taking into account an irrelevant matter

51. The Claimant asserts that because one Councillor allegedly made reference to matters that it considers to be irrelevant in the course of a lengthy debate as to whether to register the Site as a TVG this necessarily renders the decision unlawful. This is a fundamentally flawed argument: the mere fact that in a debate a Councillor refers to an irrelevant matter (which is not accepted) does not mean that a subsequent decision is unlawful. If this were the case, virtually every Council decision that is subject to any debate would be legally flawed. The important aspect is not what matters are touched upon in debate but what matters were taken into account when reaching the decision. It is clear from the minutes of the Committee's decision that it concluded that *Winterburn* should be distinguished because, unlike the position in *Winterburn* "the small number of signs on such a large site was not sufficient to make the use of the land contentious". This conclusion was not based on any alleged recollections by Councillor Abraham

referred to in Mr Allen's witness statement (which is not accepted to be an accurate account of the meeting).

52. As the minutes of the meeting make clear, Officers' clarified that:

> "The scope of the decision to be determined excluded all but the statutory test"[37]

53. Further on in the debate, the minutes records that the Officers clearly advised that:

> "Committee must be careful not to consider the Councillors' comments as evidence." [38]

54. There is no indication whatsoever in the reasons for the Committee's decision that it disregarded such advice. The reasons noted that "between 1991-1996 there were three Avon County Council signs attempting to make the use of the land contentious". It is thus clear that the Committee based its conclusions on such matters rather than personal recollections.

55. At paragraph 71 of the Claimant's skeleton argument, the School asserts that a standard comment by a councillor that views of constituents will be taken into account in response to emails somehow suggests that the Defendant took into account irrelevant considerations.[39] There is absolutely nothing in this allegation. The Claimant has not identified any particular irrelevant consideration. Further, there is absolutely no evidence that the (unidentified) matters said to be irrelevant were taken into account by the Defendant when it reached its decision to register the land as a TVG. The minutes of the Defendant's Committee make clear that the Committee disagreed with one matter in the Inspector's report namely Mr Petchey's analysis of the applicability of *Winterburn* (which the Inspector had recognised could be wrong). The Committee adopted this view after hearing representations in public from, inter alia, representatives of the Claimant and the Interested Party.

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[37] [CB/2/199].
[38] [CB/2/200].
[39] A significant proportion of the emails disclosed are copies of public statements to the planning department in relation to two planning applications. The majority of the other emails are merely written representations to the Committee in accordance with standard procedure.

Ground 2 b) Alleged breach of nature justice

56. At paragraphs 72-84 of the Claimant's skeleton argument, the School asserts that the Defendant acted in a procedurally unfair manner because it based its decision on a point that was not raised before the Inspector and upon which the Claimant had no opportunity to respond. This argument is fundamentally misconceived as a matter of fact and law.[40]

57. Contrary to the Claimant's assertions, the Interested Party sought to distinguish *Winterburn v Bennett* on the basis that the factual position in that case was fundamentally different to that in the present case before the Inspector. Thus, there was nothing new in his submission to the Committee (which the Claimant had an opportunity to respond to). In the Interested Party's written closing submissions at paragraph 64, he stated:

> "With regard to the ***Winterburn v Bennett*** judgment dated 25 May 2016. I submit that this judgement is neutral with regard to our case. I maintain that this judgment was founded on the fact that the sign at the single vehicle access entrance point to the disputed land used as a car park in Keighley, together with the less effective, sign in the window of the club (distant from the entrance to the disputed land) were found to be effective in denying use of the land to be used as a car park and hence use in that case was *with force* and consequently not *as of right.*
> Conversely I maintain that the three signs at Stoke Lodge Parkland are neither effective nor determinative. Hence use is *as of right* and the Land should be registered as a Town or Village Green as recommended in the Inspector's Report dated 22nd May 2013."[41]
>
> (emphasis in the original)

58. The Inspector concluded every issue in favour of the Interested Party, who was seeking to have the land in question registered as a TVG, other than the *Winterburn v Bennett* issue. In such circumstances, it must have been obvious to the Claimant that the First Interested Party and those persons who sought to have the land registered as a TVG would focus on this issue.

59. The Claimant makes much of the volume of representations made by persons supporting the application for registration. Contrary to the Claimant's submissions

[40] It is notable that the Claimant felt able to raise this natural justice issue prior to the recent disclosure (see paragraph 69 of the amended statement of facts and grounds see [CB/1/34].
[41] [SB/7/664]

these representations were not made behind their back but made pursuant to a process that they were well aware of and engaged in (ie making written representations to the Committee). In reality, the Claimant only complaints about one issue being raised in such correspondence namely the representations distinguishing the factual situation in *Winterburn* to that in the present case. As detailed above, the Claimant was well aware that the Claimant disputed this issue and would (inevitably) make submissions on this issue.

60. The Committee made clear the reasons for its decision in the minutes of its meeting. The Committee concluded that the Court of Appeal's judgment in *Winterburn* did not mean that the TVG registration should be refused as it concerned a fundamentally different factual situation. This decision was reached on the basis of oral and written representations about which the Claimant was well aware. It is a decision that the Committee were entitled to reach.

61. As detailed above, the Claimant was well aware, prior to issuing its claim for judicial review that the First Interested Party and others were of the view that the factual circumstances at issue in *Winterburn* were fundamentally different to that in the present case (both in relation to the size of the land and volume of signs) and that this case should be distinguished rather than applied. Further, the School was aware that the First Interested Party and others had made representations to the Committee to that effect.

Ground 3: Failure to provide adequate reasons on the issue of contentiousness

62. Even if there is a common law duty on the Committee to give reasons, any such duty is a limited one. In the present case, the Committee's reasons are more than sufficient to discharge any duty. The Claimant is well aware why the Committee decided to register the Site as a TVG. The Committee's minutes record the following reasons:

> "(i) Other than the "as of right" element the Committee accepted the inspector's findings that all the elements of the statutory test were proven on a balance of probabilities.
> (ii) That between 1991 and 1996 there were three Avon County Council signs attempting to make the use of the land contentious.
> (iii) In *Winterburn* the Court of Appeal found that landowners can prevent rights being acquired by third parties by displaying clear visible warning signs that the land is private.

(iv) Three members of the Committee considered that the facts in *Winterburn v Bennett* [2016] EWCA Civ 482 were not the same as the facts of this case. Unlike the car park in that case Stoke Lodge Playing Fields 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"[42]

63. When considering the extent of a common law duty to give reasons, the Court will take into account, inter alia, the knowledge of the parties. In the present case, the Claimant had participated in a lengthy non-statutory public inquiry and was very familiar with various issues to be considered. The Claimant (and other interested parties) understood that the Committee accepted and adopted the Inspector's reasoning on all issues other than the "as of right" issue. In relation to that issue, the Committee accepted that there had been three signs in place during the period 1991-1996 but concluded that in light of the size of the Site three such signs was not sufficient to render the use of the Site contentious. The Claimant may disagree with the Committee's conclusion but it cannot sensibly complain that it does not understand why it lost. Contrary to the Claimant's argument, the Committee's decision does not "go behind the findings of the fact of the Inspector".[43] There was more than sufficient information for the Claimant to enable it to challenge the decision if it so wished (this is clear from the subsequent challenge).

Ground 4: Failure to give reasons in relation to *Mann v Somerset*

64. When considering this ground of challenge it is important to bear in mind that the only decision challenged is that of the Council on 12 December 2016. It is the Committee that has a duty to give reasons not the Inspector.[44] As detailed above, this is not an extensive duty. The Committee was required to address the main issues in dispute before it and explain why a party won or lost on these issues.

65. At no point prior to the decision under challenge did the Claimant take issue with the Inspector's analysis. If the Claimant was of the view that the Inspector had erred in his

[42] [CB/2/202].
[43] Albeit, the Committee was entitled to reach different conclusions as to the facts, see cases cited at paras 36-37 above.
[44] For the avoidance of doubt, the First Interested Party does not accept that the Inspector failed to address this issue. He addressed it in his 2013 Report and further concluded at para 461 of his 2016 report that no other arguments in opposition would be successful.

consideration of any issue or had failed to adequately address an issue, it was incumbent on it to raise the issue with the Inspector and give him an opportunity to correct this asserted omission.[45] This is standard practice, see eg the procedure adopted in *TWL v Essex CC* [2017] Ch 310 [Aut/26] at para 17 (where four addenda reports were produced by the Inspector to deal with issues raised by the parties arising, inter alia, as to what was said and not said in the original report). The Claimant did not raise any issue with the Inspector.

66. Further, the Claimant did not raise this issue with the Committee in its various written and oral representations. This omission is particularly surprising given that the Claimant had the benefit of legal representation through solicitors and counsel. The First Interested Party, who did not have such assistance, was able to raise relevant legal points in his representations to the Committee. Thus, the Committee were not aware that the Claimant regarded this as an issue that it should determine.[46] As such, the Claimant has waived any right to raise this issue before this court. To suggest, as the Claimant now does that the Defendant erred in law because it failed to give reasons why it rejected an argument that the Claimant never raised with it is preposterous.

The merits

67. The arguments set out at paras 64-66 above, are sufficient to dispose of ground 4. However, further and in the alternative, if, which is denied, the Committee's reasoning is deficient it is irrelevant as a matter of law. As the First Interested Party understands the position, the Claimant contends that, because for a period of a number of hours on 4 days (two in 2000 and two in 2001), local inhabitants were excluded from using some of the Site whilst the School held its sports day, the use of the Site by local inhabitants for the remaining 19 years and 361 days must be by way of implied permission rather than "as of right". The Claimant contends that the Council was required to give reasons for why this submission was rejected.

[45] Of course, the First Interested Party does not accept that there was an omission.
[46] The Claimant asserts that the Committee should have been aware of this issue because the Council, in comments on the Inspector's report reserved the right to challenge any future decision of the Council relying on *R (Mann) v Somerset CC* [CB/4/523-524] does not assist. The Council did not ask the Committee to consider this argument. It merely stated that it may raise it subsequently. In the event it did not.

68. There is nothing in this ground. Firstly, contrary to the Claimant's case the Inspector (and the Council) did not accept that local inhabitants were excluded from the Site on the four days in question. The Inspector records the Head of PE, Mr Martin as saying that "it would have been possible for the public to access the land during the Sports Day"[47] and that he could not be sure whether a member of the public did in fact use the Site during this time. There was thus no factual basis upon which to base this submission. Further, even if there was such a factual basis, such *de minimis* use does not give rise to a credible argument based on implied permission in light of the judgment of the Deputy High Court judge in *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin),[48] [Aut/16] see *TW Logistics Ltd v Essex County Council and others* [2017] EWHC 185 (Ch) at paras 102-117 [Aut/26].

69. In any event, the Inspector clearly addressed this issue at paragraphs 343-366 where he concluded that there was sensible co-existence between the local inhabitants' use of the Land and that of the School and various clubs. As the Inspector made clear, his conclusion accorded with the Supreme Court's judgment in *Lewis v Redcar BC* [2010] 2 AC 70 [Aut/12] which he decided applied in the present case. He thus clearly rejected the Claimant's argument, based on *Mann*, (where the High Court distinguished *Lewis* on the facts).

70. Further and in the alternative, if contrary to the above, the Council erred in law by failing to address this issue no relief should be granted because it is highly likely that the Committee would have reached the same decision but for any failure to give reasons on this issue. The Inspector expressly addressed the issue of implied permission and the case of *Mann* in his 2013 report at paragraphs 48-66 and 71 and rejected the argument. There is no basis for suggesting that his analysis on this point in 2013 was erroneous or that it would not have been adopted by the Committee if it had been included in the 2016 report.

[47] See IR 284 [CB/2/152].
[48] Mr Mayer reserves his position on the correctness of the judgment in *Mann.*

Ground 5: Statutory incompatibility

71. This argument is simply not open to the Claimant and it failed to raise it with the Committee before it reached its decision. If the Claimant was of the view that the Inspector adopted an erroneous approach to the issue of statutory incompatibility, it was incumbent upon it to raise this in their oral and written representations to the Committee either directly or with the assistance of its extensive legal team. For whatever reason, the School elected not to make such representations. In such circumstances, the Claimant has effectively waived its right to complain about this issue.

72. Further and in the alternative, none of the three points raised by the Claimant on the issue of statutory incompatibility have any merit.[49] The Inspector's reasoning (and thus the Committee's decision) on this issue accords with the law.

The relevant time for assessment

73. Contrary to the Claimant's case, the Inspector (and the Committee) were correct to conclude that the relevant date was the date of the application rather than the date that the application was determined. None of the three cases cited (*Newhaven*, *Lancashire* and *NHS)* expressly address this issue. The First Interested Party submits that the correct approach is that adopted by the Inspector: the relevant date is the date of application. Support for this proposition can be gained from the recent judgment in *TW Logistics Ltd v Essex County Council and others* [2017] EWHC 185 (Ch) at para 160 [Aut/26] where the Court considered the period at and before the application rather than the date of registration. This approach is consistent with the standard approach in TVG applications where the local authority/Court considers whether the land met the various requirements necessary to give rise to registration during the relevant 20 year qualification period. It is not disputed that the Site was used by the School during the 20 year period and indeed after the application up until 2014. Further, it is clear that the School were able to access other land (Combe Dingle) where the children were able to engage in physical education.

[49] It is not entirely clear whether the doctrine of statutory incompatibility even applies to local authority land, see the Inspector's comments at paras 431-433. Mr Mayer reserves his position on this issue.

74. Further and in the alternative, for the reasons set out below, even if the relevant date is the date of registration (which is yet to be determined), this is not a material error because there is no such statutory incompatibility even at the date of registration (see below at paras 76-77).

Secretary of State's consent for the disposal of the land

75. The Inspector (and the Committee) was right to conclude that registration of the Site as as a TVG was not a disposal of land for the purposes of section 17 Academies Act 2010 and/or even if it was this would render the TVG registration void and that no issue of statutory incompatibility would arise.[50] Registration would not give rise to a change of use of the Site. It would merely reflect what the position on the Site had been for at least the twenty year period prior to the application and for a number of years after the application. Further, it is not open to the Claimant to raise this issue given that the Claimant's lease was acquired subject to any TVG rights that there may have been over it.

No statutory incompatibility

76. The Inspector's reasons as to the absence of statutory incompatibility at paragraphs 413-445[51] regardless of whether the relevant date is the date of application or the date of registration are correct and do not disclose any error of law. In particular, the Inspector's analysis accords with the decisions in *Newhaven*, *NHS Properties Services* and *Lancashire CC*. The Claimant is able to make, at the very least, some educational use of the Site. Some such use had occurred during the 20 year registration period where the various uses co-existed and for three years thereafter. As detailed in Mr Mayer's witness statement, the Claimant's case on the alleged statutory incompatibility has no factual basis.[52] At paragraph 101 of its skeleton argument, the Claimant makes a submission as to statutory incompatibility arising from "its statutory duties to perform physical education". However, the Claimant notably fails to identify any such statutory duty. This is because no such statutory duty exists.

[50] See IR 446-451[CB/2187-188].
[51] [CB/2178-187].
[52] See para 5 [CB/3/306].

77. Further, even if such a statutory duty did exist, the Claimant would be able to discharge this duty either at the Combe Dingle complex or elsewhere.

Section 31 Senior Courts Act 1981

78. Further and in the alternative, if, contrary to the Defendant's submissions set out above, the Court concludes that one or more of the grounds are made out, no relief should be granted pursuant to section 31 Senior Courts Act 1981 as it is highly likely that the outcome for the Claimant would not have been substantially different and there are no exceptional circumstances, see *R (Hawke) v Secretary of State for Justice* [2015] EWHC 2266 (Admin) [Aut/19].

Conclusion

79. None of the Claimant's grounds have any merit. The Council's conclusion that the Site should be registered as a town or village green accords with both the facts and the law. It was clearly a decision that the Council were entitled to reach. Further and in the alternative, to the extent that it was unlawful, such illegality was no material and, in such circumstances, no relief should be granted pursuant to section 31 Senior Courts Act 1981.

11 KBW **Andrew Sharland**

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