Michaelmas Term
[2019] UKSC 58
On appeal from: [2018] EWCA Civ 721

JUDGMENT

R (on the application of Lancashire County Council) (Appellant) *v* Secretary of State for the Environment, Food and Rural Affairs and another (Respondents)
R (on the application of NHS Property Services Ltd) (Appellant) *v* Surrey County Council and another (Respondents)

before

Lord Wilson
Lord Carnwath
Lady Black
Lady Arden
Lord Sales

JUDGMENT GIVEN ON

11 December 2019

Heard on 15 and 16 July 2019

Appellant (1)
Douglas Edwards QC
Jeremy Pike
Daisy Noble

(Instructed by Sharpe Pritchard LLP on behalf of Jane Turner, Lancashire County Council Legal, Governance and Registrars Service)

Respondent (1)
Tim Buley QC

(Instructed by The Government Legal Department)

Respondent (2)
Ned Westaway

(Instructed by Harrison Grant)

Appellant (2)
George Laurence QC
Jonathan Clay
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(Instructed by Womble Bond Dickinson (UK) LLP (Newcastle))

Respondent (2)
Dr Ashley Bowes

(Instructed by Richard Buxton Solicitors (Cambridge))

Appellant (1):- Lancashire County Council
Respondents:-
(1) Secretary of State for the Environment, Food and Rural Affairs
(2) Janine Bebbington

Appellant (2):- NHS Property Services Ltd
Respondents:-
(1) Surrey County Council Legal Services instructed by Surrey County Council
(2) Timothy Jones

LORD CARNWATH AND LORD SALES: (with whom Lady Black agrees)

Introduction

1. The principal issue in these two appeals relates to the circumstances in which the concept of "statutory incompatibility" will defeat an application to register land as a town or village green where the land is held by a public authority for statutory purposes. In *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7; [2015] AC 1547 ("*Newhaven*") this court held that the duty under section 15 of the Commons Act 2006 did not extend to an area held under the specific statutes relating to the Newhaven Harbour. We are asked to decide whether the same principle applies to land held by statutory authorities under more general statutes, relating respectively (in these two cases) to education and health services.

2. Although the two appeals raise similar issues, they were dealt with by different procedural routes. The first (Lancashire) is within the area of a "pilot" scheme under the Commons Registration (England) Regulations 2008, under which, where the registration authority (in this case Lancashire County Council - "LCC") has an interest in the land, applications are referred for determination to the Planning Inspectorate (regulations 27-28). The second case (Surrey) was not covered by the pilot scheme. The application was determined by Surrey County Council as registration authority, following a non-statutory inquiry before a barrister appointed by the council.

Modern greens - development of the law

3. As will be seen, in *Newhaven* the issue was described as one of "statutory interpretation". Unfortunately, interpreting the will of Parliament in this context is problematic, because there is no indication that the concept of a modern green, as it has been developed by the courts, was part of the original thinking under the Commons Registration Act 1965. Lord Carnwath reviewed the earlier history, including the Report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd 462) which preceded the 1965 Act, in his judgments at first instance in *R v Suffolk County Council, Ex p Steed* (1995) 71 P & CR 463 (one of the first cases under the 1965 Act), and later in the Court of Appeal in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 ("the *Trap Grounds* case"). As he observed in the latter:

> "51. The concept of a 'modern' class c green, as it has emerged in the cases since 1990, would, I think, have come as a surprise to the Royal Commissioners, and to the draftsman of the 1965 Act. There is

> no hint of it in the Royal Commission Report, or the Parliamentary Debates on the Bill. The commissioners' terms of reference were directed to sorting out the problems of the past, not to creating new categories of open land, for which there was no obvious need. By this time, of course, there were numerous statutes conferring on public authorities modern powers for the creation and management of recreational spaces for the public."

Lord Carnwath also noted, at para 52, that, as late as 1975, in *New Windsor Corpn v Mellor* [1976] Ch 380 ("*New Windsor*"), all three members of the Court of Appeal (including Lord Denning MR) had thought it natural to read the Act as referring to 20 years "before the passing of the Act" (at pp 391, 395) - an interpretation which would have ruled out the possibility of a modern green being established by more recent use.

4. It was not until the early 1990s that claims were first put forward based on 20 years' use since the 1965 Act had come into force at the end of July 1970 (apparently following the advice of the Open Spaces Society in their publication *Getting Greens Registered* (1995)). When the first case came before the House of Lords in 1999 (*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 - "*Sunningwell*"), no one seems to have argued that the Act was directed to pre-1965 use only. In that case, the House of Lords, led by Lord Hoffmann, adopted a relatively expansive view of the new concept. He drew a parallel with the Rights of Way Act 1932, which he thought had reflected Parliament's view "that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use" and the "strong public interest in facilitating the preservation of footpaths for access to the countryside" (p 359D-E). He commented, at p 359E:

> "… in defining class c town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes."

5. That interpretation of Parliament's thinking would, with respect, have been difficult to deduce from the 1965 Act itself, or from anything said - in Parliament or anywhere else - at the time. However, when the issue came before the House again, in the *Trap Grounds* case [2006] 2 AC 674, Lord Hoffmann was able to claim implicit Parliamentary support in the debates which preceded the amendments made by the Countryside and Rights of Way Act 2000. As he said, at para 26:

> "No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the

> only question raised in debate was whether the locality rule did not make it too difficult to register new village greens."

By then, as he also noted (para 28) the new Commons Bill (the 2006 Act as it became) was before Parliament, providing a further opportunity for legislative reconsideration if thought appropriate. In *Newhaven* [2015] AC 1547, para 18, this fact was cited as a reason for not having given permission to reopen the general approach adopted in the *Trap Grounds* case.

6. As to the attributes of a modern green, the 2006 Act itself, like the 1965 Act which preceded it, is very sparse in the information it gives. Section 1 of the 2006 Act requires each registration authority to maintain a register of town or village greens. Section 15 indicates that any person can apply to register land as a green where, in subsection (1)(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 the period of at least 20 years …"

As to the purpose of registration, section 2(2)(a) states simply that the purpose of the register is "to register land as a town or village green". The Act offers no further guidance as to the interpretation of the section 15 formula, nor as to the practical consequences of registration.

7. An unexplained curiosity is that section 10 of the 1965 Act, which provided that the register was "conclusive evidence of the matters registered, as at the date of registration", is not repeated in the 2006 Act. As things stand the repeal of section 10 has been brought into effect only in the pilot areas. (Section 18 of the 2006 Act, headed "Conclusiveness", which has effect in the pilot areas, does not on its face go so far as section 10.) In the *Trap Grounds* case, Lord Hoffmann had agreed (at para 43) with Lord Carnwath's analysis in the Court of Appeal [2006] Ch 43, para 100, that the 1965 Act "created no new legal status, and no new rights or liabilities other than those resulting from the proper interpretation of section 10". It was on the "rational construction of section 10" that he relied for his view that land registered as a town or village green "can be used generally for sports and pastimes" (para 50), and was also subject to section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 (para 56). None of the experienced counsel before us was able to offer an explanation for the disappearance of section 10, but none sought to argue that it had made any material difference to the rights following registration. Not without some hesitation, we shall proceed on that basis.

8. Lord Hoffmann made clear that, following registration, the owner was not excluded altogether, but retained the right to use the land in any way which does not interfere with the recreational rights of the inhabitants, with "give and take on both sides" (para 51). That qualification was further developed in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 1; [2010] 2 AC 70 ("*Lewis*"), in which it was held that the local inhabitants' rights to use a green following registration could not interfere with competing activities of the landowner to a greater extent than during the qualifying period.

9. One important control mechanism which emerged from the cases was the need for the use to be "as of right". It was established that these words, by analogy with the law of easements, imported the principle "nec vi, nec clam, nec precario", or in other words "the absence of any of the three characteristics of compulsion, secrecy or licence" (per Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 245, cited by Lord Hoffmann in *Sunningwell* [2000] 1 AC 335, 355). It followed that in practice an owner could prevent use qualifying under section 15 by making it sufficiently clear to those seeking to use the land (generally by suitable notices) either that their use was objected to, or that it was permissive. On the other hand, silent acquiescence in the use, or toleration, did not prevent it being "as of right".

10. More recently (from 25 April 2013) amendments made by the Growth and Infrastructure Act 2013 (embodied in new sections 15A and following of the 2006 Act) have provided some assistance to landowners, first by enabling a formal statement to be made to bring user "as of right" to an end, and secondly by defining certain planning-related "trigger events" which suspend or extinguish the right to apply to register a green. In *Wiltshire Council v Cooper Estates Strategic Land Ltd* [2019] EWCA Civ 840; [2019] PTSR 1980, para 4, Lewison LJ said of these amendments:

> "Ever since the *Trap Grounds* case … the courts have adopted a definition of a TVG [town or village green] which goes far beyond what the mind's eye would think of as a traditional village green. The consequence of this interpretation of the definition is that there have been registered as TVGs: rocks, car parks, golf courses, school playgrounds, a quarry, scrubland, and part of a working port. If land is registered as a TVG the effect of the registration is, for practical purposes, to sterilise land for development. This became a concern for the Government, because the criteria for registration did not take into account any planning considerations; and because it was thought in some quarters that applications for registration of TVGs were being used as a means of stopping development outside the planning system."

The 2013 amendments are of no direct relevance to the issues in the present appeal, but they are relied on as showing that Parliament has given specific attention to the balance to be drawn between the rights of the various interests involved.

11. We would draw two main lessons from the historical review. First, whatever misgivings one may have about the unconventional process by which the concept of a modern green became part of our law, the emphasis now should be on consolidation, not innovation. Secondly, the balance between the interests of landowners and those claiming recreational rights, as established by the authorities, and as now supplemented by the 2013 Act, should be respected. Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in *Newhaven* and apply it to the facts of these cases.

The proceedings and the parties

Lancashire

12. The land at issue in the first appeal is known as Moorside Fields, in Lancaster. It lies adjacent to Moorside Primary School and extends to some 13 hectares. It is divided into five areas, referred to in the proceedings as Areas A to E, described (by the planning inspector) as follows:

> "Area A, referred to as the meadow was, until recently, an undeveloped plot of land. It is adjacent to Moorside Primary School (the school) and is currently being used to facilitate the construction of an extension at the rear of the school. Area B is a mowed field, referred to as the school playing field and both it and Area A are currently surrounded by fencing.
>
> Areas C and D border Areas A and B. In the past they have been the subject of mowing tenancy agreements but these ceased in around 2001. They are separated from each other and from Areas A and B by … hedges and in places are overgrown with brambles. Area E, also adjacent to the school, is currently overgrown and difficult to access. At some times of the year it contains a pond."

Like the school the land is owned by LCC, the present appellant, which is both education authority and registration authority.

13. On 9 February 2010 Ms Janine Bebbington, a local resident, applied to register the land as a town or village green. Her application was based on 20 years' qualifying use up to the date of registration, or alternatively up to 2008. LCC, as local education authority, objected. Following a statutory inquiry, an inspector appointed by the Secretary of State (Ms Alison Lea, a solicitor) in a decision letter dated 22 September 2015 determined that four of the five areas (that is A to D, but not E) should be registered under the Act. She excluded Area E because she found insufficient evidence of its use over the 20 year period. LCC has postponed formal registration of Areas A to D, pending the outcome of the judicial review claim.

14. LCC maintains that the land was acquired for and remains appropriated to educational purposes, in exercise of the LCC's statutory powers as education authority. The statutory provisions upon which LCC relied (or now rely) as showing incompatibility were: (1) section 8 of the 1944 Education Act which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment; (2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education; (3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play; and (4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children". (The issue of safeguarding does not appear to have been raised at the inquiry.)

15. The inspector was not satisfied that the land was held for educational purposes (an issue to which we shall return below), but even on the assumption that it was she found no incompatibility:

> "119. Furthermore, even if the land is held for 'educational purposes', I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The school is currently being extended on other land and will, according to Lynn MacDonald [a school planning manager for the county council], provide 210 places which will meet current needs. There is no evidence to suggest that the school wishes to use these areas other than for outdoor

activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.

120. Areas C and D are marked on LCC's plan as 'Replacement School Site'. However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her five-year planning phase.

121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.

122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish to make that provision on the Application Land."

She concluded (para 124):

"124. It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships [in *Newhaven*]. Even if it is accepted that LCC hold the land for 'educational purposes', there is no 'clear incompatibility' between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility."

16. On the LCC's application for judicial review, the inspector's decision was upheld by Ouseley J [2016] EWHC 1238 (Admin), including her approach to the issue of statutory incompatibility.

Surrey

17. The second appeal relates to some 2.9 hectares of land at Leach Grove Wood, Leatherhead, owned by NHS Property Services Ltd ("NHS Property Services"), a company wholly owned by the Secretary of State for Health. The land adjoins Leatherhead Hospital, and is in the same freehold title. An application for registration under the Act was made by Ms Philippa Cargill on 22 March 2013, with the support of Mr Timothy Jones and others. They relied on use over a period of 20 years ending in January 2013 (when permissive signs were erected on the land).

18. At the time of the application, the land was owned by the Surrey Primary Care Trust. By section 83(1) of the National Health Service Act 2006 primary care trusts were under a duty to provide, or to secure the provision of, primary medical services in their area. The land was held by the Trust pursuant to the statute, for those purposes. On the dissolution of the Trust in 2013, the freehold title of the land was transferred to NHS Property Services, which had been created by the Secretary of State for Health under his power to form companies "to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act" (section 223(1) of the National Health Service Act 2006). Following the amendment of the National Health Service Act 2006 by the Health and Social Care Act 2012, functions previously exercised by the Secretary of State acting through a primary care trust fell to be exercised by a clinical commissioning group ("CCG") - in this case the Surrey Downs Clinical Commissioning Group. The principal statutory duties of a CCG are defined by section 3(1) of the National Health Service Act 2006; in summary they involve the provision of hospital accommodation and medical services "to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility".

19. Following a non-statutory inquiry, the inspector, William Webster, barrister, in his report dated 9 June 2015, recommended refusal of registration. He rejected the company's objection based on statutory incompatibility (paras 175(d)-(f)). He contrasted the case with *Newhaven* [2015] AC 1547 in which there had been "an obvious and irreconcilable clash as between the conflicting statutory regimes":

> "(e) … The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty

> imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.
>
> (f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has [sic]) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being."

He also accepted that there had been sufficient qualifying use of the land by local inhabitants for more than 20 years, but he held that it was not in respect of a relevant "locality" or "neighbourhood" as required by section 15. Surrey County Council, as registration authority, did not accept his recommendation, but determined to register the land which was done on 5 October 2015.

20. On the application for judicial review by NHS Property Services, on 13 July 2016 Gilbart J ([2016] EWHC 1715 (Admin); [2017] 4 WLR 130) quashed the registration, holding that the county council had failed properly to consider the question of statutory incompatibility. He had before him the judgment of Ouseley J in the Lancashire case ([2016] EWHC 1238 (Admin)), but distinguished it by reference to the wider powers conferred by the education statutes:

> "134. … It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.
>
> 135. Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is

> set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities - see section 507A Education Act 1996.
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> 136. It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there any plans that it should be, but only whether there is incompatibility as a matter of statutory construction. If the land is in fact surplus to requirements, then the use of the [2006 Act] is not the remedy.
>
> 137. Given those conclusions, it is my judgement that there is a conflict between the statutory powers in this case and registration."

The Court of Appeal

21. The appeals in both cases, respectively by LCC and the applicants for registration in the Surrey case, were heard together by the Court of Appeal (Jackson, Lindblom and Thirlwall LJJ). In a judgment dated 12 April 2018 ([2018] EWCA Civ 721; [2018] 2 P & CR 15), given by Lindblom LJ, with whom the others agreed, the court upheld the decision to register in both cases. On the issue of statutory incompatibility, he distinguished the *Newhaven* case [2015] AC 1547, for reasons which are sufficiently apparent from the following short extracts from the judgment:

> *Lancashire*
>
> "40. Crucially, as a matter of 'statutory construction' there was no inconsistency of the kind that arose in *Newhaven Port & Properties* between the provisions of one statute and the provisions of the other. The statutory purpose for which Parliament had authorized the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with *Newhaven Port & Properties*, there were no 'specific' statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible.

Surrey

> 46. As in the Lancaster case, therefore, the circumstances did not correspond to those of *Newhaven Port & Properties*. The land was not being used for any 'defined statutory purposes' with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a 'statutory incompatibility'. The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land. And again, it is possible to go somewhat further than that. Although the registration of the land as a village green would preclude its being developed by the construction of a hospital or an extension to the existing hospital, or as a clinic or administrative building, or as a car park, and even though the relevant legislation did not include a power or duty to provide facilities for recreation, there would be nothing inconsistent - either in principle or in practice - between the land being registered as a green and its being kept open and undeveloped and maintained as part of the Leatherhead Hospital site, whether or not with access to it by staff, patients or visitors. This would not prevent or interfere with the performance of any of the relevant statutory functions. But in any event, as in the Lancaster case, the two statutory regimes were not inherently in conflict with each other. There was no 'statutory incompatibility'."

Was the Lancashire land held for educational purposes?

22. Before we turn to the main issue it is convenient to dispose of a preliminary issue which arises only in respect of the first appeal. For what purposes was the land held? The inspector recorded the evidence on which LCC relied as showing that the land was held for the relevant statutory purposes.

> "113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a

conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words 'Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944'. The endorsement is dated 12 August 1948.

114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows 'Education Lancaster Greaves County Secondary School'.

115. In addition LCC provided an instrument dated 23 February 1925 and a letter from LCC to the school dated 1991. The instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of the land acquired by the council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the [Barton Road Playing Field (land also owned by LCC, to the immediate west of Areas C and D and separated from them by a shallow watercourse, but accessible from them via a stone bridge and also stepping stones)]. An acknowledgement and undertaking dated March 1949 refers to the transfer to the county council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the [Barton Road Playing Field]. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.

116. At the inquiry LCC provided a print out of an electronic document headed 'Lancashire County Council - Property Asset Management Information' which in relation to 'Moorside Primary School' records the committee as 'E'. I accept that it is likely that this stands for 'Education'. An LCC plan showing land owned by 'CYP education' shows Areas A, B and E as Moorside Primary School and Areas C and D as 'Replacement School Site'. In relation to Areas C and D the terrier was produced, and under 'committee' is the word 'education'. The whole page has a line drawn through it, the reason for which is unexplained."

23. The inspector stated her conclusions:

> "117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald … confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.
>
> 118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC's statement that 'the Application Land was acquired and is held for educational purposes and was so held throughout the 20-year period relevant to the Application' accurately reflects the legal position."

24. In fairness to the inspector, we should note that this issue seems to have been raised rather the late in the day, and was less than fully explored in LCC's submissions before her (see Ouseley J [2016] EWHC 1238 (Admin), para 49, noting Ms Bebbington's evidence as to what took place at the inquiry; the counsel who have appeared for LCC in the court proceedings did not act for it at the inquiry.

25. Ouseley J indicated that, left to himself, he would have been likely to have reached a different view, at para 57:

> "I rather doubt that, confined to the express reasoning in the DL [the decision letter], I would have reached the same conclusion as the inspector as to what could be inferred from the conveyances and endorsements on them in relation to the purpose of the acquisition of the various areas. I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition was put forward; there was no suggestion that the parcels were acquired for public open space. I would have inferred that there were resolutions in existence authorising the acquisitions for that contemporaneously evidenced

> intended purpose, which simply had not been found at this considerable distance in time. It would be highly improbable for the lands to have been purchased without resolutions approving it. The presumption of regularity would warrant the assumption that there had been resolutions to that effect, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL para 116, which shows the property, after acquisition, to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding."

26. However, he was unwilling to conclude that the inspector's decision was irrational, at para 61:

> "As I read the DL, the fundamental problem for the inspector in the LCC evidence was the absence of what she regarded as the primary sources for power under which the acquisition or appropriation of the land occurred: the resolutions to acquire or to appropriate it for educational purposes. She was entitled to regard those as the primary sources to prove the basis for the exercise of the powers of the authority …
>
> she approached her decision, as I read it, knowing what transpired before her, not on the basis that resolutions related to acquisition might well have existed but could not be found at this distance in time, but on the basis that none had been produced despite proper endeavours to find them, endeavours which had nonetheless produced the conveyances, and other related documents. So she was not prepared to assume that resolutions in relation to acquisition had existed. That was entirely a matter for her, and cannot come close to legal error."

The Court of Appeal in substance adopted Ouseley J's reasoning.

27. In this court, Mr Edwards QC for LCC accepts that this issue was one of fact for the inspector. But he submits that her conclusion was unsupportable on the evidence before her, or was vitiated by error of fact (under the principles set out in *E v Secretary of State for Home Department* [2004] QB 1044). For good measure he submits that the courts below were wrong not to admit evidence, discovered after the inquiry, in the form of council minutes from February 1948 recording the resolution to acquire Areas A and B (and E) for a "proposed primary school".

28. He starts from the proposition that the LCC, as a statutory local authority, could only acquire land "for the purposes of any of their [statutory] functions …" (see now the Local Government Act 1972, section 120(1)(a)); and that in normal circumstances the land would continue to be held for the purpose for which it was acquired unless validly appropriated for an alternative statutory purpose, when no longer required for the first (section 122). The inspector, he says, gave no weight to that statutory context.

29. As regards Areas A, B and E, he submits, the evidence before the inspector was quite clear (even without the new evidence). The inspector properly noted that the acquisition had been "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944". However, she failed to understand or give due weight to the significance of that note. As Mr Edwards explains, the effect of section 87 of the Education Act 1944 (headed "Exemption of assurances of property for educational purposes from the Mortmain Acts") was to exempt from the Mortmain and Charitable Uses Act 1888 and related Acts, land transferred (inter alia) to a local education authority, if the land was to be used for educational purposes. (The law of Mortmain dating back to the Statutes of Mortmain in 1279 and 1290, was not finally abolished until 1960.) A copy of the conveyance or other document by which the transfer of such land was made was required, within six months of its taking effect, to be sent to the Education Minister. Section 87(3) provided that a record should be kept of any conveyance sent to the minister pursuant to the section. Accordingly, says Mr Edwards, the reference to the record under section 87(3) should have been treated by the inspector as clear evidence that the original purpose of the acquisition was for educational purposes, even in the absence of a contemporary resolution to that effect. Against that background, the lack of evidence of any competing purpose to which the land might have been appropriated over the subsequent years pointed to the inference that it continued to be held for its original purpose.

30. As regards Areas C and D, Mr Edwards submits, the indication on the 1961 conveyance of an educational purpose, taken with the references in later documents to its being treated as educational land, and the lack of any evidence of a competing purpose, were sufficient to support the inference, on the balance of probabilities, that education was the purpose for which it had been acquired and subsequently held.

Discussion

31. Although Mr Edwards has accepted that this issue was one of fact for the inspector, that concession needs to be seen in context. The inspector's assessment was one depending, not so much on evaluation of oral evidence, but largely on the inferences to be drawn from legal or official documents of varying degrees of formality.

32. In our view, Ouseley J's approach to the natural inferences to be drawn from the material before the inspector was correct, but he was wrong to be deflected by deference to the inspector's fact-finding role. The main difference between them was in the weight given by the inspector to the absence of specific resolutions, from which she found it "not possible to be sure" that the land had been acquired and held for educational purposes. On its face the language appears to raise the threshold of proof above the ordinary civil test to which she had properly referred earlier in the decision. But even discounting that point, she was wrong in our view to place such emphasis on the lack of such resolutions. Her task was to take the evidence before her as it stood, and determine, on the balance of probabilities, for what purpose the land was held. On that approach, Ouseley J's own assessment ([2016] EWHC 1238 (Admin)) was in our view impeccable. The inspector's assessment was irrational, having regard to the relevant standard of proof and the evidence available. There was no evidence to support any inference other than that each part of the land had been acquired for, and continued during the relevant period to be held for, statutory educational purposes. An assessment made without any supporting evidence cannot stand: *Edwards v Bairstow* [1956] AC 14, 29.

33. In respect of Areas A and B, furthermore, there was a clear error of law, in the inspector's failure to appreciate, or take account of, the significance of the reference to section 87(3) of the 1944 Act. This may be because she was given little assistance on the point by LCC at the inquiry. It is less clear why the point, having been clearly raised in submissions in the court proceedings (see Ouseley J, para 44), seems to have been ignored in the subsequent judgments. On any view, that reference, and the inferences to be drawn from it, went beyond a pure issue of fact, and were appropriate for review by the court. In agreement with Mr Edwards we would regard it as providing unequivocal support for the conclusion that the land comprising Areas A and B was acquired for educational purposes. There was no evidence to suggest that it had ever been appropriated to other purposes.

34. In respect of Areas C and D, the evidence is less clear-cut, but we agree with Mr Edwards' submission that it is sufficient, on the balance of probabilities, to support the same conclusion and that, in the absence of any evidence to support any other view, it was irrational for the inspector to reach a different conclusion. Again, we think that Ouseley J's assessment of the facts was the correct one.

35. In these circumstances it is unnecessary to consider whether Ouseley J erred in refusing to admit the new evidence. We note, however, that it does no more than support what was already a strong case in respect of Areas A and B; it does nothing to enhance the case for Areas C and D.

Implied permission

36. We can also deal more briefly with an issue that arises only in respect of the Surrey site: that is Mr Laurence QC's application for permission to argue (for the first time) that the public's use of the land for recreation should be treated as having implied permission from NHS Property Services or its predecessors, thus showing that the use was "by right" rather than "as of right". This, as he accepts, is a departure from *Sunningwell* [2000] 1 AC 335, where it was held that mere toleration by a landowner of the public's use could not be taken as evidence that the landowner had impliedly consented to that use. He seeks to distinguish the position of land that is held for public purposes such as by his client. We quote his printed case:

> "… there is a critical distinction between (i) a private owner (such as the kindly rector in *Sunningwell*) tolerating use of land not held for public purposes - which can provide no evidence of an implied permission - and (ii) a public owner passively responding to recreational use in a statutory context which justifies the inference that that response to the public's use of the land is evidence of an implicit permission so long as the permitted use does not disrupt the public authority's use of the land for its statutory purposes. In such a case it is irrelevant that in a non-statutory, private context such a response might be characterised as toleration."

37. He also relies on section 120(2) of the Local Government Act 1972, which authorises land acquired by agreement by a local authority for a particular purpose to be used, pending its requirement for that purpose, for any of the authority's functions, which, he submits, would include recreational use. It can be inferred, accordingly, that any use by the public was permitted under that power, and as such was pursuant to the same kind of public law right, derived from statute, as was held in *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195 ("*Barkas*") and *Newhaven* [2015] AC 1547 to give rise to implied permission.

38. This submission seems to us to face two major difficulties. The first is that no such claim was made before the inspector. As he recorded:

> "174(f) No issue arises on 'as of right'. There were no vitiating features in play which would preclude use as of right and the application land was at no time held by SCC [Surrey County Council] or by any of the various NHS bodies mentioned herein for purposes which conferred an entitlement on members of the public to use the land for informal recreation. For instance, there was no evidence of any overt act or acts on the part of the objector, or its predecessor, to

> demonstrate that, before January 2013, the landowner was granting an implied permission for local inhabitants to use the wood."

In answer to this, Mr Laurence asserts that the issue is one of law rather than fact. Even if that were so, it would in our view be unfair to all those who took part in the five-day inquiry in 2015 to allow the point to be taken for the first time four years later in this court.

39. However, his main difficulty is that the submission is contradicted by clear authority. In *R (Beresford) v City of Sunderland* [2003] UKHL 60; [2004] 1 AC 889 Lord Walker had accepted the emphasis placed by Mr Laurence himself (appearing on that occasion for the supporters of registration) on "the need for the landowner to do something" (para 78); "passive acquiescence" could not be treated "as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct)" (para 79). Later in the judgment (para 83) Lord Walker accepted that permission might be "implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers", but he found no evidence in that case of "overt acts (on the part of the city council or its predecessors)" justifying the inference of an implied licence.

40. Nothing in *Barkas* or *Newhaven* undermines the principle that passive acquiescence is insufficient. Mr Laurence's then submission that the land-owner must "do something" remains good law, even if there has been some qualification of the form of communication required to the public. The existence in each case of an overt act of the owner was emphasised in the majority judgment in *Newhaven* [2015] AC 1547, para 71:

> "In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was 'by right' and not 'as of right'. The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case)."

The law remains, as submitted by Mr Laurence in *Beresford*, that passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough.

41. Accordingly we would refuse permission for this additional ground of appeal.

Statutory incompatibility

42. We turn next to the central issue in the case, based on the *Newhaven* case.

The majority judgment

43. In the judgment of the majority (given by Lord Neuberger PSC and Lord Hodge JSC) the decision not to confirm the registration was supported by two separate lines of reasoning: implied permission and statutory incompatibility. Although the latter was unnecessary for the decision, it was clearly identified as a separate ground of decision (para 74). Lord Carnwath was alone in basing his decision on the implied permission issue alone (para 137), seeing "considerable force" in the contrary reasoning on the latter issue of Richards LJ in the Court of Appeal ([2014] QB 186). No-one has argued that we should regard the majority's reasoning on this issue as other than binding. Accordingly our decision in the present case depends to a large extent on the correct analysis of that reasoning, and its application to the facts of the two cases before us.

44. The operation of Newhaven Harbour had been subject to legislation since at least 1731. At the relevant time the governing statutes included (inter alia) the Newhaven Harbour and Ouse Lower Navigation Act 1847, section 49 of which required the trustees to -

> "maintain and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith …"

and section 33 of the Harbours, Docks and Piers Clauses Act 1847, which provided that, subject to payment of rates -

> "… the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

45. The land owned by the harbour company ("NPP") included an area known as West Beach, described in the judgment as "part of the operational land of the Harbour" (para 8), although not currently used for any harbour purpose. As the judgment explained, at para 9:

> "The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction of the breakwater, accretion of sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach."

46. Following an application by the Newhaven Town Council to register the Beach as a town or village green, and the holding of a public inquiry, it was found by the inspector that the beach had been used by residents of the locality for well over 80 years (save during the war periods) for recreation. On that basis the registration authority resolved to register the land. That decision was subject to an application for judicial review, which succeeded before Ouseley J, but was dismissed by the Court of Appeal. Their decision was in turn reversed by the Supreme Court.

The judgment of this court in Newhaven

47. In the part of their judgment directed to the statutory incompatibility issue, Lord Neuberger and Lord Hodge referred to case law on public rights of way, easements and servitudes by way of analogy, adopting a cautious approach (paras 76-90). Nonetheless, they found it did provide guidance. In English law, public rights of way are created by dedication by the owner of the land, and the legal capacity of the landowner to dedicate land for that purpose is a relevant consideration (para 78, referring in particular to *British Transport Commission v Westmorland County Council* [1958] AC 126; see also para 87). Similarly, in the English law of private easements, the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition, which is based on the fiction of a grant by that owner (para 79). The law of Scotland with respect of creation of public rights of way and private servitudes had also developed on the footing that the statutory capacity of a public authority landowner to allow the creation of such rights was a relevant matter. In particular, in *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620 it was held that it was not possible that a public right of way "which it would be ultra vires to grant can be lawfully acquired by user" ([2015] AC 1547, paras 83-84); and in *Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 it was held that the commissioners of the canal did not have the power to grant a right of way which was not compatible with the exercise of their statutory duties, and that this also meant that no private right of way or servitude could arise by virtue of user of the land over many years by those claiming such a right

of way (paras 85-86). Although the Scots law of prescription had been reformed by statute, Lord Neuberger and Lord Hodge still regarded the historic position as instructive. Their discussion of English law and Scots law in respect of dedication and prescription at paras 76-90 is significant for present purposes, because the reasoning in the cases in those areas regarding statutory incompatibility is general, and is not dependent on the narrower rule of statutory construction that a general provision does not derogate from a special one (generalia specialibus non derogant), to which they also later referred by way of analogy.

48. There follows the critical part of the majority judgment, under the heading "Statutory incompatibility: statutory construction", the material parts of which we should quote in full, at paras 91-96:

> "91. As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging 'as of right' in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, *McEvoy v Great Northern Railway Co* [1900] 2 IR 325, (Palles CB at pp 334-336), which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.
>
> 92. In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.
>
> 93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: 'does section 15 of the 2006 Act apply to land which has been acquired by a statutory

undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?' In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:

> 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.'

While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act.

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

95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 … - or to encroach on or interfere with the green - section 29 of the Commons Act 1876 … See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann, at para 56.

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

We discuss this reasoning in detail below.

49. Finally in this part of the majority judgment reference is made to cases in which registration of land held by public bodies had been approved by the court: *New Windsor*, the *Trap Grounds* case and *Lewis* [2010] 2 AC 70. The treatment of these cases by Lord Neuberger and Lord Hodge is also significant for present purposes. As regards *New Windsor*, they emphasised that the land was not "acquired and held for a specific statutory purpose", so "[n]o question of statutory incompatibility arose" (para 98). They observed that in the *Trap Grounds* case, though the land was wanted for use as an access road and housing development "there was no suggestion that [the city council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility" (para 99). With respect to *Lewis* they pointed out that "[it] was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green"; hence "[a]gain, there was no question of any statutory incompatibility" (para 100).

50. In relation to each of these cases, Lord Neuberger and Lord Hodge referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. That was the basis on which they distinguished the cases. It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such.

51. Their discussion concludes, at para 101:

> "In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which

> has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

Incompatibility - the case for the appellants

52. For LCC Mr Edwards submits that the decision in *Newhaven* is of general application to land held by a statutory authority for statutory purposes, whatever the nature of the Act. He points out that the statutory duties or powers in *Newhaven* were not specific to the beach itself, but rather applied to all of the land acquired and held, from time to time, by NPP and its predecessors for the operation of the Port. NPP had not, within living memory, used the Beach for its statutory harbour purposes. The critical passage in the majority judgment (para 93) refers generally to land -

> "which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes …"

It is not limited to statutory powers directed to a specific location or undertaking. No one has argued that the principle is limited to statutory undertakers, as opposed to public authorities in general. Nor is there any requirement for the land to be in actual use for statutory purposes at the point of registration; it simply has to be held for such purposes. In *Newhaven* the Beach had not been used for harbour purposes nor was there any fixed intention to do so at any particular time in the future (see para 96).

53. In the present case, notwithstanding the inspector's findings, there was, he submits, clear incompatibility with LCC's functions in respect of the land. The effect of registration would be that there accrues a right vested in the inhabitants of Scotforth East Ward to use the land for lawful sports and pastimes of a variety of forms, including walking and dog walking. LCC could not restrict their entry onto the land, including Area B which was at the time of the inspector's decision used as a playing field by the school (see Decision Letter, para 10). Given the statutory safeguarding obligations towards primary school pupils, the use of that area for play could not continue. Any use of the land to provide a new or expanded school would be precluded. In substance, the land would be no longer available in any meaningful sense for use in fulfilment of the LCC's statutory duties as local education authority.

54. Mr Laurence makes similar submissions in respect of the Surrey site, supported in that case by the conclusions of Gilbart J [2017] 4 WLR 130.

Discussion

55. In our judgment, the appeals should be allowed in both cases. On a true reading of the majority judgment in *Newhaven* on the statutory incompatibility point, the circumstances in each of these cases are such that there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green. This has the result that the provisions of 2006 Act are, as a matter of the construction of that Act, not applicable in relation to it.

56. The principle stated in the key passage of the majority judgment at para 93 is expressed in general terms. The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time-being so held. Although the passage refers to land "acquired by a statutory undertaker", we agree with Mr Edwards that there is no reason in principle to limit it to statutory undertakers as such, nor has that been argued by the respondents. That view is supported also by the fact that the majority felt it necessary to find particular reasons to distinguish cases such as *New Windsor*, the *Trap Grounds* case and *Lewis*, all of which involved local authorities rather than statutory undertakers. Accordingly, the appellants argue with force that the test is directly applicable to the land acquired and held for their respective statutory functions.

57. The reference in para 93 to the manner in which a statutory undertaker acquired the land is significant. Acquisition of land by a statutory undertaker by voluntary agreement will typically be by the exercise of general powers conferred by statute on such an undertaker, where the land is thereafter held pursuant to such powers rather than under specific statutory provisions framed by reference to the land itself (as happened to be a feature of the provisions which were applicable in *Newhaven* itself). That is also true of land acquired by exercise of powers of compulsory purchase. In relation to the latter type of case, the majority said in terms that "the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes" (para 93). On our reading of the majority judgment, it is clear that in relation to both types of case Lord Neuberger and Lord Hodge took the view that an incompatibility between general statutory powers under which land is held by a statutory undertaker (or, we would add, a public authority with powers defined by statute) and the use of such land as a town or village green excludes the operation of the 2006 Act.

58. This interpretation of the judgment is reinforced by the analysis it contains of the English and Scottish cases on dedication and prescription in relation to rights of way, easements and servitudes and the guidance derived from those cases (see paras 76 to 91): para 47 above. It is also reinforced by the way in which Lord Neuberger and Lord

Hodge distinguished the *New Windsor*, *Trap Grounds* and *Lewis* cases: paras 49 and 50 above.

59. The respondents in these appeals submit that the reasoning of Lord Neuberger and Lord Hodge is more narrowly confined, and depends upon identifying a conflict between a particular regime governing an area of land specified in the statute itself and the general statutory regime in the 2006 Act. In support of this interpretation the respondents point to the highly specific nature of the statutory provisions governing the relevant land in *Newhaven* and to the reference in para 93 to the rule of statutory construction that a general provision does not derogate from a special one (generalia specialibus non derogant).

60. However, for the reasons we have set out above, this interpretation of the judgment does not stand up to detailed analysis. Lord Neuberger and Lord Hodge stated only that "some assistance" could be obtained from consideration of that rule of construction, not that it provided a definitive answer on the issue of statutory incompatibility. In other words, they treated it as a helpful analogy for the purposes of seeking guidance to answer the question they posed in para 93, just as they treated the English and Scottish cases on prescriptive acquisition as helpful. The way in which they posed the relevant question in para 93 shows that their reasoning is not limited in the way contended for by the respondents, as does their discussion of the prescriptive acquisition cases and the local authority cases of *New Windsor*, *Trap Grounds* and *Lewis*.

61. We do not find the construction of the 2006 Act as identified by the wider reasoning of the majority in *Newhaven* surprising. It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect.

62. Lord Hoffmann in *Sunningwell* concluded that it could be inferred that Parliament intended to allow for the creation of new rights pursuant to the 1965 Act by reason of the "public interest in the preservation of open spaces which had for many years been used for recreational purposes", but in doing so he recognised that "[a] balance must be struck" between rights attaching to private property and competing public interests of this character (p 359B-E). It is natural to expect that where a public authority is holding land for public purposes defined by statute which are incompatible with the public interest identified by implication from the 1965 Act, and now the 2006 Act, that balance will be affected. The proper inference as to Parliament's intention is that the general public interest identified by Lord Hoffmann will in such a case be outweighed by the specific public interest which finds expression in the particular statutory powers under which the land is held.

63. As Lord Neuberger and Lord Hodge appreciated, this general point can be made with particular force in relation to land purchased using compulsory purchase powers set out in statute. Such powers are generally only created for use in circumstances where an especially strong public interest is engaged, such as could justify the compulsory acquisition of property belonging to others. It seems highly unlikely that Parliament intended that public interests of such a compelling nature could be defeated by the operation of the general provisions in the 2006 Act.

64. In construing the 2006 Act it is also significant that it contains no provision pursuant to which a public authority can buy out rights of user of a town or village green arising under that Act in relation to land which it itself owns. That is so however strong the public interest may now be that it should use the land for public purposes. Since in such a case the public authority already owns the land, it cannot use any power of compulsory purchase to eradicate inconsistent rights and give effect to the public interest, as would be possible if the land was owned by a third party. Although section 16 of the 2006 Act makes specific provision for "deregistration" of a green on application to the "appropriate national authority", in relation to land which is more than 200 square metres in area the application must include a proposal to provide suitable replacement land: subsections (2), (3) and (5). This procedure is available to any owner of registered land, public or private; it is not designed to give effect to the public interest reflected in specific statutory provisions under which the land is held. Often it will be impossible in practice for a public authority to make a proposal to provide replacement land as required to bring section 16 into operation. Again, it would be surprising if Parliament had intended to create the possibility that the 2006 Act should in this way be capable of frustrating important public interests expressed in the statutory powers under which land is held by a public authority, when nothing was said about that in the 2006 Act.

65. In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in *Newhaven*, LCC and NHS Property Services can show that there is statutory incompatibility in each of their respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see *Newhaven*, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.

66. Similar points apply in the Surrey case. Although the non-statutory inspector found against the appellant on the statutory incompatibility issue, the registration authority failed to consider it. Gilbart J was satisfied that, within the statutory regime applicable in that case, there was no feasible use for health related purposes, and indeed none had been suggested. The Court of Appeal took a different view, but largely, as we understand it, on the basis that recreational use of the subject land would not inhibit the ability of NHS Property Services to carry out their functions on other land. We consider that Gilbart J was correct in his assessment on this point. The issue of incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purposes for which the land is held, not by reference to how the land happens to be being used at any particular point in time (again, see *Newhaven*, para 96).

67. As Lady Arden and Lord Wilson take a different view regarding the effect of the majority judgment in *Newhaven*, we should briefly explain why, with respect, we are not persuaded by their judgments. We are all in agreement that the outcome of these appeals turns upon the proper interpretation of the majority judgment in *Newhaven*. We cannot accept their interpretation of that judgment.

68. In our view, although the case might have been decided on narrower grounds, Lord Neuberger and Lord Hodge deliberately posed the relevant question in para 93 in wide terms, specifically in order to state the issue as one of statutory incompatibility as a matter of principle, having regard to the proper interpretation of the relevant statute pursuant to which the land in question is held. That is why the heading for the relevant section of their judgment is "Statutory incompatibility: statutory construction". They say in terms in para 93, "The question of incompatibility is one of statutory construction." Nowhere do they say it is a matter of statutory construction *and* an evaluation of the facts regarding the use to which the land has been put. According to their judgment, the issue of incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the land is held with the rights claimed pursuant to the 2006 Act, not by having regard to the actual use to which the authority had put the land thus far or is proposing to put it in future. We consider that this emerges from the critical para 93, and also from the paragraphs which follow in their judgment.

69. Thus, in para 94 they identify the relevant incompatibility as that between the 2006 Act and "the statutory regime which confers harbour powers on NPP to operate a working harbour". In para 96, it is to that statutory incompatibility that they refer, not to incompatibility with any use to which NPP had as yet put the land in question or might in fact put it in the foreseeable future. As a matter of fact, the Beach had not been used for the applicable statutory purposes. Further, in our opinion, by stating in para 96 that it was not necessary for the parties to lead evidence as to NPP's plans for the future of the harbour "in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred", Lord Neuberger and Lord Hodge were seeking to emphasise, contrary to Lady Arden's and Lord Wilson's interpretation of

their judgment, that what matters for statutory incompatibility to exist so as to prevent the application of the 2006 Act is a comparison with the relevant statutory powers under which the land is held, not any factual assessment of how the public authority might in fact be using or proposing to use the land.

70. The same point can be made about para 97, where Lord Neuberger and Lord Hodge said that it was unnecessary to consider evidence about actual proposed use of the land on the facts, since they were able to determine by looking at the statutory powers "that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour [ie to hold under the statutory powers referred to in para 94], and the registration of the Beach as a town or village green". Their discussion at paras 98 to 100 of *New Windsor*, the *Trap Grounds* case and *Lewis* supports the same conclusion. In each of those cases the relevant land had been held for a very long period without actually being put to use which was inconsistent on the facts with use as a town or village green and without any proposal that it should be put to such use. The implication from what Lord Neuberger and Lord Hodge say about them is that if it had been shown that the land was held for specific statutory purposes which were incompatible with registration under the 2006 Act, that would have constituted statutory incompatibility which would have prevented registration. Their treatment of these cases cannot be reconciled with Lady Arden's and Lord Wilson's proposed interpretation of their judgment. We do not think that para 101 can be reconciled with that proposed interpretation either. In that paragraph Lord Neuberger and Lord Hodge contrast a case in which a public body might have statutory purposes to which it could in future appropriate the land (but has not yet done so) with the situation in *Newhaven* itself, where in the relevant period NPP held the Beach "for the statutory harbour purposes and as part of a working harbour" (ie under the statutory regime referred to in para 94). In our view they were there emphasising that what matters for a statutory incompatibility defence to arise is that the land in question should be held pursuant to statutory powers which are incompatible with registration as a town or village green. Nor, with respect, do we think that Lady Arden and Lord Wilson have offered any good answer to the points we have made at paras 61 to 64 above.

71. We also consider that the reading of *Newhaven* proposed by Lady Arden and Lord Wilson would undermine the very clear test which Lord Neuberger and Lord Hodge plainly intended to state. Instead of focusing on the question of the incompatibility of the statutory powers under which the relevant land is held, Lady Arden and Lord Wilson would introduce an additional factual inquiry into the actual use to which the authority is putting the land or proposes to put the land in the foreseeable future. Thus, Lady Arden and Lord Wilson would adopt from the English case of *Westmorland* [1958] AC 126 a test of what use could reasonably be foreseen for the land in question, even though Lord Neuberger and Lord Hodge say nothing to support that in the relevant part of their judgment. They refer to both English and Scottish cases on prescriptive acquisition as being relevant to their assessment of the correct approach to be adopted in interpreting the 2006 Act, and in each case only by way of broad analogy, as they explain at para 91. The Scottish cases they cite do not

employ any such test as in the *Westmorland* case and are consistent with the clear principled test, based on statutory construction, which we understand Lord Neuberger and Lord Hodge to have laid down.

Future use

72. Finally, for completeness, we should mention briefly an issue which does not strictly arise within the scope of the appeals, but has been the subject of some discussion. That is the question whether, notwithstanding registration, there might be scope for use by the appellants of the land for their statutory purposes. This arises from a suggestion put forward in Lord Carnwath's minority judgment in *Newhaven*. He noted that in the *Trap Grounds* case it had not been necessary to consider the potential conflict between the general village green statutes and more specific statutory regimes, such as under the Harbours Acts. He said, at para 139:

> "It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour."

73. Mr Edwards, supported by Mr Laurence, seeks to build on that tentative suggestion, taken with the principle of "equivalence" adopted in the *Lewis* case [2010] 2 AC 70. As he submits, the Supreme Court accepted that there should be equivalence between the use of the land for lawful sports and pastimes in the qualifying period (in that case subject to concurrent use as a golf course) and the extent of rights vested in local inhabitants after registration. That approach was taken a stage further by the Court of Appeal in *TW Logistics Ltd v Essex County Council* [2019] Ch 243, holding that the 19th century statutes, as applied to a registered modern green, are not to be construed as interfering with the rights of the landowner to continue pre-existing uses so far as not inconsistent with the uses which led to registration (per Lewison LJ, paras 63-82).

74. This is not a suitable occasion to examine the scope of the principle of equivalence, so far as it can be relied on to protect existing uses by the landowner. *Lewis* was a somewhat special case. Lord Brown was able to draw on "[his] own experience both as a golfer and a walker for over six decades" (para 106) to attest to the feasibility of an approach based on "give and take" in that particular context. The same approach may not be so easy to apply in other contexts, and as applied to other forms of competing use. Permission has been granted for an appeal to this court in *TW Logistics*. That may, if the appeal proceeds, provide an opportunity for further consideration of this difficult issue. In any event, those cases were concerned with actual uses by the owners, not with potential uses for statutory purposes for which the land is held, as in the present cases.

75. In view of our conclusion that the land in each appeal should not have been found to be capable of being registered under the Act, the issue of what uses might have been open to a statutory owner if it were so registered does not arise, and we prefer to say no more about it on this occasion.

Conclusion

76. For these reasons we would allow the appeals in both cases.

LADY ARDEN: (partly dissenting)

Identifying the difference of view

77. My views differ from those of Lord Carnwath and Lord Sales on these appeals in an important respect. My conclusion is that the question of incompatibility between two sets of statutory provisions (on this appeal, the provisions of the Commons Act 2006 ("the 2006 Act") and the statute authorising the holding of land by the public authority in question) involves an assessment of the facts as well as a proposition of law. The fact that a public authority holds land for statutory purposes which are incompatible with the use of the land as a town or village green ("TVG"), is not of itself sufficient to make the land incapable of being registered under the 2006 Act as a TVG. It must be shown that the land is in fact also being used pursuant to those powers, or that it is reasonably foreseeable that it will be used pursuant to those powers, in a manner inconsistent with the public's rights on registration as a TVG. That requirement in my judgment follows from *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547. References in this judgment to public authorities exclude public authorities which are subject to a statutory duty to carry out a particular function on specified land, identified by statute, where such land is sought to be registered as a TVG. Such authorities are outside the scope of this judgment.

Identifying the correct approach to questions of statutory inconsistency

78. As a matter of constitutional principle, courts must approach the statute book on the basis that it forms a coherent whole. That means that, when interpreting legislation, courts must, in the absence of an indication of some other intention by Parliament, strive to ensure that the provisions work together and apply so far as possible to their fullest extent, such extent being judged according to the intention of Parliament demonstrated principally in the words used. (We have not been shown any other admissible evidence as to Parliament's intention, such as ministerial statements in Hansard.) The courts cannot simply decline to enforce parts of a statute because there may be a conflict with

some other statute. It has to be shown that the part sought to be disapplied is irreconcilable with another part of it. If the two can stand together there is no statutory irreconcilability or inconsistency: compare, for example, *The Tabernacle Permanent Building Society v Knight* [1892] AC 298. One statute cannot be said to be incompatible with another if the two statutes can properly be read together. So, the test is: can the two statutes in question properly be interpreted so that they stand together and each has the fullest operation in the sense given above?

79. In *Newhaven*, as I shall demonstrate by reference to the majority judgment in that case in the next section of this judgment, the point was that there was a risk that the statutory undertaking's working harbour would be stymied in its operations if the Beach was held to be a TVG. It was not a case where a statutory authority has acquired land for a statutory purpose but, at the time of the proposed registration as a TVG, it is not likely that the land will be used for that purpose in the reasonably foreseeable future.

Newhaven and the limits of this Court's decision in that case

80. The judgments in *Newhaven* in my judgment should be approached on the basis that they are consistent with the principles explained in para 78 above, even though the members of this Court in that case did not articulate them. This court should read their decision, if this can properly be done as a matter of statutory interpretation, as leading to the result that where public authority ownership of land and registration as a TVG can co-exist, that course will be available. As a matter again of constitutional principle, land should not be relieved of the burden of an Act of Parliament having (so far as relevant) unqualified application if there is an alternative, properly available interpretation which will lead to the two enactments in question standing together.

81. On timing, the question whether there is any conflict between public authority powers and TVG legislation must be determined as at the date when the application for registration is made. At that point in time, the public authority may be holding land it has acquired under statutory powers for a particular purpose for which it is not yet required. It is not required to apply the land for that purpose and it may decide not to do so and for example to sell the land or use it for some other purpose. Moreover, even while holding the land for a particular purpose, the local authority may be using it for another purpose because it is not required for the statutory purpose for which it is appropriated at that point in time (Local Government Act 1972, section 120(2)).

82. The factual scenario in *Newhaven* was different: the harbour company was already in operation and the beach was liable to be involved in its then current trading operations. The case shows that incompatibility is not a purely legal matter depending on the existence of statutory powers which if exercised would be inconsistent with use of the land as a TVG. It is necessary on the facts to be satisfied that that is likely to

occur after registration. It requires a real-world assessment of the situation. The court is not precluded from looking at the facts subsequent to the acquisition of the land any more than the determination as to the reasonableness of a landlord's refusal to give a consent under a lease is restricted to the facts known to the parties at the date of the lease (see *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180).

Interpreting the decision of this Court in Newhaven

83. In the *Newhaven* case, the harbour company ("NPP") had a statutory duty to maintain a harbour. The dispute concerned a tidal beach in one part of the harbour which as it happened was no longer operational. The Beach had been used for the past 80 years or so by members of the locality. The issue with which these appeals are concerned is the issue in that case as to whether the Beach could be registered as a TVG. This court held that the land in issue, namely the Beach, could not be registered as a TVG.

84. In *Newhaven*, Lord Neuberger and Lord Hodge jointly gave the leading judgment. The other members of the Supreme Court agreed with them. Lord Carnwath also wrote a concurring judgment. On these appeals, Lord Carnwath and Lord Sales examine the leading judgment in detail. They conclude that Lord Neuberger and Lord Hodge held that, where a person applies to register as a TVG land which is held for statutory purposes which would be inconsistent with the land also being TVG, the land is not capable of being so registered, and that the question is purely one of statutory construction. Thus, Lord Neuberger and Lord Hodge formulated the relevant question as, at para 93:

> "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?"

85. Having stated that question, Lord Neuberger and Lord Hodge immediately answered it by the following sentence: "In our view it does not." In that sentence, the word "it", as I read it, refers to section 15 itself.

86. The next sentence in the judgment of Lord Neuberger and Lord Hodge states (also at para 93):

> "Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire

> by user rights which are incompatible with the continuing use of the land for those statutory purposes."

87. That sentence makes it clear that Lord Neuberger and Lord Hodge regarded "use" as a critical issue. That clearly involves fact. Moreover, the expression "continuing use" also makes it clear that they regarded the operations of NPP as constituting use which was being perpetuated and that that was so even though the tidal beach which was in issue was in a part of the harbour which was not itself being used.

88. It is further clear from that sentence, in my judgment, that the Supreme Court was not considering the question what would happen if the relevant use had never started or if the relevant land had become surplus to the obligation or power to carry out any particular activity which had been imposed by Parliament. We have not been shown any statutory requirement that a public authority should regularly consider the need for any land and if thought fit dispose of land which is not required for some purpose for which it was acquired, so it may end up holding land for which it has no further need.

89. The local authority could voluntarily appropriate the land to some other purpose but, if it fails to reconsider the use for which it acquired land, or appropriates it to some other use, it is likely that the only basis on which the local authority's decision or omission to act could be challenged would be on the basis that its decision attained the standard of irrationality, which is a high standard for an applicant to have to meet. Under the judgment of Lord Carnwath and Lord Sales, that land would remain immune from the accrual of rights leading to registration as a TVG even though there would not in fact be any irreconcilability between registration and the statutory power for which the land was conferred. It is not clear what on this basis would happen if the local authority accepts that the original purpose is spent and after the application is made decides to appropriate the land to some other statutory purpose.

90. Furthermore, in *Newhaven*, para 96, Lord Neuberger and Lord Hodge held:

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

91. It follows that they regarded it as important that the harbour in question was a "working harbour" and that there was a risk of a clash between the registration of the Beach and the use of the harbour for the statutory purposes. They considered that registration would inhibit the use of the adjoining quay to moor vessels. It would prevent the harbour authority from dredging the harbour in a way which affected the enjoyment of the Beach and restrict its ability to alter the existing breakwater. So, I deduce from that paragraph that Lord Neuberger and Lord Hodge also regarded it as important that there was factual evidence establishing the continuing use and the impact of registration on that use. There had to be real, not theoretical, incompatibility.

92. Lord Neuberger and Lord Hodge continue at the end of that paragraph to observe:

> "All this is apparent without the leading of further evidence."

93. The word "further" confirms that the preceding analysis involved a consideration of the evidence on the ground. In fact the further evidence appears to have been evidence as to plans to upgrade the harbour and use it as a container terminal: see the judgment of Ouseley J in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2012] 3 WLR 709, para 127.

94. In para 97, Lord Neuberger and Lord Hodge continue by summarising further matters on which the harbour company relied, but it was not necessary in the light of the conclusion in para 96 to consider those matters. It is to be noted that in para 97, Lord Neuberger and Lord Hodge refer to an incompatibility between the proposed TVG registration and the statutory functions of NPP, which they add:

> "continues to operate as a working harbour"

This is an express reference to the state of fact. It would clearly have been material if the harbour company held the land but had ceased its statutory functions.

95. In paras 98 to 101, Lord Neuberger and Lord Hodge refer to previous leading cases to show that the question of statutory incompatibility had not previously had to be considered. But, importantly for my interpretation, they conclude that (at para 100):

> "It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green."

So, in a case concerned with future use, the court must consider if the statutory purpose would be "likely" to be impeded, not likely to be impeded if invoked. Lord Neuberger and Lord Hodge clearly envisaged that there would have to be a factual inquiry as to future use and that it would have to be shown that TVG registration would be likely to impede the exercise of those powers. Lack of impediment can logically be shown either by showing that the local authority has acquired the land for purposes (eg recreational purposes) which are not inconsistent with registration as a TVG, or by showing that there is no realistic likelihood of the land being used for the purposes for which it was acquired.

96. In addition, at para 101 of their judgment, Lord Neuberger and Lord Hodge held:

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

97. In that paragraph, Lord Neuberger and Lord Hodge addressed the question of a future development of the land. The mere power to undertake such development would not itself be sufficient to create a statutory incompatibility. They contrasted that with the position in the *Newhaven* case. Lord Neuberger and Lord Hodge again referred to the evidence that the tidal beach was part of the working harbour.

98. Paragraph 102 dealt with the separate issue of user as of right and para 103 was the summary of the conclusion, which does not take the matter further.

99. For the avoidance of doubt, I agree that this court should apply statutory incompatibility, the concept sought to be employed in *Newhaven*, to determine the question of inconsistency between the provisions of the 2006 Act enabling registration of land in issue on these appeals as TVGs and the statutory provisions, also conferred by public general Acts of Parliament, empowering the acquisition and holding of land by the public authorities in both appeals. However, in my judgment, that concept is as a matter of constitutional principle to be interpreted as I have explained in para 78 above.

Determination of incompatibility where the issue arises from a future use

100. The use relied on by the local authority in the Lancashire case in relation to Areas A and B is, as in *Newhaven*, a current use, and my analysis of *Newhaven* detailed above does not lead to any different conclusion in relation to those Areas from that reached by Lord Carnwath and Lord Sales. I would accept the submission of Mr Douglas Edwards QC, for Lancashire County Council, that in practice the land could not be used by the primary school currently using it when there was unrestricted public access as this would not be consistent with the school's safeguarding obligations: this may be inferred from the fact that the site is currently fenced. Schools are responsible for creating and maintaining a safe environment for their pupils. Mr Edwards' submission on this point was not challenged on these appeals.

101. However, as I shall next explain, where the use is only a use which may occur in the future, my analysis makes it necessary to answer further questions before any conclusion about statutory incompatibility can be reached.

102. This has a practical impact in relation to Areas C and D in the Lancashire case. Those Areas have never been used for the statutory purpose of education for which they were acquired and are now held.

103. That raises the question, what test should apply if the case is only one of possible future use? Must it be shown that it is simply possible that the land may be used for the statutory purpose or must it be shown that it is reasonably likely or foreseeable that it will be so used? These questions did not directly arise in *Newhaven*.

104. In answering these questions, I have found assistance in the decision of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126, in which a railway company contended that it would have been inconsistent with the statutory powers conferred on it for the public to have a right of way over a bridge spanning the railway line (originally built for private benefit) and that accordingly its predecessor (another statutory company) could not have dedicated it to the public. In *Newhaven*, Lord Neuberger and Lord Hodge cited the judgment of Lord Keith of Avonholm in this case as authority for the proposition that incompatibility with an Act of Parliament is a question of fact, at para 87:

> "In *British Transport Commission* [1958] AC 126, 164-165 Lord Keith of Avonholm commented on Lord Kinnear's opinion in *Magistrates of Edinburgh*, suggesting that it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined

> at p 166, that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility."

105. The other members of the House also treated it as a question of fact (see Viscount Simonds at p 144, Lord Morton of Henryton at p 149, Lord Radcliffe at p 156, Lord Cohen at p 163 and Lord Keith at p 166). Moreover, they held that, to show compatibility, it was not necessary to show that there were no circumstances in which a conflict could arise. That would make it impossible for members of the public ever to acquire a public right of way over land belonging to the railway company. The House also rejected the argument that a statutory company could not grant an easement over a footpath over its railway. To hold otherwise "would be a grave impediment to public amenity" (per Lord Radcliffe at p 153). It was unlikely on the facts that the railway company would ever need to pull the bridge down.

106. The relevant question was whether a conflict, or incompatibility, was reasonably foreseeable. Thus, Viscount Simonds (at p 144), Lord Morton (at p 149) and Lord Keith (see p 166) rejected the following test: was it *possible* that land would be used in future for a certain purpose? They considered that the normal statutory burden should apply and be discharged, namely that it should be shown that the use was reasonably likely to occur.

107. The House considered the question on a current basis and did not decide whether the critical time was the date of dedication or some other date (see for example pp 144-145). At all events it did not seek to determine the question as at the date of the incorporation of the statutory company when its statutory powers were conferred.

108. In my judgment, the test of reasonable foreseeability is the correct test also to apply in this context, ie when asking whether there is incompatibility between registration of land as a TVG and the statutory powers of a public authority in relation to the same land where the relevant use that the public authority might make of the land under those powers is a potential future use which has not yet started.

109. It is said by Lord Carnwath and Lord Sales that this test is not clear. It may not be easy to apply on the facts but that is necessarily so if the law applies a solution which is fact-dependent rather than drawing a bright line as the majority does. Lord Neuberger and Lord Hodge refer to the *Westmorland* case at two points in their judgment. In the light of their conclusion that the evidence as to current use was sufficient it was not necessary for them to consider it in any further detail, but they would not have cited it if they did not approve of its approach. If I am right there is no question of the use of land being stymied by the 2006 Act (cf para 61 above). Circumstances may have moved on and the public authority may no longer require the land it is holding for any particular statutory purpose.

Application of the principles to the facts of the appeals

(1) The Lancashire appeal

110. The issue of future use of the land arises on the Lancashire appeal in relation to Areas C and D. The local authority in the Lancashire appeal did not adduce evidence that it was reasonably likely that these Areas would be used for educational purposes in the future. There had in the past been a plan to relocate a school on this area but that was not proceeded with and there was no substitute. Moreover, those Areas had never been used for educational purposes. Accordingly, as I see it, those plots should have been registered as a village green. The only objection to doing so was one of statutory incompatibility and as I see it, that fails on the facts.

111. The position is different in relation to Areas A and B which are currently used for educational purposes. Importantly, as I read the facts, the sites cannot be registered as TVGs and be school playgrounds at the same time for the reason that this would be inconsistent with the school's safeguarding duty. The school has an obligation to provide outdoor space as a playground under regulation 10 of the School Premises (England) Regulations 2012, and that is its current use. The inspector did not reach any conclusion on the question of the compatibility in fact of the current use of Areas A and B with their registration as TVGs, and she expressly left open the door to further evidence on incompatibility.

(2) The Surrey appeal

112. In the Surrey appeal, the result is different because the site in issue lies immediately next to the hospital. On the basis of my judgment, the correct legal test applying to future use was not applied. There have been no findings of fact as to whether it is reasonably foreseeable that even now the land will be used for the statutory purposes for which it is currently held. In those circumstances, in my judgment, this matter should be remitted to the registration authority for a decision on that issue.

Restrictions on TVG registration in the Growth and Infrastructure Act 2013

113. Lord Carnwath and Lord Sales begin their judgment with an analysis of the development of the law on TVGs since the report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd 462), chaired by Sir Ivor Jennings QC, which led to the Commons Registration Act 1965. Undoubtedly that Act and its successor, the 2006 Act, have led to the registration of TVGs at a more significant level than can have been envisaged by the Royal Commission.

114. Accordingly, it is now an inescapable fact that the actual use of the TVG legislation has, in the light of practical experience and the needs and expectations of local communities up and down the country, eclipsed the original conception of a more limited role for TVG registration. The clock cannot be turned back.

115. Moreover, Parliament has essentially given its approval to that use in later legislation. The Growth and Infrastructure Act 2013 ("the 2013 Act") introduced a package of measures designed to restore the balance between the public and landowners but retaining the same basic system of registration.

116. The three main changes brought about by the 2013 Act in this connection can be summarised, and it will be seen that they were substantial:

(1) The period within which a person may apply to register land as a TVG after the landowner has terminated the use by members of the public without permission has been reduced from three years to one year (2006 Act, section 15(3A) as amended).

(2) The 2013 Act has inserted a new section 15C into the 2006 Act terminating the public's right to apply to register land as a town or village green after any one of a range of "trigger events" occurs. These include an application for planning permission. The right to apply for registration as a TVG will arise again if a "terminating event" occurs, namely (in the case of an application for planning permission) the planning application is withdrawn, is refused or expires, or the local planning authority ("LPA") does not determine it. (Where the planning application is for a project of public importance under section 293A of the Town and Country Planning Act 1990, the right to make an application to register as a TVG does not arise where the LPA declines to determine it.)

(3) Landowners have a new right to deposit statements with the appropriate registration authority with respect to any land and this will have the effect of terminating any existing or accruing rights to register that land as a TVG (2006 Act, section 15A, as amended). Landowners already had a right to apply to deregister land as a TVG, but comparable land must be offered in exchange (2006 Act, section 16).

117. Lord Carnwath and Lord Sales are right to say that these changes are not directly relevant, and there is no information about any fall in the number of TVG registrations. However, these changes are important. It is open to public authorities to take advantage of these changes (and this is my core answer to the points that Lord Carnwath and Lord Sales make in para 64 above). They show, among other matters, that Parliament did not consider that there should be some special exemption applying in respect of all publicly-held land. That may be a recognition of the fact that public bodies may be holding land which is surplus to their statutory requirements. While many statutes confer a power on

statutory bodies to acquire and hold land, we have not been shown any provision requiring the body on which the power is conferred to sell it when it becomes clear that the land is not required or is no longer required for the purpose for which it was acquired. If a public authority took no action to dispose of land it did not need, it might well be difficult to obtain judicial review of its action as irrationality may have to be shown.

118. Moreover, Parliament took no steps in the 2013 Act to revise the conditions for registration for TVGs.

Judgment of Lord Wilson

119. Since circulating the first draft of my judgment I have had the benefit of reading the judgment of Lord Wilson. He agrees with the approach of the Court of Appeal [2018] 2 P & CR 15. I have great admiration for his judgment and that of Lindblom LJ, with which Jackson and Thirlwall LJJ agreed. In particular, I agree with the three general points made by Lindblom LJ in para 36 of his judgment. In a sense my approach might be described as a halfway house between their judgments and that of Lord Carnwath and Lord Sales. The ten judges who have considered the issues on these appeals have unfortunately been very divided. For my own part, I do not consider that the view of the Court of Appeal addresses the effect on incompatibility of the possibility of future use of the sites sought to be registered as TVGs, or the intention of Parliament in such cases. However, if I am wrong on the approach I have taken, I would adopt that of Lord Wilson and the Court of Appeal in preference to that of Lord Carnwath and Lord Sales. Respectfully, their approach results in introducing into the legislation a blanket exemption for public authorities which Parliament has not itself expressly given. Parliament has instead provided all landowners with other measures which they can use to protect their position for the future.

120. Limiting the issue of incompatibility to a "desktop" exercise of considering the statutory powers of the landowner, without reference to the facts on the ground, runs the risk, to borrow Lord Radcliffe's words in *British Transport Commission* at p 153, of "a grave impediment to public amenity." There will potentially be a loss of access by the public to land which they have used for very many years.

Conclusion

121. My approach to statutory incompatibility in my judgment strikes a fairer balance between the public interest in the use of land by the public authority for the appropriated statutory purpose and that of the public who are intended by the 2006 Act to have a right of access to recreational spaces than the approach of Lord Carnwath and Lord Sales. That is my principal answer to the points which they make in paras 61 to 64 and

67 to 71 above and my other responses to those paragraphs appear from this judgment. My judgment does not as suggested in any way involve frustrating the intention of Parliament since the statutory powers under which the public authority holds the land will prevail if it is shown that there is a current use of the land in exercise of those powers, or that it is reasonably foreseeable that such use will occur (se para 77 above).

122. Accordingly, I would hold that the appeal in Lancashire should be allowed in part and that in Surrey the appeal should also be allowed on the basis that the matter remitted to the registration authority for a determination of the application in accordance with this judgment.

LORD WILSON: (dissenting)

123. I would have dismissed both appeals.

124. Although I hold each of my three colleagues in the majority in the highest esteem, I am driven to suggest that today they make a substantial inroad into the ostensible reach of a statutory provision with inadequate justification.

125. It is agreed that, in their capacity as education authorities, local authorities, such as the appellant in the Lancashire case, can hold land only for specified statutory purposes referable to education; that health authorities, such as the appellant in the Surrey case, can hold land only for specified statutory purposes referable to health; and that, for example, in their capacity as housing authorities, local authorities can hold land only for specified statutory purposes referable to housing.

126. If public authorities which hold land for specified statutory purposes are to be immune from any registration of it as a green which would be theoretically incompatible with their purposes, the reach of section 15 of the Commons Act 2006 Act is substantially reduced. One would expect that, had such been its intention, Parliament would have so provided within the section. In the absence of any such provision, whence does justification for it come?

127. It comes, according to today's ruling, from the decision of this court in the *Newhaven* case, cited in para 1 above, from which the court would in any event be able to depart if necessary. In my view interpretation of that decision by today's majority is controversial. The claim in para 11 above that their interpretation represents no more than consolidation of the law is unfortunately not one to which I can subscribe.

128. The decision in the *Newhaven* case wrought an exception to the availability of registration under section 15. It is always dangerous to interpret an exception too widely lest it becomes in effect the rule and the rule becomes in effect the exception.

129. In the *Newhaven* case statutes had cast upon the harbour authority, as the owner/operator of the port, specific *duties* in relation to *that particular harbour*; and the operational land of that harbour included that particular beach. An Act of 1847 obliged the authority to maintain and support that harbour. An Act of 1878 obliged it to keep that harbour open to all for the shipping and unshipping of goods and the embarking and landing of passengers. Incidental to these obligations were statutory powers, including one in an instrument of 1991 to dredge the foreshore of that harbour. Were it to exercise its power to dredge the area of the foreshore to the east of the breakwater, the authority would destroy the beach.

130. It is therefore no surprise to read within the joint judgment of Lord Neuberger and Lord Hodge emphasis on the statutory duties cast upon the authority in relation to that particular harbour; no surprise that, in the opening paragraph they described the relevant point of principle as "the interrelationship of the statutory law relating to village greens and other *duties* imposed by statute" (emphasis supplied); and no surprise that, at the outset of the crucial paragraph (namely para 93, set out in para 48 above), in which they set out their reason for allowing the appeal on the relevant point, they stated:

> "The question of incompatibility is one of statutory construction."

131. What did Lord Neuberger and Lord Hodge mean by "statutory construction"? They meant conflict between two statutory regimes. They explained in the same paragraph that, where such conflict existed,

> "… some assistance may be obtained from the rule that a general provision does not derogate from a special one …, which is set out in … *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:
>
> > 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one.'"

In the next paragraph they proceeded to explain that the specific duties conferred by statutes on the authority in relation to that harbour were incompatible with the general

provision in the 2006 Act which, on the face of it, permitted registration of the beach as a green and that therefore the general provision had to give way.

132. By contrast, statutory provisions which confer power to acquire and hold land, not there identified, for educational and health purposes, such as are in play in the present appeals, cannot be said to be incompatible with the general provision in the 2006 Act which, on the face of it, permits registration of the respective parcels of land as greens.

133. No reason for the disapplication of section 15 of the 2006 Act is advanced other than the alleged effect of the decision in the *Newhaven* case. It is in the light of the above circumstances that I would have dismissed the appeals.

134. Let me, however, suppose that my understanding of the decision in the *Newhaven* case is flawed; and that, had I better understood it, its reasoning would extend to the facts in these appeals.

135. Even in those circumstances the majority falls, so I venture to suggest, into error.

136. In *The King v The Inhabitants of Leake* (1833) 5 B and Ad 469 the issue was whether villagers in the fenlands were obliged to repair a road. If it had been dedicated as a public highway, they were obliged to do so. The land on which the road had been constructed was owned by commissioners who had bought it pursuant to statutory powers to drain specified fens and to keep them drained. They had constructed drains on it and, with the excavated earth, had built a wide bank which the villagers had used as a highway for more than 20 years. In the Court of King's Bench the villagers contended that any dedication by the commissioners of the road as a public highway would have been inconsistent with their powers. On behalf of the majority Parke J, later Lord Wensleydale, made clear that the contention should be addressed by means of a practical inquiry on the ground. He said at p 480:

> "The question then is reduced to this, whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?"

The answer was no.

137. The *Leake* case demonstrates that for almost 200 years the law of England and Wales in relation to the capacity of a public authority to dedicate its land as a public highway, or indeed as a public footpath, has been to assess its alleged incompatibility

with the statutory purposes for which the land is held on a practical, rather than a theoretical, basis.

138. Such is made clear in the Opinions of the appellate committee of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126, cited in para 71 above. A railway company was authorised by statute to buy land in Kendal for the purposes of operating a railway and to build bridges across it where necessary. On one of its bridges it built a footpath, which the public had used for more than 20 years. The question was whether, in the light of the limited statutory purposes for which it could hold land, the company could have dedicated the footpath as a public highway. Applying the *Leake* case, the appellate committee held that the answer was to be found by determining whether the use of the footpath by the public was incompatible with the statutory purposes; that incompatibility was a question of fact (p 143); that the test was pragmatic (p 152); that the question was not whether it was conceivable but whether it was reasonably foreseeable that the public use of the footpath would interfere with the company's use of its land in the exercise of its powers for the statutory purposes (p 144); that the burden lay on the company to establish that it was reasonably foreseeable (p 166); and that, by reference to the case stated by the local justices, the company failed to discharge that burden.

139. In para 78 of their judgment in the *Newhaven* case Lord Neuberger and Lord Hodge explained the decision in the *Westmorland* case. In paras 77 and 91 they stressed that, like other decisions which they examined and which related to the acquisition of prescriptive rights under English and Scots law, the decision applied only by analogy to the statutory registration of a green on land owned pursuant to statutory purposes.

140. Nevertheless, in a case in which the objection to registration as a green is cast as incompatibility with statutory purposes, there is in my view every reason to assess incompatibility in accordance with the approach adopted in the *Leake* case and indorsed in the *Westmorland* case.

141. I am convinced that in the *Newhaven* case such was also the view of Lord Neuberger and Lord Hodge, and indeed of Lady Hale and Lord Sumption who agreed with them. I refer to four passages in the joint judgment.

142. First, from para 91:

> "It is … significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes *and*

> *continued to carry out those purposes*, where the user founded on would be incompatible with those purposes." (Emphasis supplied)

143. Second, from the crucial para 93:

> "Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the *continuing use* of the land for those statutory purposes." (Emphasis supplied)

144. Third, the whole of para 96:

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

145. And fourth, from para 101:

> "The ownership of land by a public body … which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and *as part of a working harbour*." (Emphasis supplied)

146. It thus seems clear from the *Newhaven* case that registration of the beach as a green was there precluded as incompatible with the existing use of the land as a working harbour; and that, in the absence of existing use of the land, the public authority needs to adduce evidence. What evidence? Evidence which makes it reasonably foreseeable that public use of the land as a green would in practice interfere with a proposed exercise of the authority's powers in relation to the land for the statutory purposes.

147. It follows that I respectfully disagree with the suggestion in paras 65 and 66 of the judgment of Lord Carnwath and Lord Sales that incompatibility with statutory purposes should be assessed as a theoretical exercise rather than by means of a practical inquiry into interference with the authority's existing or proposed future use of the land.

148. Adopting what I believe to be the correct, practical, approach to the assessment of incompatibility in relation to the present appeals, I agree with the Court of Appeal that neither the education authority nor the health authority has established that public use of its land as a registered green would be likely to be incompatible with its use of it pursuant to its statutory powers. In the Lancashire case the Inspector conducted the requisite practical assessment, which led her to reject the alleged incompatibility; and, like the Court of Appeal, Ouseley J in the Administrative Court found no fault with her reasoning. I discern no ground upon which this court might have concluded otherwise. In the Surrey case the Inspector, while recommending refusal of the application for a different reason later shown to be invalid, also rejected the alleged incompatibility on apparently practical grounds; and the error of law which Gilbart J in the Administrative Court perceived him to have made in assessing it practically rather than as a matter of statutory construction was in my view correctly held by the Court of Appeal to have been no error at all.

149. It was with complete passivity that, for no less than 20 years, these two public authorities contemplated the recreational use of their land on the part of the public. Their simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: *Winterburn v Bennett* [2016] EWCA Civ 482, [2017] 1 WLR 646. In such circumstances it is hardly surprising that they both failed to establish its practical incompatibility with their own proposed use of it.