Hilary Term
[2010] UKSC 11
On appeal from: 2009 EWCA Civ 3

JUDGMENT

R (on the application of Lewis) (Appellant) *v* Redcar and Cleveland Borough Council and another (Respondents)

before

Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lord Brown
Lord Kerr

JUDGMENT GIVEN ON

3 March 2010

Heard on 18, 19 and 20 January 2010

Appellant
Charles George QC
Jeremy Pike
Cain Ormondroyd
(Instructed by Irwin Mitchell)

1st Respondent
George Laurence QC
Rodney Stewart Smith

(Instructed by Redcar and Cleveland Borough Council)

2nd Respondent
Ross Crail
(Instructed by Ward Hadaway)

LORD WALKER

The issue

1. Section 15 of the Commons Act 2006, so far as relevant to this appeal, provides as follows:

> 15. *Registration of Greens*
>
> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.
>
> (4) This subsection applies (subject to subsection (5)) where-
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied-

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right".

The application relevant to this appeal was expressed to be made under section 15(4). It was suggested in argument that (because of the "deeming" provision in subsection (7)) it was also, or alternatively, made under subsection (2). In any case it was a valid application, and neither subsection (5) nor subsection (6) is in point.

The issue

2. The general issue for the Court is whether a piece of open land next to the sea in Redcar ought to have been registered as a town green under section 15. For at least 80 years before 2002 the land in question ("the disputed land") formed part of a golf course in regular use by members of the Cleveland Golf Club, whose trustees were tenants of the course. The inspector who held a public inquiry found as a fact that when local residents using the disputed land for recreation encountered members of the golf club playing golf, the former "deferred" to the latter. In these circumstances the legal issue for the Court can be more particularly stated as whether the legal consequence of this deference was that the local residents were not indulging in recreation "as of right" within the meaning of the Commons Act 2006.

3. During the last decade there have been three important decisions of the House of Lords dealing with different aspects of the law (as it stood before the Commons Act 2006) as to town and village greens: *R v Oxfordshire County*

Council Ex p Sunningwell Parish Council [2000] 1 AC 335 ("*Sunningwell*"); *R(Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889 ("*Beresford"*); and *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 ("*Oxfordshire*"). In none of these appeals did the House of Lords have to decide the point now at issue, although both sides have placed reliance on some passages in their Lordships' opinions. The Commons Act 2006 (which is still not fully in force) makes important changes in the law, but does not directly affect the issue of deference.

The facts

4. The appellant, Mr Kevin Lewis, is one of five local residents who made the application for registration of the disputed land under section 15 of the Commons Act 2006. The first respondent, Redcar and Cleveland Borough Council, has a dual capacity, being both the registration authority and the freehold owner of the disputed land. The second respondent, Persimmon Homes (Teesside) Ltd is an interested party. It has since 2003 been the Borough Council's development partner in the Coatham Links coastal regeneration project. The project is for a mixed development for residential and leisure purposes on a site extending to 14 hectares. The disputed land forms an important, and possibly indispensable, part of the development site. The appeal is therefore of great importance to the parties, as well as raising a point of law of general public interest.

5. Redcar is on the south side of the Tees estuary. The disputed land is part of an area known as Coatham Common or Coatham Links (Coatham was originally a separate village but is now part of Redcar). On the south (landward) side of the disputed land there is a mainly residential area. To the east is the site of the former club house and a leisure centre (the club house site is not included in the disputed land but was included in the earlier application mentioned below). To the west is more open land still used as a golf course. To the north is the beach and the North Sea. The disputed land formerly included the tees, fairways and greens of the first and eighteenth holes, and a small practice area.

6. The inspector's report dated 14 March 2006 described the boundaries in more detail and contained (paras 6 and 7) this further description of the disputed land (referred to as "the Report Land"):

> "The character of the Report Land is typical of coastal sand dunes, with irregular sand hills covered in rough grass. The dunes are noticeably higher on the northern side. There is a flatter area along the southern side, particularly west of the Church Street access. The former tees, greens and fairways of the golf course are no longer

> obvious. The Report Land is crossed by numerous informal paths of which the most well used run alongside and close to the southern and northern boundaries. A number of photographs show the general nature of the land.
>
> There are some fairly new signs erected by [the Borough Council] on the Report Land. The gist of the signs is that they give the public temporary permission to use the Report Land for recreation pending its redevelopment. I call these signs 'the permissive signs'."

The footpath near the southern boundary is a public footpath.

7. Mr Lewis and his fellow applicants applied for registration of the disputed land on 8 June 2007, soon after section 15 of the Commons Act 2006 had come into force on 5 April 2007. It was not the first application that had been made in respect of the disputed land. An earlier application had been made by another group of local residents on 1 March 2005. It was therefore considered under the earlier law, that is the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000. This earlier application was the subject of a public inquiry held by Mr Vivian Chapman QC as an inspector appointed by the Borough Council as registration authority. The inquiry was held over several days in December 2005 and January 2006. Mr Chapman produced a lengthy report dated 14 March 2006 recommending that the application should be refused, and the Borough Council accepted his recommendation. An application for leave for judicial review of that decision was refused on the papers by Collins J on 22 August 2006 and was not renewed.

8. When the second application was made in 2007 it was rightly thought that it was unnecessary, and would be a waste of time and money, to hold a second public inquiry, since it would be directed to the same factual issues. Mr Chapman did however (in connection with the first application) make a second report dated 9 June 2006 addressing the decision of the House of Lords in *Oxfordshire* (he advised that it made no difference to his conclusions, and that in any case it was not open to the Borough Council to reopen its decision).

9. The relevant findings of fact are therefore in Mr Chapman's report dated 14 March 2006 on the first application. The crucial findings are in paras 171, 172, and 175. These paragraphs are set out in full in the judgment of Dyson LJ in the Court of Appeal [2009] EWCA Civ 3, [2009] 1 WLR 1461, but they are of such central importance that they need to be set out again. Para 171 dealt with use of the disputed land by golfers:

> "171. I find that, from as far back as living memory goes (at least as far back as the 1920s), the Report Land was continuously used as part of the Cleveland Golf Club links. The only exception is that the golfing was suspended during World War II. Golfing use ceased in 2002. I find that the club was a popular one and that the golf links were well used nearly every day of the year. In the years before 2002, the Report Land was used for the club house, the first and eighteenth holes and for a practice ground. There is some evidence that the precise configuration of the course changed somewhat over the years. The club house, tees, fairways, greens and practice ground did not, however, take up the whole of the Report Land and there were substantial areas of rough ground beside and between these features."

10. Para 172 dealt with use by non-golfers (that is, local residents):

> "I find that from as far back as living memory goes, the open parts of the Report Land have also been extensively used by non golfers for informal recreation such as dog walking and children's play. Some of the walking has been linear walking in transit. Thus the informal paths running east-west have been used by caravan residents to get access to the centre of Redcar with its shops and public houses. Also, there is evidence of people taking a short cut south-north from Church Street to the gap in the fence in Majuba Road. However I am satisfied that the open parts of the Report Land have been extensively used by non golfers for general recreational activities apart from linear walking. I prefer the evidence on this point of the applicants' witnesses and of Mr Fletcher to the evidence of the objector's other witnesses that such use was occasional and infrequent."

11. Paras 173 and 174 concluded that the local people who used the land for informal recreation came primarily from the Coatham area of Redcar. Then para 175 dealt with the relationship between the two types of use:

> "I find that the relationship between the golfers and the local recreational users was generally cordial. There was evidence of only a few disputes. Only Squadron Leader Kime seems to have caused problems by actively asserting a right to use the Report Land and the golf club appears to have tried to avoid any formal dispute with him. In my judgment, the reason why the golfers and the local people generally got on so well was because the local people (with the exception of Squadron Leader Kime) did not materially interfere

> with the use of the land for playing golf. Many of the applicants' witnesses emphasised that they would not walk on the playing areas when play was in progress. They would wait until the play had passed or until they were waved across by the golfers. Where local people did inadvertently impede play, a shout of 'fore' would be enough to warn them to clear the course. I find that recreational use of the Report Land by local people overwhelmingly deferred to golfing use."

12. Para 221 (in the part of the report applying the law to the facts as found) referred to the decisions of Sullivan J in *R* (*Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin), [2004] 1 P&CR 573 ("*Laing Homes"*) and His Honour Judge Howarth in *Humphreys v Rochdale MBC* unreported, 18 June 2004:

> "Leaving aside the public footpath, I consider that the reasoning in *Laing Homes Ltd* and *Humphreys* squarely applies to the Report Land in the present case. Use of the Report Land as a golf course by the Cleveland Golf Club would have been in breach of Inclosure Act 1857 section 12 and Commons Act 1876 section 29 if the Report Land had been a town or village green. It was a use which conflicted with the use of the Report Land as a place for informal recreation by local people. It was not a use which was with a better view to the enjoyment of the Report Land as a town or village green. The overwhelming evidence was that informal recreational use of the Report Land deferred to its extensive use as a golf course by the Cleveland Golf Club. Accordingly, use of the Report Land by local people was not as of right until use as a golf course ceased in 2002."

Mr Chapman concluded (para 223) that (apart from use of the public footpath) recreational user of the disputed land was not as of right before 2002 because it deferred to extensive use of the land by the golf club, and that user as of right was not continuing because of the permissive signs erected in 2003.

13. It is convenient, at this point, to dispose of the matter of the signs. They were contentious earlier but are no longer a live issue. There were two sets of signs: warning signs erected by the golf club in 1998 and the permissive signs erected by the Borough Council in 2003. The warning signs read "Cleveland Golf Club. Warning. It is dangerous to trespass on the golf course". The inspector found (para 176):

> "Although these were vandalised several times after which the golf club gave up trying to maintain them, I am satisfied that they were in place long enough for regular users of the report land to know of them. Indeed it seems that they caused a stir locally because of the implication that local people using Coatham Common were trespassers."

The inspector treated them as material to the outcome of both applications, but on judicial review of the second application Sullivan J ([2008] EWHC 1813 (Admin), paras 11 to 23) held that the wording was too ambiguous to alter the character of the residents' use of the land, and that conclusion has not been challenged by the respondents. The permissive signs erected in 2003 were fatal to the first application but not to the second application, because of the change in the law made by s.15 of the Commons Act 2006.

The course of the second application

14. Mr Chapman advised the Borough Council in an opinion dated 12 June 2007 that the application made on 6 June 2007 was bound to fail on two of the same grounds on which the first application failed, that is the deference issue and the 1998 warning notices. He recommended that the application should be summarily dismissed, subject to any new points raised by the applicants. Various points were raised but in three further opinions dated 29 July, 13 October and 18 October 2007 Mr Chapman maintained his advice that the application should be rejected. On 19 October 2007 the Borough Council, by its General Purposes and Village Greens Committee, accepted Mr Chapman's advice and resolved to reject the application for registration.

15. On 18 July 2008 Sullivan J, at a "rolled up" hearing, granted the applicants permission to apply for judicial review of the Borough Council's decision, but dismissed the substantive application. He did so on the ground that the local residents' deference to the golfers had prevented their user being "as of right" before 2002. He relied on para 82 of his own judgment in *Laing Homes* [2004] 1 P & CR 573, and on para 57 of Lord Hoffmann's opinion in *Oxfordshire* [2006] 2 AC 674. He granted leave to appeal, commenting, "deference is judge-made law, judge-made by me."

16. The Court of Appeal (Laws, Rix and Dyson LJJ) unanimously dismissed the appeal in reserved judgments handed down on 15 January 2009: [2009] 1 WLR 1461. Dyson LJ gave the principal judgment, and Rix LJ added a concurring judgment. Both judgments put the decision squarely on the ground of deference excluding user as of right (although Dyson LJ denied that there was any "principle

of deference”). The provisions of two Victorian statutes relating to greens (section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876) which had formed part of the grounds of decision in *Laing Homes*, were not relied on in the Court of Appeal. In short, all the subsidiary issues have disappeared and this Court is faced with the single issue of deference. It is not however a simple issue.

As of right

17. The concept of user “as of right” is found (either in precisely those words or in similar terms) in various statutory provisions dealing with the acquisition by prescription of public or private rights. Section 5 of the Prescription Act 1832 makes it sufficient to plead enjoyment “as of right” (while section 2 refers to a way “actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years”). Section 31 of the Highways Act 1980 refers to use of a way being “actually enjoyed by the public as of right and without interruption for the full period of 20 years.” Section 22(1A) of the Commons Registration Act 1965, as substituted by the Countryside and Rights of Way Act 2000, refers simply to inhabitants indulging in lawful sports and pastimes “as of right” for at least 20 years.

18. Both *Sunningwell* [2000] 1 AC 335 and *Beresford* [2004] 1 AC 889 were concerned with the meaning of “as of right” in the Commons Registration Act 1965. In *Sunningwell* Lord Hoffmann discussed the rather unprincipled development of the English law of prescription. He explained that by the middle of the 19th century the emphasis shifted from fictions (pp350-351):

> “to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see *Mills v Colchester Corporation* (1867) LR 2 CP 476, 486.) The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period.”

Lord Hoffmann pointed out that for the creation of a highway, there was an additional requirement that an intention to dedicate it must be evinced or inferred

(as to that aspect see *R(Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28; [2008] AC 221).

19. In *Sunningwell* the villagers had used about ten acres of glebe land for dog-walking, children's games, and similar activities. This use seems to have coincided with the land being let for grazing by horses, but the report gives little detail about this. The inspector (as it happens, Mr Chapman) advised against acceptance of the registration because although the witnesses had said that they thought they had the right to use the glebe, they did not say that they thought the right was confined to villagers (as opposed to the general public). Lord Hoffmann held (and the rest of the Appellate Committee agreed) that this was an error. The decision of the Court of Appeal in *R v Suffolk County Council Ex p Steed* (1996) 75 P & CR 102 was overruled. That was the context in which Lord Hoffmann stated in a passage (at pp352-353) relied on by the respondents:

> "My Lords, I pause to observe that Lord Blackburn [in *Mann v Brodie* (1885) 10 App Cas 378, 386, as to dedication of a highway] does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been, as Parke B said in relation to private rights of way in *Bright v Walker* 1 CM & R 211, 219, 'openly and in the manner that a person rightfully entitled would have used it'. The presumption arises, as Fry J said of prescription generally in *Dalton v Angus & Co* 6 App Cas 740, 773, from acquiescence."

20. The proposition that "as of right" is sufficiently described by the tripartite test *nec vi*, *nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner) is established by high authority. The decision of the House of Lords in *Gardner v Hodgson's Kingston Brewery Co.* [1903] AC 229 is one of the clearest: see Lord Davey at p238 and Lord Lindley at p239. Other citations are collected in Gale on Easements, 18th ed. (2008) paras 4-80 and 4-81. The proposition was described as "clear law" by Lord Bingham of Cornhill in *Beresford* [2004] 1 AC 889, para 3. The opinion of Lord Rodger of Earlsferry (para 55) is to the same effect. So is that of Lord Scott of Foscote (para 34), though with a cautionary note as to the difference between the acquisition of public and private rights.

Laing Homes

21. The respondents' case is that although Sullivan J, in his judgment in *Laing Homes* [2004] 1 P & CR 573, was indeed the first judge to speak in terms of

"deference" shown by local residents, he was not striding into entirely unknown and uncharted territory. Earlier authorities (including those mentioned in the passage of Lord Hoffmann's opinion in *Sunningwell* quoted in para [19] above) suggest that although the local residents' private beliefs as to their rights are irrelevant, the same is not true of their outward behaviour on the land in question, as it would appear to a reasonable owner of the land. It is relevant, on this argument, to look at what might today be called the residents' attitude or body language (this thought is elaborated in an imaginary example given by JG Riddall, Miss Tomkins and the Law of Village Greens [2009] Conveyancer and Property Lawyer 326). I propose to look next at *Laing Homes* itself, and then to consider how far the respondents can claim much more long-established roots for the doctrine of deference which *Laing Homes* articulates.

22. *Laing Homes* was concerned with three adjoining fields ("the application area"), extending in all to 38 acres, on the edge of Widmer End in Buckinghamshire. This land, together with three smaller fields not affected by the application for registration, had been acquired by Laing Homes, a house-builder, and held in its "land bank" since 1963. The land was subject to a grazing licence from 1973 to 1979, when the farmer stopped using it for grazing because of repeated troubles with trespassers. In the course of time footpaths were established round the three fields in the application area (cutting some corners) and these were officially recognised as public footpaths in June 2000. An application for registration of the application area was made in August 2000. The registration authority's decision to register the land as a village green was challenged by way of judicial review on various grounds (including human rights grounds on which Sullivan J did not find it necessary to rule).

23. In his judgment Sullivan J listed, in para 50, the four main grounds on which Laing Homes was attacking the inspector's report (and the registration based on it). The first ground was that there was insufficient evidence of the use of the whole of the application area for lawful sports and games over the 20-year period. The second was the inspector's conclusion that the use of the fields for an annual hay crop (from about 1980 until the early 1990s) was not incompatible with the establishment of village green rights. Sullivan J considered the second ground first. He discussed it at some length and differed from the inspector. He did so primarily on the view he took of the perception of a reasonable landowner, although he was also influenced by the point (no longer relied on) as to the Victorian statutes (para 86):

> "Like the Inspector, I have not found this an easy question. Section 12 [of the Inclosure Act 1857] acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of land for recreational purposes: see Sunningwell. If the statutory framework within which section 22(1)

> [of the Commons Registration Act 1965] was enacted had made provision for low-level agricultural activities to coexist with village green type uses, rather than effectively preventing them once such a use has become established, it would have been easier to adopt the Inspector's approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with [the farmer's] taking of an annual hay crop for over half of the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist."

24. I have to say that I am rather puzzled by Sullivan J's summary of the evidence about hay-making, and the discussion of it (both by the inspector at paras 56 and 57, and by the judge himself at paras 59-63). There is a detailed description of the local residents keeping off the fields for a few days in spring when they were harrowed, rolled and fertilized, and again for a few days during hay-making. But there are only the most passing references by the judge (in paras 59 and 111) to the further need for people to keep off the fields for many weeks while the crop was growing, if it was to be worth the farmer's while to get it in. The length of this period would vary with the quality of the land and the seasonal weather, but would usually, I imagine, be of the order of three months. The evidence was that the farmer generally got well over 2,000 bales of hay from the application area. So it seems that the local residents must, in general, have respected the hay crop.

25. The puzzle is partly explained by Sullivan J's consideration of the first ground (evidence of use of the whole application area) which follows at paras 88-111. In para 111 the judge commented that there was an overlap between the two grounds, because the existence of public footpaths round the three fields (cutting some corners) provided an alternative explanation of the local residents' use of the fields. It seems likely that they used the perimeter paths and kept off the hay while it was growing, although their dogs may not have done, as the judge discussed at some length (paras 103 to 110).

26. There are some dicta about *Laing Homes* in Lord Hoffmann's opinion in *Oxfordshire* [2006] 2 AC 674. Lord Rodger and I expressed general agreement with Lord Hoffmann, but did not comment on this point. Lord Hoffmann observed (para 57):

> "No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so 'as of right'. But, with respect to the judge, I do not agree that the low-level agricultural activities must be

> regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not."

27. There was some discussion in the course of argument of what Lord Hoffmann meant by the first sentence of this passage. In the Court of Appeal (para 45) Dyson LJ took it to mean inconsistency between competing uses manifested "where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees)". I am rather doubtful about that. I think it just as likely that Lord Hoffmann had in mind, not concurrent competing uses of a piece of land, but successive periods during which recreational users are first excluded and then tolerated as the owner decides. An example would be a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals were indoors for the worst of the winter.

28. Whether that is correct or not, I see great force in the second sentence of the passage quoted. Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. *Fitch v Fitch* (1797) 2 Esp 543 is venerable authority for that. That is not to say that *Laing Homes* was wrongly decided, although I see it as finely-balanced. The residents of Widmer End had gone to battle on two fronts, with the village green inquiry in 2001 following a footpaths inquiry two or three years earlier, and some of the evidence about their intensive use of the footpaths seems to have weakened their case as to sufficient use of the rest of the application area.

The earlier authorities

29. I have already referred to *Fitch v Fitch*, the case about cricket and hay-making at Steeple Bumpstead in Essex. The report is brief, but what Heath J is reported as having said is a forthright declaration of the need for coexistence between concurrent rights:

> "The inhabitants have a right to take their amusement in a lawful way. It is supposed, that because they have such a right, the plaintiff should not allow the grass to grow. There is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers."

30. Against that Mr Laurence QC relied on the general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. That was in line with what Lord Hoffmann (in *Sunningwell* [2000] 1 AC 335, 350-351, quoted at para [18] above) called "the unifying element" in the tripartite test: why it would not have been reasonable to expect the owner to resist the exercise of the right.

31. The first of the old authorities relied on by Mr Laurence was *Bright v Walker* (1834) 1 CM & R 211, 219, a case on a private right of way, in which Parke B spoke of use of a way "openly and in the manner that a person rightfully entitled would have used it". I read that reference to the manner of use as emphasising the importance of open use, rather than as prescribing an additional requirement. On its facts the case raised as much of an issue as to *vi* as to *clam* since gates had been erected and broken down during the relevant period. The point of law in the case turned on the peculiarity that the freehold owner of the servient tenement was a corporation sole.

32. The next case relied on (another case about a claim to a private way) was *Hollins v Verney* (1884) 13 QBD 304 (there is a fuller statement of the facts in the first instance report (1883) 11 QBD 715). Lindley LJ (giving the judgment of the Court of Appeal) observed at p315:

> "No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute."

33. The second sentence of this passage begins with "Moreover", suggesting that Lindley LJ was adding to the requirement that the use should be continuous. But the passage as a whole seems to be emphasising that the use must be openly (or obviously) continuous (the latter word being used three more times in the passage). The emphasis on continuity is understandable since the weight of the evidence was that the way was not used between 1853 and 1866, or between 1868 and 1881. It was used exclusively, or almost exclusively, for carting timber and underwood which was cut on a 15-year rotational system. The use relied on was too sparse for any jury to find section 2 of the Prescription Act 1832 satisfied.

34. In *Bridle v Ruby* [1989] QB 169 the plaintiff established a right of way by prescription despite his personal belief that he had such a right by grant. Ralph Gibson LJ said at p178:

> "The requirement that user be 'as of right' means that the owner of the land, over which the right is exercised, is given sufficient opportunity of knowing that the claimant by his conduct is asserting the right to do what he is doing without the owner's permission. If the owner is not going to submit to the claim, he has the opportunity to take advice and to decide whether to question the asserted right. The fact that the claimant mistakenly thinks that he derived the right, which he is openly asserting, from a particular source, such as the conveyance to him of his property, does not by itself show that the nature of the user was materially different or would be seen by the owner of the land as other than user as of right."

That the claimant's private beliefs are generally irrelevant, in the prescription of either private or public rights, was finally confirmed by the House of Lords in *Sunningwell* (see paras [18] and [19] above).

35. The last authority calling for mention on this point is *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* [1992] SLT 1035 (Court of Session), 1993 SC (HL) 44 (House of Lords). In the Court of Session the Lord President (Lord Hope), after considering several authorities, observed (at p1041):

> "The significance of these passages for present purposes is that, where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance."

Lord Hope's reference to the manner of use must, I think, be related to the unusual facts of the case (set out in detail at pp1037-1038). The issue was whether there was a public right of way over an extensive walkway in a new town, designed to separate pedestrian from vehicular traffic. It gave access to the town centre where there were numerous shops (whose tenants no doubt had private rights of way for themselves and their customers). But the walk was also used for access to public places such as the railway station, the church, a health centre and a swimming pool. It was held that the use of the way "had the character of general public use of a town centre pedestrian thoroughfare" (p1042). The House of Lords upheld this decision. It is worth noting that Lord Jauncey of Tullichettle stated, at p47,

> "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor."

Deference or civility?

36. In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in *Sunningwell* [2000] 1 AC 335, to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector's word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the Court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998).

37. There is in my opinion a significant difference, on this point, between the acquisition of private and public rights. As between neighbours living in close proximity, what I have referred to as "body language" may be relevant. In a Canadian case of that sort, *Henderson v Volk* (1982) 35 OR (2d) 379, 384, Cory JA (delivering the judgment of the Court of Appeal of Ontario) observed:

> "It is different when a party seeks to establish a right-of-way for pedestrians over a sidewalk. In those circumstances the user sought to be established may not even be known to the owner of the servient tenement. In addition, the neighbourly acquiescence to its use during inclement weather or in times of emergency such as a last minute attempt to catch a bus, should not too readily be accepted as evidence of submission to the use.
>
> It is right and proper for the courts to proceed with caution before finding that title by prescription or by the doctrine of lost modern grant was established in a case such as this. It tends to subject a property owner to a burden without compensation. Its ready invocation may discourage acts of kindness and good neighbourliness; it may punish the kind and thoughtful and reward the aggressor."

38. That is, if I may say so, obviously good sense. But I do not think it has any application to a situation, such as the Court now faces, in which open land owned by a local authority is regularly used, for various different forms of recreation, by a large number of local residents. The inspector's assessment did in my opinion amount to an error of law. He misdirected himself as to the significance of perfectly natural behaviour by the local residents.

Rights after registration

39. Mr Laurence made some forceful submissions as to what the position would have been on a double hypothesis: that the disputed land had been registered as a town green, and that it had continued to be let to the golf club after its registration. In those circumstances, he said, the fortunes of the golfers and the local residents would be dramatically reversed: instead of being all "give" by the residents it would be all "take", to the point at which the golf club would no longer be able to function at all. There was, he said, a massive mismatch between what the residents would have done in order to gain the rights, and what they would be in a position to do after the green had been registered. This lack of symmetry was a reason, he argued, for doubting the soundness of the reasoning on which the appellant's case rested.

40. These submissions raise two distinct questions. The first is a question of law about the effect of registration of a green. The second is a speculative question of predicting the behaviour of a group of people in an eventuality which cannot now arise.

41. I would spend little time on the second question. Like other members of the Court, I am sceptical about the notion that the local residents' attitude towards the golfers, if the green were to be registered in circumstances where it was still being used by the golf club, would suddenly turn from friendly civility to vindictive triumphalism. Many of them must have friends or neighbours who are members of the golf club; some are even members themselves. But I would accept that the question of law needs to be considered on the footing that it is at least possible that relations between the two groups might become rather more strained.

42. Here it is necessary to come back to *Oxfordshire* [2006] 2 AC 674. The proceedings in that case were not judicial review proceedings. They were initiated by the registration authority, by a claim form under CPR Part 8, for guidance on a pending application for registration (the first instance judgment is reported at [2004] Ch 253). In the House of Lords both Lord Scott of Foscote and Baroness Hale of Richmond regarded some of the questions raised as unnecessary, academic and inappropriate (see Lord Scott at paras 91-103 and Baroness Hale at paras 131-137). The questions to which they most strongly objected were (i) whether, when a green was registered, the relevant inhabitants had legal rights to take recreation on it; and (ii) whether land registered as a green fell within the scope of what had been referred to as the Victorian statutes.

43. Lord Hoffmann, while recognising these concerns, thought that it would be appropriate to answer the questions, because Oxford City Council had a real interest in the question (para 45):

> "But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so."

So Lord Hoffmann proceeded to answer them, and Lord Rodger and I expressed general agreement with his opinion.

44. Lord Hoffmann noted (para 46) that registration is conclusive evidence of the matters registered, but

> "In the case of a town or village green, the registration states simply that the land is a green. No other information is prescribed."

The position under the Commons Act 2006 will be similar once it has come fully into force. The only rights specifically registrable in respect of a town or village

green will be rights of common: see section 2(2) and section 3(4). But section 3(5) enables regulations to be made requiring or permitting other information to be included in the register. Regulations have been made (The Commons Registration (England) Regulations 2008 S.I.2008/1961) but they do not require or permit specific rights of recreation to be registered. The extensive management provisions in Part 2 of the Act apply to town or village greens only if they are subject to rights of common, and deal with the regulation of rights of common. This seems to be in line with what Lord Hoffmann said in *Oxfordshire* [2006] 2 AC 674, para 48, that although the Commons Registration Act 1965 was intended to be followed by further legislation in relation to the management of commons, it was by no means clear that Parliament contemplated further legislation as to rights over greens.

45. I must set out at some length what Lord Hoffmann said about rights after registration (paras 49 to 51):

> "So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending commons commissioners round the country on a useless exercise. If the Act conferred no rights, then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court. There would have been no point in the conclusive presumption in section 10. Another possibility is that registration conferred such rights as had been proved to support the registration but no more. So, for example, if land had been registered on the strength of a custom to have a bonfire on Guy Fawkes Day, registration would confer the right to have a bonfire but no other rights. But this too would make the registration virtually useless. Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.
>
> In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law,

> under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell case* [2000] 1 AC 335, 357A-C.
>
> This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides."

Lord Hoffmann then (paras 54 to 57) dealt with the Victorian statutes as I have already mentioned.

46. Lord Scott (thinking it right to express a limited view on this issue) disagreed (para 105):

> "But I do not agree that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he has been able to use the land during that 20-year period. I do not accept that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field."

47. Having reconsidered the general agreement that I expressed in *Oxfordshire*, I find that I agree with almost all that Lord Hoffmann said in the paragraphs that I have quoted. He had already, in *Sunningwell* [2000] 1 AC 335, 357, explained that "sport or pastime" denotes a single composite class, and recognised that "dog walking and playing with children [are], in modern life, the sort of informal recreation which may be the main function of a village green". The only point on which I differ from Lord Hoffmann is the point which Lord Scott picked up in para 105: the notion that a custom to have an annual bonfire on Guy Fawkes Day could be a sufficient basis for registration of a green. Such a right might have been established as a stand-alone custom, but would to my mind be far too sporadic to amount to continuous use for lawful sports and pastimes (quite apart from the fact that most bonfires are now illegal on environmental grounds). Once that special case is eliminated, I see little danger, in normal circumstances, of registration of a green leading to a sudden diversification or intensification of use by local residents. The alleged asymmetry between use before and after registration will in

most cases prove to be exaggerated. Golfers and local residents can co-exist without much friction even when the latter have established legal rights.

Conclusion

48. Disparaging references are sometimes made to the "village green industry" and to applications for registration being used as a weapon of guerrilla warfare against development of open land. The House of Lords has (both in *Beresford* and *Oxfordshire*) expressed some doubt about the extension of town or village green protection to land very different (both in size and appearance) from a traditional village green. However, in the Commons Act 2006 Parliament has made it easier, rather than more difficult, to register a green. There is also the prospect (as Lord Hope mentions in para 56 of his judgment) of further legislation, which might possibly make provision for the management of greens on lines comparable to those proposed for commons in Part 2 of the Commons Act 2006. As it is, district councils have power under section 1 of the Commons Act 1899 to make by-laws for the preservation of order on commons, which are defined (in section 15) as including town and village greens. Even without such regulation, conflicts over competing uses (whether as between the owner and the local residents, or between different interest groups among the local residents) are capable of resolution by the "constant refrain in the law of easements that 'between neighbours there must be give as well as take'" (Gray and Gray, Elements of Land Law, 5th ed. (2009) para 5.2.72, citing Megarry J in *Costagliola v English* (1969) 210 EG 1425, 1431).

49. For these reasons I would allow the appeal and order that the Borough Council should register the disputed land as a town green under section 1 of the Commons Act 2006 (if then in force in Redcar and Cleveland) or under the applicable transitional provisions.

LORD HOPE

50. This appeal relates to an application by Kevin Paul Lewis for judicial review of a decision of the General Purposes and Village Greens Committee of Redcar and Cleveland Borough Council on 19 October 2007 to reject an application to register part of the land in Redcar known as Coatham Common as a town or village green under the Commons Act 2006 ("the 2006 Act"). On 18 July 2008 Sullivan J dismissed the application but granted permission to appeal: [2008] EWHC 1813 (Admin). On 15 January 2009 the Court of Appeal (Laws, Rix and Dyson LJJ) dismissed the appeal: [2009] EWCA Civ 3; [2009] 1 WLR 1461. The applicant now appeals to this court. The interested party, Persimmon Homes

(Teesside) Ltd., seeks to develop the land for housing and leisure activities. It supports the case for the local authority, as it did in the courts below.

51. As Lord Walker has explained, the land is owned by the local authority. Until 2002 it was part of the land that formed the links of the Cleveland Golf Club. It comprised the first and eighteenth holes of the golf course and a practice ground. There were also substantial areas of rough ground beside and between these features. It was also used by the local inhabitants for informal recreation such as walking their dogs, children's games and picnics. They did not interfere with or interrupt play by the golfers. They would wait until the play had passed or until they were waved through by the golfers. The relationship between the golfers and the local inhabitants was cordial. The two activities appear to have co-existed quite happily during this period. The details are set out in the report by Mr Vivian Chapman QC ("the Inspector"). He was appointed by the local authority to hold an inquiry following an application by Mr Lewis and a number of other local inhabitants to register an area of land which included the club house as a town or village green under the Commons Registration Act 1965 ("the 1965 Act"). He was asked to provide a further report following a second application to register the area with which this case is concerned which was made after the 2006 Act came into force. His comments in a series of further opinions on the relationship between the golfers and the local inhabitants confirmed his earlier conclusions that the local inhabitants deferred to the golfers, and that the deferral to golfing use precluded use of the land by the local inhabitants as of right for recreational purposes. The relevant findings have been quoted in full by Lord Walker: see paras 9-11, above.

52. On 18 January 2008 these judicial review proceedings were commenced. Sullivan J agreed with Mr Chapman's conclusion that the recreational use of the land was not "as of right" because it deferred to the use of the land by the golf club. Asking himself how the matter would have appeared to the golf club, he said that it would not be reasonable to expect the club to resist the recreational use of the land by local users if their use of the land did not in practice interfere with its use by the golf club: para 41. The Court of Appeal agreed with that approach: [2009] 1WLR 1461, Dyson LJ, para 54; Rix LJ, paras 64-65. Rix LJ said that, if it were otherwise, there would be no way of resolving questions that would subsequently arise, given that registration does not confer qualified or limited rights but the unqualified right to use the land generally for sports and pastimes. He envisaged questions as to whether, if a right of registration were to be assumed, the local inhabitants had a right of walking on the golf greens themselves during play or of playing golf as though they were members of the club itself.

The issues

53. As Lord Walker has explained, the question is whether the land ought to have been registered. In an attempt to focus their arguments more precisely, the parties were agreed that it raised the following issues:

(1) Where land has been extensively used for lawful sports and pastimes nec vi, nec clam, nec precario for 20 years by the local inhabitants, is it necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging?
(2) If the answer to (1) is "yes", does the mere fact that local inhabitants did not prevent the playing of golf by walking in front of the ball (or seeking to prevent the playing of strokes by golfers) preclude the use from being "as of right" under section 15(4)?
(3) If the answer to (2) is "no", did the local authority (and the Inspector) err in law in concluding that the inhabitants' use was not "as of right", given what the Inspector described as "overwhelming evidence" that recreational use of the land by local people deferred to the golfing use?

54. This presentation was not, as it turned out, particularly helpful. As counsel recognised, issues (2) and (3) fall to be taken together, as they are both directed to the question of deference. And I agree with Lord Brown that the critical question, which none of these issues addresses, is what are the respective rights of the local inhabitants and the owner of the land once it has been registered. It is a remarkable fact that the statute gives no guidance at all on this issue. In *R (Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin), [2004] 1 P & C R 573, paras 27-29, referring to what Carnwath J said in *R v Suffolk County Council, Ex p Steed* (1995) 70 P & C R 487, Sullivan J said that this was not the original intention. The 1965 Act was intended to be a two stage legislative process. As a first step the registers would establish the facts and provide a definitive record of what land was, and was not, common land or a town or village green. In the second stage Parliament would deal with the consequences of registration by defining what rights the public had over the land that had been registered.

55. In *New Windsor Corporation v Mellor* [1975] Ch 380, 392, Lord Denning MR said that he hoped that the second stage legislation would not be long delayed. But here we are, 45 years after the passing of the 1965 Act. Parliament has still not said what these rights are. In *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para 48 Lord Hoffmann said that, while there were indications that further legislation about rights over common land was in prospect, it was by no means clear that Parliament contemplated further legislation about rights over village greens. It has been left to the courts to try to work this out for themselves. As Lord Hoffmann put in para 49, one has to look at the provisions about greens

like those of any other legislation and assume that Parliament legislated for some practical purpose. I think that one must assume too that it was Parliament's intention that practical common sense would be the best guide to the way the public right was to be exercised once the land had entered the register.

56. In answer to a series of written questions by Lord Greaves, the Parliamentary Under-Secretary of State for the Department for the Environment, Food and Rural Affairs, Lord Davies of Oldham, said that the Government proposes to consult in the spring of 2010 as to whether changes are needed to the existing framework: Hansard (HL) Written Questions, 15 January 2010, Qs 961-964. This initiative appears to have been prompted by a research report which was received by DEFRA into the registration of new town and village greens, which has identified particular concerns as to its use in relation to land which is subject to proposals for residential development. I hope that the opportunity will be taken to look at the consequences of registration as revealed by the developing case law as well as how the registration system itself is working.

Previous authority

57. I agree with Lord Walker that in none of the three decisions of the House of Lords to which he refers (see para 3, above) was it necessary for the House to address the question of deference which lies at the heart of this case. *Reg v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 was concerned with the registration of a glebe which was used predominantly by the villagers for informal recreation. The diocesan board had obtained planning permission to build two houses on part of the glebe, and it objected to registration. But the inspector found that it had been tolerant of harmless public use of the land for informal recreation. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 the land was an open, flat area of grass which was used by the local inhabitants for ball games and other lawful pastimes. The council cut the grass from time to time, but it did not use it in any other way that might have interfered with its use by the locals. In *Oxfordshire County Council v Oxford City Council*, para 125 the land was described by Lord Walker as an overgrown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in north-west Oxford – hardly the ideal site to focus close attention on the critical issue that is before us in this case.

58. The only passages in these three cases that might be taken as suggesting that the rights acquired by the local inhabitants would be enlarged over those of the owner once the land had been registered, as Rix LJ assumed would happen in this case, are to be found in Lord Hoffmann's speech in *Oxfordshire*. In para 51 he said of the effect of registration:

> "This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants."

In para 59, where he distinguished *Oxfordshire* from the decision of the European Court of Human Rights in *J A Pye (Oxford) Ltd v United Kingdom* [2005] 3 EGLR 1, there is a subtle change of language. He said:

> "In the present case, first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration under the 1965 Act was introduced to preserve open spaces in the public interest."

I think that the first passage, in which Lord Hoffmann uses the words "interfere with", goes some way to supporting the idea that after registration the rights of the local inhabitants predominate. The second passage, on the other hand, does not. "Preventing" the use of the land for recreation would, of course, defeat the point of registration completely.

59. Lord Scott of Foscote was obviously very troubled in *Oxfordshire* by the idea that the public would acquire much broader, more intrusive rights over the land after registration and the management problems that this might give rise to: para 85. But his objections were, as I read them, based on an assumption as to the effect of the registration as a town or village green on places such as a dense wood in which people wandered to pick bluebells or look for mushrooms: para 76. His dissent casts some light on what he thought was at issue in that case. But I do not think that it can be used to elevate what Lord Hoffmann said in para 51 to a ruling on the point which, on the facts of that case, did not arise.

60. The only case which directly addresses the question of deference is *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, in which Sullivan J quashed the resolution that the land should be registered. As Dyson LJ observed in the Court of Appeal, [2009] 1 WLR 1461, para 30, the concept of deference as a bar to the creation of a new town or village green is Sullivan J's creation. The land in that case consisted of three adjacent fields which Laing Homes Ltd held as part of its land bank. It granted a grazing licence to a farmer, Mr Pennington, who for a few years at the start of the 20 year period kept cattle on the fields until he had to give this up because of problems with members of the public, whose use of the perimeters of the fields resulted in the paths that they had established there being registered as public footpaths. For over half of

that period Mr Pennington used the land for taking an annual crop of hay. The question was whether this use of the land, or the growing of any other crop, was inconsistent with the right to use the land for recreation that was contended for by the local inhabitants.

61. After referring to passages in Lord Hoffmann's speech in *Sunningwell* about the extent of the user by the public that was needed to establish that the land was being used by them as of right, Sullivan J said in para 82:

> "If the starting point is, 'how would the matter have appeared to Laings?' it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's, use of them for taking an annual hay crop."

In para 84 he said that, so long as the local inhabitants' recreational activities did not interfere with the way in which the owner had chosen to use his land, there would be no suggestion to him that they were exercising or asserting a public right to use it for lawful sports and pastimes. In para 85 he said:

> "I do not believe that Parliament could have intended that such a user for sports or pastimes would be 'as of right' for the purposes of section 22 [of the 1965 Act]. It would not be 'as of right', not because of interruption or discontinuity, which might be very slight in terms of numbers of days per year, but because the local inhabitants would have appeared to the landowner to be deferring to his right to use his land (even if he chose to do so for only a few days in the year) for his own purposes."

62. In para 86 he added these words:

> "Like the Inspector, I have not found this an easy question. Section 12 acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of the land for recreational purposes: see *Sunningwell*. If the statutory framework within which section 22(1) was enacted had made provision for low-level activities to co-exist with village green type uses, rather than effectively preventing them once such a use has become established, it would have been easier to adopt the Inspector's approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with

> Mr Pennington's taking of an annual hay crop for over half the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist."

63. This passage suggests that Sullivan J was approaching the case on the assumption that registration was inconsistent with the continued use of the land by Mr Pennington for taking the annual hay crop. In other words, registration would bring non-interference to an end. The public right to use the fields for recreational purposes would make it impossible for them to be used for growing hay. His approach has also been taken as indicating that in cases where the land has been used by a significant number of inhabitants for 20 years for recreational purposes nec vi, nec clam, nec precario, there is an additional question that must be addressed: would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging? I am not sure that Sullivan J was really saying that there was an additional question that had to be addressed. But if he was, I would respectfully disagree with him on both points.

The section 15 questions

64. The application in this case was made under section 15(4) of the 2006 Act, which provides that a person may apply for registration of land as a town or village green where "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years" if they ceased to do so before the commencement of that subsection, so long as the application is made within a period of five years beginning with the date of the cessation. The words that I have set out in quotation marks appear in each of subsections (2), (3) and (4) of section 15. The definition of the phrase "town or village green" in section 22(1) of the 1965 Act, as amended by section 98 of the Countryside and Rights of Way Act 2000, has been repeated throughout this section, with the addition of the words "a significant number".

65. The theory on which these provisions are based is known to the common law as prescription: see Lord Hoffmann's explanation in *Sunningwell*, [2000] 1 AC 335, 349-351, of the background to the definition of "town or village green" in section 22(1) of the 1965 Act. As the law developed in relation to private rights, the emphasis was on the quality of the user for the 20 year period which would justify recognition of a prescriptive right:

> "It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner…. The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the use, but for a limited period. So in *Dalton v Angus* (1881) 6 App Cas 740, 773 Fry J (advising the House of Lords) was able to rationalise the law of prescription as follows:
>
>> 'the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence.'"

Section 2 of the Prescription Act 1832 made it clear that what mattered was the quality of the user during the 20 year period. It had to be by a person "claiming right thereto". It must have been enjoyed openly and in the manner that a person rightfully entitled would have used it, and not by stealth or by licence: *Bright v Walker* (1834) 1 CM & R 211, 219 per Parke B. In *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 239 Lord Lindley said that the words "as of right" were intended to have the same meaning as the older expression nec vi, nec clam, nec precario.

66. Referring then to section 1(1) of the Rights of Way Act 1932, Lord Hoffmann said in *Sunningwell* at p 353:

> "The words 'actually enjoyed by the public as of right and without interruption for a full period of 20 years' are clearly an echo of the words 'actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years' in section 2 of the Act of 1832. Introducing the Bill into the House of Lords (HL Debates), 7 June 1932, col 637, Lord Buckmaster said that the purpose was to assimilate the law of public rights of way to that of private rights of way. It therefore seems safe to assume that 'as of right' in the Act of 1932 was intended to have the same meaning as those words in section 5 of the Act of 1832 and the words 'claiming right thereto' in section 2 of that Act."

He concluded at p 354 that there was no reason to believe that "as of right" in section 22(1) of the 1965 Act was intended to mean anything different from what those words meant in the Acts of 1832 and 1932. The same can be said of the meaning of those words in section 15 of the 2006 Act.

67. In the light of that description it is, I think, possible to analyse the structure of section 15(4) in this way. The first question to be addressed is the quality of the user during the 20 year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word "lawful" indicates that they must not be such as will be likely to cause injury or damage to the owner's property: see *Fitch v Fitch* (1797) 2 Esp 543. And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, paras 6 and 77), the owner will be taken to have acquiesced in it – unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way – either because it has not been asked, or because it has been answered against the owner – that is an end of the matter. There is no third question. The answer to the first issue (see para [4], above) is: No.

68. Mr Charles George QC for the appellants said that there was only one simple test: was the use caught by any of the three vitiating circumstances? Mr George Laurence QC confirmed that it was common ground that the use of the land for recreation in this case was nec vi, nec clam, nec precario, but he said that this did not exhaust the issue. The unifying principle was one of reasonableness. He said that, if it was not reasonable to expect the owner to resist what the users were doing, no harm could come to the owner from his omission to resist or complain. In this case, as the Inspector held, the local inhabitants overwhelmingly deferred to the golfers. As Dyson LJ said in the Court of Appeal, the user of the local inhabitants was extensive and frequent, but so too was the use by the golfers: the greater the degree of deference, the less likely it was that it would appear to the reasonable owner that the locals were asserting any right to use the land [2009] 1 WLR 1461, paras 48- 49.

69. I agree with Mr George that all the authorities show that there are only three vitiating circumstances: *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 238 per Lord Davey, p 239 per Lord Lindley; *Sunningwell* [2000] 1 AC 335, p 350, per Lord Hoffmann; *Beresford* [2004] 1 AC 889, para 3 per Lord Bingham of Cornhill, para 16 per Lord Scott of Foscote, para 55 per Lord Rodger of Earlsferry; Riddall and Trevelyan, *Rights of Way*, 4th ed (2007) pp 41, 47. There

is no support there for the proposition that there is an additional requirement. But that does not answer Mr Laurence's point, which was really and quite properly directed to the first question as to the quality of the user that is relied on. That, as has been said, is the critical question in this case.

Deference

70. In para 175 of his report the Inspector said that he found that the relationship between the golfers and the local recreational users was generally cordial. This was because local people (with the exception of Squadron Leader Kime) did not materially interfere with the use of the land for playing golf. They would wait until the play had passed or until they had been waved on by the golfers. When local people did inadvertently impede play, the golfers' shout of "fore" was enough to warn them to clear the course. The Inspector asked himself whether this indicated deference to the golfers. Following what Sullivan J said in *Laing* [2004] P & CR 573, para 85, he understood that the use would not be "as of right" if the local inhabitants would have appeared to the owner to be deferring to his right to use his land for his own purposes. That approach is based on the judge's assumption, which the Court of Appeal endorsed, that the effect of registration would be to enlarge the right of the local inhabitants in a way that would effectively prevent the golfers from using the land for their own purposes.

71. I do not find anything in the words used in section 15(4) of the 2006 Act that supports that approach. On the contrary, the theme that runs right through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other. In *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 774 Fry J, having stated at p 773 that the whole law of prescription rests upon acquiescence, said that it involved among other things the abstinence by the owner from any interference with the act relied on "for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop *the act* being done." [my emphasis] In other words, one looks to the acts that have been acquiesced in. It is those acts, and not their enlargement in a way that makes them more intrusive and objectionable, that he afterwards cannot interfere to stop. This is the basis for the familiar rule that a person who has established by prescriptive use a right to use a way as a footpath cannot, without more, use it as a bridleway or for the passage of vehicles.

72. In *White v Taylor (No 2)* [1969] 1 Ch 160, 192 Buckley LJ said that the user must be shown to have been "of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, *and of a right of the measure of the right claimed*." [again, my emphasis] That was a case in which it

was claimed, among other things, that sheep rights had been established by prescription at common law. But I think that this observation is consistent with the approach that is taken to prescriptive rights generally. It has to be recognised, of course, that once the right to use the land for lawful sports and pastimes is established and the land has been registered its use by the local inhabitants for those purposes is not restricted to the sports or pastimes that were indulged in during the 20 year period. Lord Hoffmann said in *Oxfordshire* [2006] 2 AC 674, para 50, that the rational construction of section 10 of the 1965 Act, which did not require the rights of recreation as such to be registered, was that land registered as a town or village green can be used generally for sports and pastimes:

> "It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell* case [2000] 1 AC 335, 357A-C."

As he put in the passage referred to in *Sunningwell*, as long as the activity can properly be called a sport or pastime, it falls within the composite class. This approach indicates that, while the principle of equivalence tells one in general terms what the land may be used for, there may be some asymmetry as to the manner of its use for that purpose before and after it has been registered. But it does not follow that, where the use for recreation has co-existed with the owner's use of the land during the 20 year period, the relationship of co-existence is ended when registration takes place.

73. In *Fitch v Fitch* 2 Esp 543, where the inhabitants had the right to play lawful games and pastimes on the plaintiff's close which he used for growing grass for hay, the jury were told that the rights of both parties were distinct and might co-exist together. But the inhabitants could not use the close in the exercise of their right in a way that was not fair or was improper. Referring to that case in *Oxfordshire* [2006] 2 AC 674, para 51, Lord Hoffmann said that there had to be give and take on both sides. Mr Stewart Smith, following Mr Laurence QC, did not agree. He said that it was fundamental to his argument that the concept of give and take had no place in rights of the kind that were established by registration under the 2006 Act. He submitted that these rights were unqualified and unlimited. He said that *Fitch v Fitch* did not support the idea of give and take, and he sought to contrast rights of the kind that follow registration with those of the kind discussed in *Mercer v Woodgate* (1869) LR 5 QB 26, where there was dedication of the right of way to the public subject to the owner's right to plough the soil in the due course of husbandry. Cockburn CJ said at p 30 that there would be great injustice

and hardship to hold that there had been an absolute dedication where the owner had clearly only intended a limited dedication. Blackburn J said at p 31 that he could see no objection in law to such a partial dedication.

74. I agree that care needs to be taken in drawing conclusions from cases about the creation of a right of way by dedication. But the concepts of partial dedication and the co-existence of rights on both sides appear to me to be capable of being applied generally. Lord Hoffmann would not have mentioned give and take in the *Oxfordshire* case [2006] 2 AC 674 if he had thought that it had no application to town and village greens. If it were otherwise it would in practice be very difficult, if not impossible, to obtain registration in cases where the owner is putting his land to some use other than, perhaps, growing and cutting grass for hay or silage. There being no indication in the statute to the contrary, I would apply these concepts to the rights created by registration as a town or village green too.

75. Where then does this leave deference? Its origin lies in the idea that, once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: *Laing* [2004] P & CR 573, para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20 year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can co-exist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist.

76. Of course, the position may be that the two uses cannot sensibly co-exist at all. But it would be wrong to assume, as the Inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use ~~of~~ the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights co-exist over the same land there may be occasions when they cannot practically be enjoyed simultaneously: Rowena Meager, *Deference & user as of right: an unholy alliance*, Rights of Way Law Review, October 2009, 147, 152. If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the landowner they could, no doubt, be restrained by an injunction: Philip Petchey, *R (Lewis) v Redcar and Cleveland B C,* Rights of Way Law Review, March 2009, 139, 143. In my

opinion the Inspector misdirected himself on this point. The question then is whether the Council's decision which was based on his recommendation can be allowed to stand if the facts are approached in the right way.

77. The facts of this case, as described by the Inspector, show that the local inhabitants (except for Squadron Leader Kime) were behaving when they were using the land for sports and pastimes in the way people normally behave when they are exercising public rights over land that is also used as a golf course. They recognise that golfers have as much right to use the land for playing golf as they do for their sports and pastimes. Courtesy and common sense dictates that they interfere with the golfer's progress over the course as little as possible. There will be periods of the day, such as early in the morning or late in the evening, when the golfers are not yet out or have all gone home. During such periods the locals can go where they like without causing inconvenience to golfers. When golf is being played gaps between one group of players and another provide ample opportunities for crossing the fairway while jogging or dog-walking. Periods of waiting for the opportunity are usually short and rarely inconvenience the casual walker, rambler or bird-watcher. I cannot find anything in the Inspector's description of what happened in this case that was out of the ordinary. Nor do I find anything that was inconsistent with the use of the land as of right for lawful sports and pastimes.

Conclusion

78. For these reasons, and those given by everyone else with which I agree, I would allow the appeal and make the order that has been proposed by Lord Walker.

LORD RODGER

79. I agree with the judgment of Lord Walker. In view of the importance of the issue, I add some observations of my own.

80. As Lord Walker has explained, until 2002 an area of land ("the disputed land") in the Coatham district of Redcar formed part of a golf course on which members of the Cleveland Golf Club played. The club were tenants of the Council, which owned the land. Then, in 2002, the course was reconfigured and the club gave up its tenancy of the disputed land. The following year, the Council entered into an agreement with Persimmon Homes (Teesside) Ltd for a mixed residential

and leisure development on an area of land of which the disputed land formed an important part.

81. In March 2005 a group of residents applied to have the disputed land registered as a village green. In March 2006 the inspector recommended against registration. In June 2007 Mr Lewis and his fellow applicants put in a fresh application under section 15 of the Commons Act 2006. Again the inspector recommended against registration and the matter has now led to the present appeal.

82. This sequence – a proposal to develop an area of open land, followed by an application to register the land as a village green in order to stop the development – is very familiar. The House of Lords dealt with three such cases in the space of a few years and newspaper articles refer to many other examples. But the fact that the disputed land was used by the golf club during the period of 20 years which the applicants rely on to justify its registration as a village green has prompted much heart-searching as to what the position would have been if the land had been registered as a village green while the club was still in occupation and its members were still wanting to play on the land. Would registration have enabled the dog walkers of Redcar to take over and, in effect, extinguish the rights of the golfers to play on that part of their course?

83. However interesting the point of law may be, in a case like this the issue is more than just a little unreal. The fact of the matter is that, if the golf club had remained as tenants after 2002, the golfers would have continued to hack their way over the disputed area and the dog walkers would have continued to make their way across the course. It is a fair bet that in that happy state of affairs no-one would have dreamed of applying to have the land registered as a village green. It was only the prospect of the development on this open space, when the golf club was no longer using it, which prompted the application for registration with a view to stopping the development in its tracks. So, in the real world, the dog walkers and golfers will never actually have to co-exist on the disputed land if it is registered as a village green.

84. If, however, in some imaginary parallel universe, the two groups had been required to co-exist after registration, then, like Lord Walker, I find it hard to imagine that there would, in practice, have been many problems. The pre-existing situation suited the local inhabitants well enough: doubtless, some of them were themselves members of the club and played on the land; in any event, the golf club must have kept the grass cut and the area looking presentable. If the inhabitants had previously shown no inclination to break out the croquet hoops, or to set up butts or cricket stumps or to dance around a maypole on the disputed land, it seems unlikely that registration would have suddenly brought on the urge. Indeed, too many developments of these kinds would probably have upset the dog walkers

almost as much as the golfers. In all likelihood, therefore, things would have gone on much as before, with a bit of give and take on both sides. I would therefore particularly associate myself with what Lord Walker says in para 47 of his judgment.

85. Under section 15 of the Commons Act 2006 registration of land as a village green requires that a significant number of the inhabitants of any locality, or of any neighbourhood in a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. Since *R v Oxfordshire County Council Ex p Sunningwell Parish Council* [2000] 1 AC 335 it has been settled law that dog walking and playing with children count as lawful sports and pastimes. Since both activities can and do take place on almost any and every open space near centres of population, the scope for applying to register land as a village green is correspondingly wide. Owners of land are taken to be aware of this chapter of the law and of the need to take appropriate preventive steps if they see a risk of circumstances arising in which an application could be made and their land become registered as a village green. If they fail to do so, they are treated as having acquiesced in the inhabitants indulging in sports and pastimes on their land "as of right".

86. Here the evidence shows that, as far back as living memory goes, many local inhabitants used the disputed land for informal recreation such as dog walking and children's play. But the courts below have held that they were not doing so "as of right".

87. The basic meaning of that phrase is not in doubt. In *R v Oxfordshire County Council Ex p Sunningwell Parish Council* [2000] 1 AC 335 Lord Hoffmann showed that the expression "as of right" in the Commons Registration Act 1965 was to be construed as meaning *nec vi, nec clam, nec precario*. The parties agree that the position must be the same under the Commons Act 2006. The Latin words need to be interpreted, however. Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.

88. The opposite of "peaceable" user is user which is, to use the Latin expression, *vi*. But it would be wrong to suppose that user is "*vi*" only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts *vis* was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done *vi*. See, for instance, D.43.24.1.5-9, Ulpian 70 *ad edictum*, commenting on the word as used in the interdict *quod vi aut clam*.

89. English law has interpreted the expression in much the same way. For instance, in *Sturges v Bridgman* (1879) 11 Ch D 852, 863, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:

> "Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario: for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, *or which he contests and endeavours to interrupt*, or which he temporarily licenses" (emphasis added).

If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being *vi* and so does not give rise to any right against him. Similarly, in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 786, Bowen J equated user *nec vi* with peaceable user and commented that a neighbour, "without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton v Swansea Waterworks Co* (1851) 17 QB 267." The contrary view, that the only manner in which enjoyment of window lights could be defeated before the Prescription Act was by physical obstruction of the light, "was not the doctrine of the civil law, nor the interpretation which it placed upon the term '*non vi*'…".

90. In short, as *Gale on Easements* 18th ed, (2008), para 4-84, suggests, user is only peaceable (*nec vi*) if it is neither violent nor contentious.

91. In *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335, 350-351, Lord Hoffmann found that the unifying element in the three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right. In the case of *nec vi* he said this was "because rights should not be acquired by the use of force." If, by "force", Lord Hoffmann meant only physical force, then I would respectfully disagree. Moreover, some resistance by the owner is an aspect of many cases where use is *vi*. Assuming, therefore, that there can be *vis* where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

92. If, then, the inhabitants' use of land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious. This is at least part of the reason why, as Lord Jauncey observed, in the context of a claim to a public right of way, in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44, 47, "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor."

93. In this case the local inhabitants' use of the disputed land for recreation was peaceable, open and not based on any licence from the Council or the golf club. So, prima facie, the inhabitants did everything that was necessary to bring home to the Council, if they were reasonably alert, that the inhabitants were using the land for recreation "as of right".

94. But the Council argue that, since there were competing interests, the inhabitants' use of the land was peaceable only because they "overwhelmingly" deferred to the golfers' simultaneous use of the same land. Had they not done so, it would have become contentious. But, because they routinely deferred to the golfers, the inhabitants did not do "sufficient to bring home to the reasonable owner of the application site that they were asserting a right to use it." Cf Dyson LJ, [2009] 1 WLR 1461, para 49. In other words, the reasonable owner of the disputed land would have inferred from the behaviour of the inhabitants that they were not asserting a right over the land – and so would have seen no need to take any steps to prevent such a right accruing.

95. On closer examination, the starting point for this argument must be that the owner of the land is entitled to infer from the inhabitants' behaviour in deferring to the golfers that they are aware of the legal position. But that starting point is inherently implausible. To adapt what Lord Sands said in connexion with a public right of way in *Rhins District Committee of Wigtownshire County Council v Cuninghame* 1917 2 SLT 169, 172, people walk their dogs or play with their children on the disputed land because they have been accustomed to see others doing so without objection. The great majority know nothing about the legal character of their right to do so and never address their minds to the matter. Moreover, to draw an inference based on the premise that the inhabitants are aware of the legal position is hard to reconcile with the decision in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 355-356, that the subjective views of the inhabitants as to their right to indulge in sports and pastimes on the land are irrelevant. It would therefore have been far from reasonable for the Council to infer that the inhabitants' behaviour towards the golfers was based on some understanding of the legal position. It would have been equally unreasonable for the Council to go further and conclude that the inhabitants were deferring to the golfers because of a conscious decision on their

part to respect what they perceived to be the superior rights of the owners of the land.

96. Such a conclusion might, just conceivably, have been plausible and legitimate if there had been no other explanation for the inhabitants' behaviour. But that is far from so. The local inhabitants may well have deferred to the golfers because they enjoyed watching the occasional skilful shot or were amused by the more frequent duff shots, or simply because they were polite and did not wish to disturb the golfers who – experience shows – almost invariably take their game very seriously indeed. A reasonable landowner would realise that any of these motives was a more plausible explanation for the inhabitants' deference to the golfers than some supposed unwillingness to go against a legal right which they acknowledged to be superior. In my view the inspector misdirected himself on this aspect of the case.

97. I would accordingly allow the appeal and make the order proposed by Lord Walker. I confess that I view the outcome with little enthusiasm. The idea that this land should be classified and registered as a village green, when it was really just an open space that formed part of a golf course, is unattractive, to say the least. It is hard to imagine that those who devised the registration system ever contemplated that it would produce such a result. But, given the established case law and given also that Parliament has not amended the law despite the known problems, the result is unavoidable.

LORD BROWN

98. I would formulate the critical question for the Court's determination on this appeal very differently from any of those identified in the statement of facts and issues. The critical question to my mind is what are the respective rights of the landowner ("the owner") and the local inhabitants ("the locals") over land once it is registered as a town or village green?

99. Take the facts of this case, as already sufficiently recounted by other members of the Court, but assume that the land here in question, instead of becoming vacant in 2002 and subject now to development proposals, remained in use by the owner (as for convenience I shall call the Redcar & Cleveland Golf Club, the actual owner's licensee) as the first and 18th holes (and practice green) of their golf course. Suppose then that the local inhabitants, having themselves made such use of the land as the Inspector records, "deferring" to the golfers in the way

he describes, successfully applied for its registration as a town green, what then would be the consequences with regard to the owner's own continuing rights? Would the owner remain entitled to use the land for golf with the locals continuing to "defer" to the golfers? Or would the balance shift entirely, the locals' rights being substantially enlarged by registration, the owner's effectively extinguished?

100. So far from this question begging that as to the right to registration (the ultimate question at issue here), it seems to me one which necessarily should be resolved before it can sensibly be decided what must be established in order to have the land registered. Indeed, I may as well say at once that, were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold that more is required to be established by the locals merely than use of the land for the stipulated period *nec vi nec clam nec precario*. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case.

101. This is not merely because in my opinion no other approach would meet the merits of the case. Also it is because, to my mind, on the proper construction of section 15 of the Commons Act 2006, the only consequence of registration of land as a green is that the locals gain the legal right to continue to "indulge" in lawful sports and pastimes upon it (which previously they have done merely as *if* of right) – no more and no less. To the extent that the owner's own previous use of the land prevented their indulgence in such activities in the past, they remain restricted in their future use of the land. The owner's previous use ex-hypothesi would not have been such as to have prevented the locals from satisfying the requirements for registration of the land as a green. No more should the continuance of the owner's use be regarded as incompatible with the land's future use as a green. Of course, in so far as future use by the locals would *not* be incompatible with the owner continuing in his previous use of the land, the locals can change, or indeed increase, their use of the land; they are not confined to the same "lawful sports and pastimes", the same recreational use as they had previously enjoyed. But they cannot disturb the owner so long as he wishes only to continue in his own use of the land.

102. Is there, then, anything in the case law which precludes our deciding, as I have already indicated I would prefer to decide, that registration does not carry with it a right in future to use the land inconsistently with such use as the owner

himself has been making and wishes to continue making of it? The respondents here urge that the decision of the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 is just such a case. They so submit notwithstanding that the land there was disused scrubland of which the owner made no use whatever so that no question arose there as to possibly conflicting uses or the respective rights of owners and locals following registration. For my part I simply cannot regard *Oxfordshire* as having decided the particular question I am addressing here. The respondents rely on passages in Lord Hoffmann's speech such as that, following registration, "[The owner] still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants" (para 51) and "[T]he owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation" (para 59). To my mind, however, these are not inconsistent with the position which I have suggested arises on registration and, indeed, (also at para 51) Lord Hoffmann states: "There has to be give and take on both sides."

103. True it is that, in a partially dissenting opinion, Lord Scott (at para 105) himself appears to have understood the other members of the Committee to have decided that registration of land as a green "bring[s] about a diminution of the landowner's property rights, not simply by establishing the local inhabitants' right to go on doing what they had been doing for the last 20 years but by depriving the landowner of the right to go on doing what he has been doing for the last 20 years". Lord Scott did "not agree [inferentially, with the majority view] that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he had been able to use the land during that 20 year period . . . [or] that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field." That, however, was in the context of Lord Scott's view (para 106) that registration of the land there in question would (or at least should) entitle the locals only to "recreative rights of user . . . commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes [for instance, clay pigeon shooting or archery contests]". It is important to note, moreover, that all of this was concerned with the first of the ten issues before the House as to which it was held (per the headnote) that: "registration gave rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes, such rights extending (Lord Scott of Foscote dissenting) to sports and pastimes generally and not merely that use which had been the basis for registration, the landowner retaining the right to use the land in any way which did not interfere with those rights".

104. I repeat, the position arising on registration at a time when both the owner and the locals are using land in theoretically conflicting ways but in fact harmoniously simply did not arise in *Oxfordshire* and I for my part would decline to treat that case as if it has decided how such an issue should be resolved.

105. I would, therefore, hold that in this different situation the owner remains entitled to continue his use of the land as before. If, of course, as in *Oxfordshire* itself, he has done nothing with his land, he cannot complain that upon registration the locals gain full and unqualified recreational rights over it. But that is not the position I am considering here.

106. In short, on the facts of this case, had the use of the land as part of a golf course continued, the locals would in my opinion have had to continue "deferring" to the golfers. By this I understand the Inspector to have meant no more than that the locals (with the single exception of Squadron Leader Kime) recognised the golfers' rights to play (in this sense only the locals "overwhelmingly deferred to golfing use"), both locals and golfers sensibly respecting the use being made of the land by the other, neither being seriously inconvenienced by the other, sometimes the locals waiting for the golfers to play before themselves crossing, sometimes the golfers waiting for the walkers to cross before playing. It is not unique for golf courses to embrace at least some common land and there are innumerable courses crossed by public footpaths. Both walkers and golfers are generally sensible and civilised people and common courtesy dictates how to behave. Harmonious coexistence is in practice easily achievable. For my part, and in the light of my own experience both as a golfer and a walker for over six decades, I do not read the Inspector's findings as indicating (to quote Sullivan J) [2008] EWHC 1813 (Admin) para 40 "that there was overwhelmingly 'give' on the part of the local users and 'take' on the part of the golfers."

107. This being so I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather, as Lord Hope, Lord Walker and Lord Kerr make plain, the focus must always be on the way the land has been used by the locals and, above all, the quality of that user.

108. I too, therefore, would allow this appeal.

LORD KERR

109. For the reasons given by Lord Hope, Lord Rodger, Lord Walker and Lord Brown with all of which I agree, I too consider that this appeal should be allowed. I venture to offer a few words of my own because my conclusion that the appeal should be allowed represents a change from the view that I initially held and because I can well understand why the Court of Appeal and Sullivan J dismissed the application for judicial review.

110. The critical question in this case centres on the meaning to be given to the words 'as of right' in section 15 of the Commons Act 2006. It is not possible to give a literal interpretation to the words since, clearly, the right cannot vest in the local inhabitants until the period of twenty years has elapsed. They cannot be considered to have indulged in sports and pastimes by dint of a right until the right has come to fruition - see Lord Bingham in *R(Beresford) v Sunderland City Council* [2003] UKHL 60 [2004] 1 AC 889, para 3. It is also clear that they do not need to believe that they have a right – see below. As Lord Walker said in *Beresford* at paragraph 72 it has sometimes been suggested that the meaning of the statutory formula is closer to "as if of right": see, for instance, Lord Cowie in *Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1043.

111. Using this formulation, the question is what does 'as if of right' mean. Does it simply mean openly indulging in the pastimes etc without force or under licence or does it connote something more? Clearly, it cannot be construed to mean 'as if they believed they had the right'. The House of Lords so held in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. Does it mean that they *acted* as if they had the right? If so, how is that to be judged? Does it mean that they gave every indication that they had the right to indulge in the pastimes and sports? According to Mr George QC, the only exception to the tripartite test arises where the users expressly represent that they are not asserting any right at all. In those circumstances, according to him, they are either benefitting from the implied permission of the owner or they are covertly allowing the necessary period to elapse in which case they fall foul of the requirement that the use of the lands should not be secret.

112. The question that has troubled me is, 'What if the inhabitants' engagement in the pastimes and sports is not on foot of an express representation that they are not asserting a right but on the basis of an unspoken understanding by all concerned that they are not doing so?' Is there a reason why, as a matter of principle, there should be any different legal outcome? It appears to me that there is none. If the owner of the lands and those who recreate on them share the

appreciation that no right is being asserted, then no right is acquired. Therefore, as Lord Hope has said (in para 19 of his judgment), one must focus on the manner in which the local inhabitants have used the land or, as he has put it, 'the quality of the user relied on'.

113. The use of the word 'deferring' in the context of the inhabitants' use of lands is potentially misleading. In common parlance 'deferring to an owner's use of his lands' can easily be understood to mean no more than the ordinary courteous and civilised acknowledgement of the entitlement of the owner to make use of the lands. Such civility does not necessarily import an acceptance of any lack of entitlement on the part of the users to continue to indulge their recreations with a view to the acquisition of a right under section 15. But if deference takes the form of acceptance that the users are not embarked on a process of accumulating the necessary number of years of use of the lands or if it evinces an intention not to embark on such a process, this must surely have significance in relation to the question whether the inhabitants have indulged in the activities 'as of right'.

114. It is for this reason in particular that I am in emphatic agreement with Lord Hope in his view that one must focus on the way in which the lands have been used by the inhabitants. Have they used them as if they had the right to use them? This question does not require any examination of whether they believed that they had the right. That is irrelevant. The question is whether they acted in a way that was comparable to the exercise of an existing right? Posed in that way, one can understand why the Court of Appeal considered that the examination of the relevant question partook of an inquiry as to the outward appearance created by the use of the lands by the inhabitants. On that basis also one can recognise the force of Mr Laurence QC's argument that it was necessary to show not only that the lands had been used *nec vi, nec clam, nec precario* but also that it was reasonable to expect the landowner to resist the use of the land by the local inhabitants. The essential underpinning of both these assertions, however, was the view that the registration of the lands as a village or town green had the inexorable effect of enlargement of the inhabitants' rights and the commensurate diminution of the right of the owner to maintain his pre-registration level of use, if that interfered with the inhabitants' extended use of the lands.

115. For the reasons that Lord Hope and Lord Walker have given, the view that this was the effect of the relevant authorities in this area may now be discounted. For my part, I find it unsurprising that this view formerly held sway. Mr Laurence (without direct demur from Mr George) informed us that it was the universal opinion of all who practised in this field that the inevitable consequence of the decision in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 was that local inhabitants acquired unrestricted rights of recreation after registration. Passages from the speech of Lord Hoffmann in that case - particularly at para 51 - appeared to lend support for the notion that general, unrestricted rights

of recreation over the entire extent of the lands followed upon registration. And the speech of Lord Scott of Foscote certainly seemed to imply that he apprehended that this was the outcome of the decision by the majority. Whatever may have been the position previously, however, it is now clear that, where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration.

116. On that basis, I am content to accept and agree with the judgments of Lord Hope, Lord Walker and Lord Brown that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test. The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands. Put simply, if confronted by such use over a period of twenty years, it is *ipso facto* reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration.